



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: O'KUBASU (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 243 OF 2000 (114/2000 UR)

STANLEY KAIYONGI MWENDAAPPLICANT
AND
CYPRIAN KUBAIRESPONDENT

(Application for extension of time to serve Notice of
Appeal out of time in an intended Appeal from the
High Court of Kenya at Meru (Hon. Justice Tuiyot)
dated 20th July, 2000
in
H.C.P. & A NO 219 OF 1999

R U L I N G

Before me is Notice of Motion brought under Rules 4 and 42 of the Rules of this Court in which the applicant is seeking the following orders:-

"1.THAT this Honourable Court be pleased to grant extension of time to the Applicant to serve the Notice of Appeal lodged on 3rd August, 2000 from the Ruling of the Honourable Mr. Justice Tuiyot delivered on the 20th July, 2000 at Meru.

2.THAT the costs of this application be provided for".

The application is brought on the following grounds:-

"a.Judgment was delivered on the 20th July, 2000 in the presence of the Applicant.

b.Notice of Appeal was filed on 3rd August, 2000 and lodged on the same day.

c.The Applicant/Objector applied for proceedings which were supplied on 10th August 2000.

d.That the applicant/objector did not file Notice of Appeal before 3rd August 2000 because the Court file was not available.

Mr. Kirugara for the applicant stated that the applicant was not conversant with Court of Appeal Rules and hence he had to seek advice of counsel and was advised that he was three days out of time.

Mr. Arithi for the respondent opposed this application on the ground that there are no sufficient grounds advanced as to why there was a delay in filing the notice of appeal.

As it has been said on numerous occasions in an application of this nature this court is being asked to

exercise its unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in his favour. If the explanation given is acceptable, the court will then exercise its discretion in favour of the applicant. As Lakha J.A said in Peter Maina Munyua v. Damaris Njoroge - Civil Application N"oW.h enN AI 2t1h0e reo f 19i9s9 (nuon repoerxtpelda)n:a-tion there can be no indulgence".

And 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".

In the present application the applicant has explained why there was a delay in filing Notice of Appeal. The applicant who had been acting in person did not know what he was required to do and so by the time he filed the Notice of Appeal he was three days out of time.

Having regard to the circumstances of this case, I find that there has been adequate and reasonable explanation for the delay. Hence the applicant ought not be shut out of exercising his statutory right to be heard on appeal. Accordingly, I allow this application and extend time for filing a Notice of Appeal by 15 days from the date of this ruling. Now that the applicant is represented by Mr. Kirugara the issue of lodging the Record of Appeal will be handled by Mr. Kirugara who should know how to proceed in this matter. As regards the costs of this application, I order that the same shall abide the intended appeal.

Dated and delivered at Nairobi this 15th day of September, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR