



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Keiwua JA)**

**CIVIL APPLICATION NO NAI 311 OF 2001 (KSM 54/01)**

**DANIEL OLUKOBA WAMATSI..... APPLICANT**

**VERSUS**

**BENSON OMURMA**

**PASCAL WANGA WAMATSI**

**WILFRED BUKUSU WAMATSI.....RESPONDENTS**

(Application for extension of time to file and serve

Notice of Appeal, Memorandum and Record of Appeal from the

judgment of the High Court at Kakamega (Birech CA) dated

12th October, 2000 in HCCC No 240 of 1990)

**RULING**

The application is for extension of time within which to file and serve the Memorandum and Record of Appeal. The applicant was, due to ill health coupled with inability to raise the required filing fees and security for costs, unable to instruct his advocate in time to file and serve these documents. The intended appeal is not without merit and the grant of the application would facilitate the determination of it on merit.

Judgment in HCCC No 240 of 1990 was delivered on October 12, 2000 when the applicant, who was sick, was present in court and instructed his advocate to file a Notice of Appeal, which was filed on October 18, 2000 and served on October 23, 2000. The applicant's advocate applied for copies of proceedings and judgment on October 24, 2000, which were paid for on October 30, 2000. The applicant had been undergoing surgical operations on his stomach, which occurred in September 2000, in April and June 2001. Letters from doctors who were involved in the operations vouch for these events. The copies were received on April 2, 2001, which information was conveyed to the applicant on April 3, 2001 when a meeting was requested but the applicant was not able to attend immediately.

However, the meeting requested for on April 3, 2001 took place on May 16, 2001 when the instructions to file the appeal were given albeit belatedly and without the necessary filing fees for the intended appeal

whose deadline was June 4, 2001. On May 16, 2001 the advocate for the applicant forwarded a draft decree to the respondent who in a letter dated May 23, received on May 29, 2001 declined to approve it. But the differences were sorted out over a telephone conversation and a timetable agreed that the decree would be approved by June 4, 2001 when the respondent's advocates received it. That did not happen, as the decree was not approved until June 16, 2001.

The approved decree was signed and sealed by the court on June 20, 2001 whereupon the applicant was summoned by his advocate to swear an affidavit in support of this application. The message did not reach the applicant until July 15, 2001 a time when the applicant was confined in hospital after a surgical operation on June 30, 2001. Though fees were paid on June 21, 2001 the applicant was not able to visit his advocate for purposes of swearing an affidavit until August 24, 2001.

The application is vehemently opposed by the respondent. The sickness of the applicant did not begin the other day but in 1997 and the applicant's advocates, after receipt of copies of proceedings, did not have to wait before sending the draft decree for approval. Passing the draft to the Registrar for approval would even have dispensed with the need to pass it to the advocate for the respondent. I see what the respondent says about the fact that the applicant was warned by his advocate that the time for filing the appeal would come to an end on June 4, 2001.

I am, however, aware of the facts and the explanations given by the applicant like his inability to see his advocate due to ill health and being confined for surgical operations in hospital or the fact that at that particular time he had no funds for the filing fees and for security for costs in connection with the intended appeal.

In view of all the circumstances surrounding the delay in filing the intended appeal, I am of the view that the applicant had all along intended to appeal against the decision of the superior court and whatever the hurdles which appear to have been encountered in pursuit of that intention, cannot in my judgment be of the applicant's making or deliberate attempts to thwart or in any other way to delay the course of justice.

Though the sickness has afflicted the applicant for a long time back, I accept that the delay involved in filing and serving the Memorandum and Record of Appeal has been satisfactorily explained and I exercise my discretion to enlarge time within which to file and serve the Memorandum and Record of Appeal. The Memorandum and Record of Appeal shall be filed within the next 21 days from the date hereof and shall be served on the respondent by the applicant within the next 7 days from the date of filing the Memorandum and Record of Appeal. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Kisumu this 28<sup>th</sup> day of March 8, 2003

**M.M.O. KEIWUA**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**