



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 184 OF 2001

BETWEEN

GEOFFREY ORAO - OBURA APPLICANT

AND

MARTHA KARAMBU KOOMERESPONDENT

Being an application for Extension of Time to file a Notice of Appeal and Lodge an Appeal against the whole of the judgment of the High Court of Kenya at Nairobi by Hon. Mr. Justice Ole Keiwua dated 30th September, 1998

in

H.C.C.C NO. 478 OF 1998 (O.S)

RULING

This is an application by way of Notice of Motion brought under rule 4 of the Court of Appeal Rules in which the applicant Geoffrey Orao Obura is seeking the following orders:

- "1.THAT the time for filing the Notice of Appeal be extended.
- 2.THAT the time for lodging the Record of Appeal be extended.
- 3.Such further or other orders to meet the ends of Justice as may be necessary be made.
- 4.THAT costs of this Application abide the result of the Appeal.

This application brought on the following grounds:-

"1.The Applicant has a strong arguable Appeal with high probability of success.

2.The Applicant had already filed an Appeal i.e Civil Appeal No.146 of 2000 but it was struck out on 8th June, 2001 because the Advocate who signed the same did not have a practising certificate at the time it was signed.

3.The struck out Appeal aforesaid had been duly admitted out of time.

4.The Applicant has not been indolent".

When the application came up for hearing on 26th June, 2001 Mr. Khamati for the applicant argued that the appeal which the applicant had filed was struck out on 8th June, 2001 and this application filed on 13th June, 2001 hence there was no delay. He went on to state that the appeal was struck out for no fault of the applicant and hence he (applicant) should be given opportunity to be heard.

Hon. Karua for the respondent opposed the application. She pointed out that there were no grounds upon which this Court could exercise its discretion in favour of the applicant since Mr. Khamati was not candid in his affidavit. She complained that there had been several applications/appeals filed by the applicant in this same matter.

The facts leading to this application are fairly simple and straightforward. The applicant herein had filed an appeal in this Court (Civil Appeal No. 146 of 2000) which appeal was struck out on 8th June, 2001 as being incompetent as the appeal had been filed and signed by an advocate who had not obtained a practising certificate for the year 2000. In striking out that appeal this Court stated:-

"In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this court or in any other court. Accordingly, we strike out the appeal with costs thereof to the applicant including the costs of the notice of motion dated 26 February, 2001".

When the applicant's appeal was struck out, it meant that he had to start the process all over again. Hence, this current application for extension of time in which to file the notice of appeal and memorandum of appeal. It must be pointed out that when Mr. Khamati the advocate for the applicant signed the memorandum of appeal in the appeal that was struck out, he did so when he had no practising certificate for the year 2000. The argument by Mr. Khamati to the effect that although he had no practising certificate he had paid for the same does not make any difference. The most important point is that Mr. Khamati had no practising certificate for the year 2000. That was certainly in breach of Section 9(c) of the Advocates Act. So Mr. Khamati had no capacity to file an appeal on behalf of Mr. Obura, himself an advocate. The applicant herein is Mr. Obura. His appeal was struck out for no fault of his own but that of his advocate.

In view of the foregoing, it was Hon. Karua's contention that this Court ought to balance the interest of both applicant and respondent and come to the conclusion that this application should be dismissed. She relied on this Court's ruling in First American Bank of Kenya Ltd and Another vs. Grandways Venture Ltd - Civil Application No. NAI. 173 of 1999 (unreported) in which non-compliance related to rule 85 (1) (h) of this Court's Rules. In that case this Court stated:-

"We always understood the rule to be that once a party was in default (as the applicants here admittedly were) it was for them to place the necessary and relevant material before the Court to satisfy the court that despite their default, the discretion should nevertheless be exercised in their favour. This burden unfortunately, the applicants have not discharged".

Hon. Karua would like this application to be considered on the basis of what was stated in the above quoted observations of this Court. But here it must be pointed out that the appeal by this applicant was struck out for the simple reason that the applicant's advocate (Mr. Khamati) had not obtained practising certificate for the year 2000. The appeal was struck out on that ground alone and not for noncompliance of the Rules of this Court.

In an application of this nature, (extension of time in which to file the notice of appeal and record of appeal) this Court is being asked to exercise its discretion. It is upon an applicant to explain to the satisfaction of the court that this discretion ought to be exercised in its favour. Although the court has unfettered discretion, but like all judicial discretion it must be exercised on reason not caprice and the

exercise must not be arbitrary or oppressive.

In Leo Sila Mutiso v. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated, inter alia:-

"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".

As already observed earlier in this ruling, the applicant's appeal was struck out on 8th June, 2001 on the ground that the applicant's (appellant's) advocate (Mr. Khamati) who signed the memorandum of appeal had no practising certificate for the year 2000. The applicant wanted to reinstate his appeal and hence filed this application on 13th June, 2001 which was within one week of the appeal being struck out. Hence there was no delay in bringing this application. The question of chances of the appeal succeeding cannot really be canvassed here but suffice it to say that the appeal had been listed for hearing on its merits when it was discovered that Mr. Khamati had no practising certificate for the year 2000. On the face of it, the appeal merited being heard and that is why it was listed for hearing. It is, however, safe to say nothing more on the merits of the intended appeal at this stage.

In view of the foregoing, I allow the application and extend the time for filing a Notice of Appeal by 15 days from the date of this ruling and the record of appeal to be lodged within 21 days from the date of filing the Notice of Appeal. The respondent will have the costs of this application. It is so ordered.

Dated and delivered at Nairobi this 6th day of July, 2001.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR