



IN THE COURT OF APPEAL

AT ELDORET

CORAM: O’KUBASU J.A (IN CHAMBERS)

CIVIL APPLICATION 17 OF 2005

BETWEEN

MICHAEL HUBERT KLOSS

BAYERF EAST AFRICA LTD.....APPLICANTS

AND

1.DAVID SERONEY)

2.PERIS CHEPKOECH)

3.CHRISTINE CHEPKORIR SERONEY)

4.FLORENCE CHEOCHICHIR).....RESPONDENTS

5.ZIPPORAH JEBICHI SERONEY)

6.ROSE JEMUTAI SERONEY)

(An application for extension of time to file the Notice and Record of Appeal in an intended appeal out of time from the Judgment of the High Court of Kenya at Eldoret (Nambuye J) dated 2nd March 2004

in

H.C.C.C. NO. R. 6 of 2000 CONSOLIDATED WITH R. 69 OF 2000)

RULING

Before me is an application by way of notice of motion brought under Rule 4 of the Court of Appeal Rules in which the applicants Michael Hubert Kloss and Bayer East Africa Limited (the applicants) are seeking the following orders:

“ (1) An order that the time for filing the notice of appeal and the Record of

Appeal in an intended Appeal from a judgment and decree of the High Court of Kenya at Eldoret (Nambuye J) delivered on 2nd March, 2004 be enlarged by thirty (30) days from the date of this order;

(2) And for an order that the costs of and incidental to this application be in the cause,

The application is supported by a long and detailed affidavit running into 22 paragraphs sworn by Mohamed Munir Chaudhri.

The gist of this application is that the applicants and their advocates were not aware of the date when the judgment of the superior court was delivered. To support that contention there are copies of the many letters written by the applicants' advocates annexed to Mr. Chaudhri's long affidavit.

In reply to that contention we have a replying affidavit sworn by Moses Oyoko Obiero who depones that he was acting for the respondents and that when the judgment of the superior court was delivered an advocate by the name of Carey Francis Otieno held brief for the firm of **M/s Nyairo & Company Advocates** which firm was holding brief for **M/s Chaudhri & Associates**. The judgment of the superior court was delivered on 2nd March, 2004.

It is now settled that in an application under rule 4 of this Court's Rules the single Judge of the court is called upon to exercise his unfettered discretion. The matters which are to be considered whether to grant an extension of time are first the length of the delay, the reason for that delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In **Patel v Waweru & 2 Others [2003] KLR 361 at pp. 362 –3** this Court had the following to say in respect of rule 4 of this Court's Rules:-

“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application NO. NAI 251 of 1997 (unreported) this court stated:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted”.

And in **Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 Others [2003] KLR 74** I had the following to say on rule 4:-

“I think, it is now settled that an application of this nature (under rule 4 of this Court's Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be

exercised judicially.

In Muchugi Kiragu v James Muchugi Kiragu & Another - Civil App. NO. NAI 356 of 1996 this Court had the following to say as regards this Court's discretion under rule 4;-

“Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In the present application it has been shown that the judgment of the superior court was delivered on 2nd March, 2004. It is the applicants' contention that they were not aware of the date of the judgment. In a letter dated 6th November, 2003 the Deputy Registrar of the superior court at Eldoret wrote to the applicants' advocates as follows:

“Thank you for your letter Ref No MC 8177/1/2000 dated 23rd October, 2003.

According to my record the two cases were consolidated but Lady Justice Roselyne Nambuye heard Eldoret HCCC NO. R.6 of 2000 whose judgment has not been delivered to date. You will be notified of the date of judgment once the file is received from Lady Justice Nambuye”.

It should be pointed out that prior to the above quoted letter of 23rd October, 2003 several letters had been written to the Deputy Registrar by the applicants' advocates asking when the judgment would be delivered by the superior court. There was yet another letter dated 24th April, 2004 asking about the delayed judgment. Lastly, there was a letter dated 12th October 2004 on the same subject. This letter was copied to various parties.

I have now considered all that has been placed before me by the applicants. Can it be said that the applicant knew when the judgment of the superior court was delivered? I do not think so. If the applicants and their advocates knew of the judgment which was delivered on 2nd March, 2004 then there would have been no reason for the letters of 24th April, 2004 and 12th October, 2004. This then explains why the applicants did not file a notice of appeal soon after 2nd March, 2004 when the judgment of the superior court was delivered.

In view of the foregoing I am satisfied that the applicants have satisfactorily explained their delay in taking appropriate steps. This application is therefore allowed and I direct that the applicants do file the Notice of Appeal within seven (7) days from the date hereof and the Record of appeal be lodged and served within 30 days from the date the Notice of appeal is filed. Costs of this application shall be in the appeal.

Dated and delivered at Eldoret this 21st day of September, 2005.

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR