



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O'KUBASU, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 77 OF 2000

BETWEEN

JASAN K. KOSKEI APPLICANT

AND

VISHVA BUILDERS LIMITED RESPONDENT

(Being an application for extension of time to serve
notice of appeal out of time and to lodge record of
appeal out of time from a ruling order of the High
Court of Kenya (Lady Justice R. Nambuye) made on 4th
October, 1999

in

ELDORET H.C.C NO. 102 OF 1995)

RULING

This is an application under Rule 4 of the Court of Appeal Rules in which the applicant is seeking the following orders:-

- "a.THAT the period limited for serving notice of appeal be extended.
- b.THAT the period limited for lodging and serving Record of Appeal be extended.
- c.THAT notice of Appeal be deemed to have been served in time.
- d.The Record of Appeal be deemed to have been lodged and served in time".

This application is based on the following grounds:-

- a.The applicant did not serve notice of appeal upon the respondent's advocate within the period limited for serving the notice of appeal due to an oversight on the part of the applicant's advocate.
- b.That the time required for preparation and compilation and incorporation of all documents in the record of appeal after delivery of proceedings and judgment took about one month and ten days.

- c. That the appeal is not frivolous and the applicant has an arguable appeal.
- d. The period of one month and ten days is not an inordinate delay.
- e. The applicant was not accorded opportunity of being heard in the superior court.
- f. The ruling and order of the high court appealed from is a nullity in law the same having originated from an incurably defective application.
- g. The applicant has a right of appeal and also to challenge the validity and competency of the ruling made against him or to have it set aside.
- h. The respondent will not be prejudiced in anyway if the applicant application to extend the time is granted.
- i. The applicant case in the superior court was tried on affidavits only and the entire proceedings were a nullity since no summons for directions were issued nor were issues drawn.
- j. It is well settled law that no litigant shall be shut out of corridors of justice".

When this application came up for hearing on 5th June, 2000, Mr. Amata for the applicant relied on the above stated grounds upon which this application was brought. He pointed out that there was a certificate of delay.

Mr. Gicheru for respondent opposed the application essentially on the ground that the applicant has not brought himself within the rules as he has not given sufficient reason for not filing the Notice of Appeal in time and lodging the Record of Appeal within 60 days. Mr. Gicheru then gave instances of various delays on the part of the applicant. In Mr. Gicheru's view, this application ought to be dismissed with costs to the respondent.

As it has been said many times by this Court in an application of this nature (under Rule 4 of this Court's Rules), the Court is being asked to exercise its discretion. It is upon the applicant to explain to the satisfaction of the Court that this discretion ought to be exercised in its favour. If the explanation is found to be reasonable and acceptable, the Court will exercise its discretion in the applicant's favour. In Civil Application No. NAI 356 of 1996 this Court said:-

"Lastly we would like to observe that the discretion

granted under r.4 of the Rules of this Court to extend
time for lodging an appeal is as is well known, unfettered
and only subject to it being granted on terms as the Court
may think just.

Within this context this court has on several occasions

granted extension for time on the basis that the intended
appeal is an arguable one and it would therefore be wrong
to shut an applicant out of court and deny him the right of appeal
unless it can be fairly said that his action was in the circumstances

inexcusable and his opponent was prejudiced by it".

Having considered the explanation given for the delay, and in view of what was stated in above cited authority, I am of the view that this is a fit case in which I should exercise my discretion in favour of the applicant. Hence the period for serving notice of appeal is extended by seven days from the date of this ruling and the period for lodging and serving Record of Appeal is also extended by seven days from the date of this ruling. And finally notice of Appeal is deemed to have been served in time, and the Record of appeal is also deemed to have been lodged and served in time. Costs of this motion shall abide the result of the intended Appeal.

Dated and delivered at Nairobi this 23rd day of June, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL

Mr. Katwa I apply for reference to three judges under Rule 54.

Order The prayer for reference to three judge bench granted.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR