



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 256 OF 2001

BETWEEN

NURA AWADH BAWAZIRAPPLICANT

AND

CHRISTOPHER STEPHEN AKILANO AKIWUMI1ST RESPONDENT

GIULIANA DENTI STELLA 2ND RESPONDENT

(Application for extension of time to file a record of appeal in an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Kuloba, J.) dated 28th October, 1998

in

H.C. SUCCESSION CAUSE NO. 1619 OF 1995)

RULING

By this application expressed to be brought under rule 4 of the Rules of this Court the applicant seeks extension of time within which to lodge the record of appeal.

The facts forming the basis for the application are simple and straight forward. The applicant was dissatisfied with the ruling delivered by Kuloba J on 28th October, 1998.

She instructed her advocate to appeal against it and the notice of appeal was timeously filed on 6th November, 1998.

The application for the copies of the proceedings was duly and properly made and a Certificate of Delay was issued on 1st February, 2001. The operative date therein being 9th January, 2001, when the applicant's counsel collected the proceedings from the Court Registry. It would follow, therefore, that the applicant was mandated to lodge the record of appeal within 60 days from 9th January, 2001. However, this was not done and instead; on 12th January, 2001, her advocate filed an application for extension of time - Civil Application No. 26 of 2001. On 17th July, 2001 when it came for hearing it was withdrawn when her advocate realised that it was premature and ought not to have been filed in the first place. The error is explained as follows:

"15. That upon obtaining the Certificate of Delay we erroneously filed the Application for leave to file Appeal out of time (Civil Application NO. 26 of 2001) instead of filing the Appeal itself due to inadvertence on our part as we erroneously thought we needed leave of court of file the Appeal out of time."

Mr. Opini, for the applicant, submits that the mistake of counsel should not be visited upon the applicant and that the delay in resurrecting this application is not inordinate.

On the other hand Mr. Akiwumi, for the respondents, has strongly urged me to reject the application on the ground that all the assets of the estate, the subject matter of the intended appeal, have been distributed and disposed of and there is nothing left of them. Further, he submitted, the main witnesses have left the country and they would not be available if the appeal and the suit were to be commenced. Thus, the respondents would be gravely prejudiced.

Under rule 4 aforesaid, I have unfettered discretion to enlarge time on such terms as seem just. But it is a judicial discretion that I should exercise taking into account the interests of both parties to the present application.

The omission to lodge the appeal within the prescribed time falls entirely on the part of counsel who freely accepts full responsibility. The applicant is indeed blameless. In the circumstances, should she be denied the chance to canvass her appeal? I do not think so especially when I am of the view that the applicant and her counsel are not guilty of laches after the mistake or omission was discovered. The delay that arose has been satisfactorily explained and counsel has shown that there is good reason why the appeal was not filed within the prescribed time. Though witnesses have left the jurisdiction of the court sufficient safeguards can be made by the superior court or this court should their presence be deemed necessary during the hearing of the suit or the intended appeal.

In the result, I allow the application as prayed in the motion. The time for lodging the record of appeal is extended by 30 days from the date of this ruling. The costs occasioned by this application assessed at Shs.6,000/= are awarded to the respondents and shall be paid to them within 10 days hereof.

Dated and delivered at Nairobi this 28th day of February, 2002.

P. K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR