



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: WAKI, J.A (IN CHAMBERS))

Civil Appeal (Appli) 159 of 2003

BETWEEN

GEORGE GIKUBU MBUTHIA .....  
APPLICANT

AND

PETER NJERU MUGO)

GEOFFREY KARIUKI MWENDA)

HON. ATTORNEY GENERAL)

CONSOLIDATED BANK OF KENYA LTD.).....  
.....RESPONDENTS

(An application for leave to file an appeal out of time from  
the ruling/decree of the High Court of Kenya at Nairobi, Milimani

Commercial Courts (Nyamu, J.) dated 20.03.03

in

H.C.C.C. NO. 1260 OF 2002)

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RULING

Although the record before me looks voluminous, the matter that falls for consideration is fairly short and straightforward. It is an application taken out by **George Gikubu Mbuthia** (hereinafter “the applicant”) **under rule 4** of this Court’s rules for extension of time to file an appeal out of time and to deem the appeal already filed as **No. 159 of 2003** on 11.07.2003 as properly filed.

The intended appeal is against the decision of the superior court (Nyamu, J.) made on 20.03.03 in which the learned Judge struck out the applicant’s suit filed on 18.12.02. The suit is a continuation of a long-running battle between the applicant and the four respondents since 1982 relating to some property in

Buru Buru, **LR. No. Nairobi Block 73/225**. He pleaded fraudulent dealings between the respondents and sought some 17 reliefs against all of them jointly and severally. The 2nd respondent (2nd defendant), **Geoffrey Kariuki Mwenda**, however took out a chamber summons seeking to have the suit against him struck out for the reasons, *inter alia*, that the suit was frivolous, embarrassing and vexatious and was in any event *res judicata*. The Attorney General (3rd respondent) and the Consolidated Bank of Kenya Ltd. (4th respondent) did not file any documents before the superior court but orally supported Mwenda, while the 1st respondent Peter Njeru Mugo did not participate in the application. In the end the learned Judge granted the application and struck out the suit as against the 2nd, 3rd and 4th respondents with costs to “*all the defendants.*”

Aggrieved by that ruling the applicant filed and served a notice of appeal in accordance with the rules of this Court on 24.03.03. He also applied to be supplied with copies of the proceedings and ruling on 21.03.03 and copied the letter to all the respondents. In a letter dated 28.4.03 addressed to him by the registrar and received on 06.05.03, the applicant was notified that the copies applied for were ready for collection upon payment of Shs.1,500/=. He responded to that letter by going to the registry but on perusing the copies he found glaring typing errors which the registry promised to correct before delivering the copies. On 19.05.03 the registrar wrote to him confirming that the corrections had been made and the applicant responded two days later on 21.05.03 when he collected and paid for the typed proceedings. The registrar did not however issue a certificate of delay which the applicant demanded and was eventually issued on 04.07.05 confirming that the period 21st February 2003 (sic) (should be 21st March, 2003) up to 21st May, 2003 was taken in preparation and supply of the proceedings. The appeal was filed on 11.07.03 which was 51 days after receipt of the copies of the proceedings.

On those facts, it seems to my mind, that the appeal was filed in accordance with the rules of this Court. I hold that view because the timetable for filing appeals is set under **Rule 81** of the rules of this Court, thus:

**“ ..... an appeal shall be instituted by lodging in the appropriate registry within 60 days of the date when the notice of appeal was lodged.....”**

The notice of appeal here was lodged on 24.03.03. Sixty days would ordinarily expire on 23.05.03. But there is a proviso to the rule which provides: -

**“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”**

So that, if the applicant applied for a copy of the proceedings in accordance with **subrule (2)**, within 30 days of the decision, time stops running until the copies are delivered to the applicant. The registrar must however certify such period, although the period taken in issuing the certificate is not excluded. It is evident in this matter that the proviso was complied with, as was **sub-rule (2)**. It would follow therefore that the period certified by the registrar is for exclusion in compilation of time, with the result that the appeal filed on 11.07.03 would have been filed within time. The applicant nevertheless believes that it is mandatory to seek extension of time even where the registrar has validly certified the excluded period. No authority was cited for that proposition and I do not see the logic of making the rule available when a party would still be required to apply for extension of time with or without the certificate of delay, thus causing even further delay in the adjudication of the appeal. I would myself have found it unnecessary to require the application now made before me.

Unfortunately learned counsel for the 1st and 3rd respondents did not refer to or make submissions in that regard. Not in any detail, at any rate. They were content to oppose the application on the ground that the applicant should have filed the appeal immediately he received copies of the proceedings without waiting for a certificate of delay. The other reason harped on by the two respondents is that this dispute has persisted for 18 years and has been through numerous and different courts which have all decided against

the applicant. In their view, the litigation was so obviously vexatious and an abuse of court process that it ought to be brought to a stop. The applicant has shown that he is no respecter for the rule of law.

I think the answer to the submissions from the two respondents is that there is a right of appeal against the decision of Nyamu, J and the applicant is exercising such right. It would be disrespectful to the rule of law to take away such right without cogent and lawful reasons.

It was learned counsel for the 3rd respondent Mr. McCourt who alluded to, and argued, the view that it was not necessary for the applicant to file the application now before me. His reasoning however was that the applicant was within time to file the appeal when he received copies of the proceedings on 21.05.03. The copies were applied for on 24.3.03 and were supplied on 21.05.03 which was less than 60 days, and so the applicant had another 4 days within which to file the appeal. He must therefore explain the delay between 22.05.03 and 11.07.03 when the appeal was filed, which explanation was lacking and therefore the delay was inordinate. Mr. McCourt dismissed the relevance of the certificate of delay, submitting that it would have been unnecessary if the appeal was timeously filed before 24.05.03.

The advocate is of course right in the submission that a certificate of delay has no relevance in the scheme of things covered under the proviso to *rule 81*. But I think where one is available, the certificate of delay enures to the benefit of the applicant in excluding the period taken by the registrar in preparation and supply of the copies applied for. There is one before me and I do not think I am entitled to ignore it. Even if it was not there, I would still be satisfied with the explanation given, as it is well supported, that the applicant was pursuing copies of the proceedings and the court was responsible for most of the delay occasioned. I do not consider the delay of 4 days as inordinate. Furthermore, in the circumstances of this case, I see no prejudice to the respondents that cannot be atoned for in costs if the application was granted. Even if it was necessary to file the application therefore, I would have allowed it, and now do so.

The time for the filing of an appeal in this matter is extended to the extent that civil appeal **No. 159/03** filed on 11.07.03 is hereby deemed to have been filed within time. The costs of this application shall abide the result of the main appeal.

**Dated and delivered at Nairobi this 18th day of November, 2005.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**