



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI 17 OF 1999

BETWEEN

FREDRICK JONES KINYUA

PETER KIPLAGAT KOECHAPPLICANTS

AND

WANDA BAIRDRESPONDENT

(An application for extension of time to an intended
Appeal from the Judgment/Decree of the High Court of
Kenya at Nairobi (Mr. Justice G.S. Pall) dated 10th
December, 1993

in

H.C.C.C NO. 4819 OF 1989)

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 is seeking the following orders:-

- "1.THAT leave be granted to the applicant to file fresh Notice of Appeal and a Record of Appeal against the judgement/Decree of the High Court of Kenya at Nairobi (Hon. Justice G.S. Pall) dated the 10th December, 1993 out of time.
- 2.THAT the Honourable Court be pleased to direct time within which the said fresh Notice of Appeal and Record of Appeal are to be filed upon grant of leave.
- 3.THAT the applicant be at liberty to apply for further order and/or Directions as the Honourable Court may deem fit and just to grant.
- 4.THAT the costs of and incidental to this application do abide the outcome of this application".

This application is brought on the grounds that:-

"1.The Applicants appeal herein Civil Appeal Number 66 of 1998 FREDRICK JONES KINYUA, PETER KIPLAGAT KOECH VERSUS WANDA BAIRD was struck out on the 15th October, 1998 on the ground that the typed copy of the judgement appealed against and which was supplied to the applicants herein and contained in the record of appeal therein was neither signed nor dated by the judge who made it.

II.Upon a further perusal of the court file the signed copy of the typed judgement against which applicants intend to appeal was found.

III.The applicants were erroneously supplied by the unsigned and undated copy of the High Court Judgement by the Deputy Registrar of the Superior Court.

IV.The Applicants have an arguable appeal and it is in the interest of justice and fair play that it is granted leave to lodge in a fresh Notice of Appeal and Record of Appeal".

Mr. Ochieng Oduol for the applicants explained that there was an appeal by the applicants which appeal was struck out as the judgment to be appealed against had not been signed. Mr. Oduol went on to state that there were two folders and that one of the folders had the signed judgment. Now that they have a copy of the signed judgment they are asking for leave to file Notice of Appeal and Record of Appeal a fresh. Mr. Oduol argued that the applicants had given an explanation as to why the appeal was struck out and that the error should not be visited on the applicants. It was also pointed that the subject matter being land the applicants should be allowed to revisit the appeal.

Mr. Regeru for the respondent opposed this application on the ground that the applicants (and their counsel) were not diligent. He pointed out that while there was a duly signed judgment the applicants chose to file undated and unsigned judgment. Mr. Regeru was of the view that a delay of nine months would disentitle the applicants from what they were seeking. background to this matter shows that the judgment of superior court (Pall J as he then was) was delivered and dated on 10th December, 1993. The applicants filed Notice of Appeal on 10th December, 1993 and Record of Appeal was filed on 20th April, 1998.

That Record of Appeal was struck out on 19th October, 1998 on the ground that the judgment to be appealed against had not been dated and signed. The applicants had to start afresh. The signed and dated copy of the judgment of superior court was discovered in a separate folder. That is when they filed this Notice of Motion before this Court. The Notice of Motion was filed on 22nd January, 1999.

From the foregoing it would appear that from the date the appeal was struck out to the time of filing this Notice of Motion there is a delay of about three months. We have not been told what the applicants were doing for this period of three months.

In Mohamed Ali Aden and Another v. The United Nations Civil Application No. NAI. 145 of 1997 (unreported) Kwach J.A said:-

"According to that certificate uncertified copies of the proceedings and ruling were ready on 18th March, 1997. This application ought to have been filed promptly after that date but it was not filed until 18th June, 1997, thus there was a delay of 90 days. This is the delay Mr. Ibrahim for the plaintiffs should have explained, but he did not. And in the absence of that explanation there is no basis upon which I can exercise my discretion in favour of the plaintiffs as strongly urged by Mr. Ibrahim".

Then in Mulembe Farm Ltd. and Another v. John B. Masika and Others - Civil Application No. NAI. 31 of 1997 (unreported) Lakha J.A had the following to say:-

"The applicants knew of the delivery of judgment at the latest by 22nd November, 1996. Yet this application was not filed until 4th February, 1997 more than two months later. This delay has not been satisfactorily accounted for. In all circumstances I am not persuaded that this is a proper case

for the exercise of my discretion to grant the extension. Accordingly the application is dismissed with costs".

In this application, we find that there was no explanation as to why there was this long delay. It is to be noted that the applicants had the signed and dated judgment of the superior court by October, 1998 but they waited until January, 1999 when they filed this application. They did not file this application promptly. In an application of this nature, an applicant must give a satisfactory explanation to warrant the court to exercise its discretion in his favour. That is what was required of an applicants herein. In the present case the applicants have not been forthright in explaining the cause for the long delay. There was an attempt to shift blame from the applicants (and their counsel) to the Deputy Registrar of the superior court but that showed clearly that the applicants had no valid explanation to offer. Where there is no explanation there can be no indulgence.

For these reasons, this application fails and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 10th day of March, 2000.

E.O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR