



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**CIVIL APPLI 96 OF 2005**

**JAMES THUO NDAGURI .....APPLICANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT**

***(An application for extension of time to file and serve notice of appeal out of time from the judgment of the High Court of Kenya at Nairobi (Khamoni, J.) dated 10.02.1998***

**in**

**H.C.C.A NO. 195 OF 1996)**

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**RULING**

The notice of motion dated 14.04.05 seeks an order under **Rule 4** of this Court's rules for extension of time "to serve a notice of appeal out of time in terms of the draft annexed to the application." The applicant filed it in person and appeared before me to argue the application.

The intended appeal is against a judgment of the superior court (Khamoni, J.), delivered in its appellate jurisdiction on 10.02.98, allowing an appeal from a decision of the Senior Resident Magistrate, Kiambu who had allowed a review of an earlier dismissal of the applicant's suit. The applicant, who was the plaintiff in that court, had pleaded in a plaint dated 02.03.94 in RMCCC No. 921/94 that the respondent here, who had employed him as a storekeeper Grade II, had unlawfully terminated his services on 13<sup>th</sup> January, 1988. he wanted to be paid for loss of earnings for a period of 6 years and to be reinstated in his employment. That suit was struck out with costs after objection was taken that it was filed outside the limitation period for the cause of action. The applicant however replicated the same pleadings in Kiambu RMCC 630/95 but the suit met the same fate as the first one on 17.04.96. Undaunted by such dismissals, the applicant applied for review of the dismissal and sought reinstatement of the second suit on the ground that despite termination of his employment in 1988, he continued to correspond with the respondents until 1993 when they finally refused to reverse their decision and he decided to sue them. The cause of action therefore arose in 1993 and not in 1988. The resident magistrate agreed withy him and reinstated the suit ordering him to amend his pleadings. The respondent however appealed against that decision and Khamoni, J reversed it as stated above, on 10.02.98.

The applicant filed a notice of appeal on 23.02.98 which was served out of time. He then applied for

extension of time to file the appeal out of time but that application was dismissed on 16.04.02 by Kwach J.A because time for filing the appeal had not lapsed by the time the application was made. There was a certificate of delay issued by the registrar. The appeal was not filed but another application was made for extension of time to serve the notice of appeal and lodge the appeal. This time Kwach J.A granted the application on 31.10.02 subject to the filing of the appeal within 14 days and the payment of assessed costs of shs.5000/= within 7 days. That amount has not been remitted to the respondents or their advocates since then but there was a default clause for execution. The appeal however was filed and eventually it came up for hearing on 18.11.04. It was found defective and the applicant chose to withdraw it with costs thereof payable to the respondents. In all the proceedings before the subordinate court and in the superior court, the applicant was represented by advocates. Nothing was heard of the matter again for the next five months until 15.04.05 when the application before me was filed.

All the information related above was not obtained from the applicant but from an elaborate affidavit in reply filed by the respondent. The applicant was content to submit only the notice of motion, a 10-paragraph affidavit, a copy of the notice of appeal dated 23.02.98, the order of Kwach J.A dated 31.10.04; the order of this Court dated 18.11.04 and a draft memorandum of appeal. The affidavit itself merely states the date Khamoni J. allowed the appeal; the dates the notice of appeal and the appeal were lodged; and when the appeal was withdrawn on 18.11.04 which are all undisputed matters of fact already on record. There was no attempt to explain what became of the matter after 18.11.04.

The discretion I have to exercise under Rule 4 is in terms of unfettered. But it cannot be exercised on whim, sympathy or caprice. As I said As I said in **Fakir Mohammed v Joseph Mugambi & 2 others** Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38.”**

This Court also stated in **Patel v Waweru & 2 others** [2003] KLR 361 citing the House of Lords in **Ratman v Cumarasamy** [1964] 3 All ER 933, that: -

**“The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.**

**The above passage has been quoted with approval by this court in Grindlays Bank International (K)**

**Limited v George Barbour civil application No. NAI. 257 of 1995 and, Trade Bank Limited (in liquidation) v LZ Engineering Construction Limited and another – Civil application No. NAI. 282 of 1998.”**

Applying those principles I am constrained to find that the total lack of explanation in the affidavit for the delay of 5 months renders it inordinate and it cannot form a basis for the exercise of my discretion. In oral submissions before me, this omission was pointed out to the applicant but he simply said he was stuck in obtaining proceedings. Buy there was nothing to show that the delay had anything to do with proceedings. It was also contended by learned counsel for the respondent Mr. Gitonga Murugara that although there was no possibility of the appeal succeeding, the applicant continues to pile up costs which

he has no intention of paying. Such are the costs before the suborindate court; the costs before the superior court taxed at Shs.108,730/=; the costs for the various applications finalized before this Court and costs for the withdrawal appeal. An attempt to execute for some of those costs came a cropper and if for any reason the application was to be considered favourable, he submitted, there must be security for costs deposited forthwith. The applicant did not dispute that there were costs pending payment but asserted orally that he had challenged the taxation before the superior court, while he will arrange to settle other costs given

Time to do so. Insisting on payment upfront would, in his view, be a malicious manouvre to frustrate his good appeal.

I think for my part that the issue of costs and the ability of the applicant to pay is a factor that may be considered as it reflects on the prejudice that may be caused to the respondent. There is power donated under **rule 104 (3)** of this Court's rules for directing that security be given and past costs be paid. I would have considered such factor if I was minded to grant the application, which I am not. The possibility of the appeal succeeding is a factor that may be considered too although the determination of the appeal on merits lies with the full court. Only a prima facie view of it may therefore be express at this stage and for my part I express grave doubts on that issue. There must surely be an end to litigation and this one has had a chequered history since 1994.

I have said enough to show that the application is not for grant. It is dismissed with costs.

Dated and delivered at Nairobi this 11<sup>th</sup> 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