



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI.247 OF 2002 (UR.123/02)

BETWEEN

DR. KIRTEE B. PATEL APPLICANT

AND

FREDRICK WAWERU IST RESPONDENT

J.M. MUCHIIRI 2ND RESPONDENT

FRANCIS MWAURA NJOROGE 3RD RESPONDENT

(Application for extension of time to lodge an application for leave to appeal against

the Ruling of the High Court of Kenya at Nairobi (Hon. Justice Aganyanya)

dated the 15th December, 1998

in

H.C.C.C. NO.1826 OF 1987)

RULING

The application before me was listed for hearing on a certificate of urgency pursuant to the provisions of rule 47 of the Court of Appeal Rules (The Rules). Dr. Kirtee B. Patel, the applicant, seeks an extension of time within which to seek the leave of this Court to appeal against the decision of the superior court (Aganyanya, J.) given on 15th December, 1998.

The applicant filed a notice of appeal against that decision on 21st January, 1999, but his counsel subsequently, on the mistaken belief that it was out of time, conceded an application by the three respondents herein for an order to strike it out on the ground that it had been filed out of time. However in view of the provisions of rule 3(e), of the Rules, the period of Christmas vacation, viz between 21st December, and 21st January, the said notice of appeal was in actual fact in time. But the said notice having been struck out the applicant does not have any valid notice of appeal in place. That much Mr. Goswani for the applicant concedes. In view of that fact, Mr. Muli for the respondents urged that since the applicant does not have any valid notice of appeal, this Court would not have jurisdiction to grant the

leave to appeal. In reply Mr. Goswani submitted in my view correctly, that as the applicant is only seeking an extension of time to take an essential step regarding his intended appeal the Court has jurisdiction. There is a pending application for leave to file a fresh notice of appeal out of time, namely Civil Application No.27 of 2002.

Has the applicant placed sufficient material before me to enable me exercise my discretion in his favour? Mr. Goswani swore the affidavit in support of the application before me. In the said affidavit he depones, inter alia, that he filed a notice of appeal on behalf of the applicant on time, and also an application for leave but which application was struck out by this Court as he had overlooked to include a copy of the notice of appeal. The bench that heard the motion for leave to appeal was of the view that in absence of a notice of appeal it lacked the jurisdiction to grant the leave. Mr. Goswani deposes further that the superior court record went missing soon after the decision against which an appeal is intended, and so it was not possible to obtain the ruling. Consequently the applicant could not possibly bring the application for leave within time.

The applicant's application for leave to appeal was struck out on 29th May 2001. But this motion was not brought until 21st August 2002. If the applicant was able to take out a motion for leave to lodge an appeal in January 1998, it has not been explained satisfactorily why the applicant did not renew the application promptly. I am unable to accept that the delay in taking out this motion was due to mere oversight or a mistake on the part of the applicant's counsel. Nor can the delay be attributable to the absence of the superior court record in view of what I stated earlier.

The applicant has clearly not placed sufficient material before me to enable me exercise my unfettered discretion under rule 4 of the Rules in his favour. In the result I dismiss the application with costs to the respondents assessed at Kshs.5,000/=.

Dated and delivered at Nairobi this 29th day of November, 2002

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR