



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: O’Kubasu JA)**

**CIVIL APPLICATION NO NAI 21 OF 2003**

**WAWERU & ANOTHER .....APPLICANTS**

**VERSUS**

**KIRORI.....RESPONDENT**

(An application for extension of time to file and serve Notice of Appeal and Record of Appeal from the judgment of the High Court at Nairobi (Ang’awa J) delivered on 2nd March, 2000 in HCCC No 293 of 1998)

**JUDGMENT**

I have an application before me brought by way of Notice of Motion stated to be “Persuant to rule 4, rule 42 and rule 74 of the Court of Appeal Rules”. The applicant is seeking leave for extension of time in which to file Notice of Appeal and lodge Memorandum of Appeal. This application is based on the following grounds:

a. The applicants herein having been dissatisfied with the judgment delivered on the 2nd day of March, 2000 by the lady Justice Mary Ang’awa at Nairobi in High Court Civil Suit Number 293 of 1998 lodged a Notice of Appeal on the 16th day of March, 2000 which was within the time prescribed by law.

b. The applicants acted expeditiously and lodged the Notice of Appeal within the stipulated time.

c. The applicants have an arguable appeal which has high chances of success and it will be rendered nugatory should this Honourable Court refrain from granting the orders sought.

d. The delay in filing the Record of Appeal has not been deliberate but due to reasons beyond the control of the applicant namely that certified copies of proceedings and judgment having been applied for, were ready for collection well out of time prescribed for filing the Record of Appeal.

e. The applicants now wish to file a fresh Notice of Appeal and Record of Appeal”.

Looking at the above grounds, I think the most important one was ground

(d) which is to the effect that the delay was not deliberate but due to reason beyond the control of the applicant. But was that indeed the reason for the delay? Let us consider the background to this application. Judgment of the Superior Court was delivered on 2nd March, 2000. The Notice of Appeal was lodged in the Superior Court on 16th March, 2000 – just in time.

Under rule 81(1) of the Court of Appeal Rules (the Rules) the applicant ought to have lodged the Memorandum and Record of Appeal within sixty (60) days from the date the Notice of Appeal was filed ie from the date of judgment by superior court nothing appears to have happened until 3rd December, 2001 when the Deputy Registrar wrote to the applicant's advocates informing them that the copies of proceedings and judgment were ready.

That letter was copied to the advocates for the respondent. This Notice of Motion for extension of time was filed in this Court on 5th February, 2003, so that there was a delay of about three years.

Mr Marube for the applicant reminded me that under rule 4 of the Rules, this Court has wide and unfettered discretion. I agree. But that discretion must be exercised on reason not caprice and the exercise of the discretion must not be arbitrary or oppressive. In *Samken Limited and Another v Mercedes Sanchez Rau Tussel & Another* – Civil Application No NAI 21 of 1990 this Court said:

“We said at the beginning of this ruling that rule 4 under which the applicants went before the single judge gives an unfettered discretion to the single judge in deciding whether or not to grant the extension sought. Though the discretion is unfettered, like all judicial discretion it must be exercised on reason not caprice and the exercise must not be arbitrary or oppressive. Accordingly, the courts have over the years put down guidelines on how the exercise of a discretion ought to be done”.

As regards the essential matters to be considered when considering an application under rule 4 of the Rules, this Court had the following to say in *Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997

“It is now well 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.”

In the present application we find that there was delay of about three years. It is important to note that as far back as 3rd December, 2001 the Deputy Registrar of the High Court wrote to the advocates for the parties informing them that copies of the proceedings and judgment were ready for collection. The applicant took no positive step towards prosecuting the appeal until this year (5th February, 2003) when this application for extension of time was made.

No valid reason has been given for this long delay. Pausing here for a moment it cannot be denied that there was inordinate delay which has not been adequately explained. The respondent is certainly prejudiced by this long delay since this has kept him away from the fruit of his judgment.

The rules of the Court must, surely, be complied with. In *Ratman v Cumarasamy* [1964] 3 All ER 933 Lord Guest delivering the opinion of the Privy Council at P 935 said:

“The rules of the 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 have unqualified right to an extension of time which 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 Number NAI 257 of 1995 and *Trade Bank Limited (in*

*Liquidation ) v L Z Engineering Construction Limited and Another – Civil Application No NAI 282 of 1998 (unreported).*

I have considered the authorities cited by Mr Marube and they all emphasize that although the Court has unfettered discretion an applicant must explain to the satisfaction of the Court what lead to the delay. In the current application the applicant had no explanation to give other than the fact that having filed a Notice of Appeal he waited for proceedings but even when these were ready for collection he never made an effort to collect them. It would appear that there was no serious intention to appeal. The Rules of the Court must be complied with so that litigation may be brought to an end.

In view of the foregoing, I do not think this is a proper case in which to exercise my discretion in favour of the applicant. Accordingly the application is dismissed with costs.

Dated and delivered at Nairobi this 27<sup>th</sup> day of June, 2003

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**