



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 238 OF 2000

BETWEEN

1. JULIUS MUTHOKA NDOLO

2. PETER NGILA

3. JOSEPH MAWIA

4. E. B. MUTISO

5. PHILIP NGENZI APPLICANTS

AND

DANSON MUTUKU MUEMA..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Machakos (Mwera, J.)dated 18th November, 1999

in

H.C.C.APPEAL NO. 6 OF 1991)

RULING

This is a Notice of Motion brought under Rule 4 of this Court's Rules. The applicants are seeking the following orders:-

"1.THAT the time limited by the Rules within which to file and serve Notice of Appeal to the respondent be extended.

2.THAT the attached Notice of Appeal be admitted as duly filed."

Then immediately after the above we find the following:-

"ON THE GROUNDS that it is just and fair and such orders will not in any manner prejudice the rights of

the Respondent."

When the application came up for hearing before me on 13th December, 2000 Mr. F. M. Mulwa for the applicants started his submissions by correctly pointing out that the application was seeking this court's discretion. Then he pointed out that judgment of the superior court was delivered on 18th November, 1999. Mr. Mulwa again, correctly, stated that without explanation the delay is unreasonable. He then gave what he considered to be adequate explanation. It would appear that the delay was due to the fact that the applicants relied on their counsel's advice and that it was only after stay of execution was refused that the applicants realized that they needed to file a notice of appeal. So, it was Mr. Mulwa's contention that the applicants should not be punished for the faults of their advocates.

Mr. Mbithi for the respondent opposed this application on the grounds that the applicants did not intend to file appeal in this matter as there was a delay of about 260 days. The other grounds are that there was no explanation for the delay and that there was an application for review and yet this same dispute is before Machakos Land Dispute Tribunal.

From what has been argued before me, it should be pointed out that the intended appeal has nothing to do with the dispute between the parties but only to costs. Indeed, this was made very clear by Mr. Mulwa that the intended appeal is against costs only. This is so because the parties are still involved in applications for review in the superior court with yet a pending dispute before Machakos Land Disputes Tribunal.

In an application 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. Although this is unfettered discretion but like all judicial discretions it must be exercised on reason not caprice; and the exercise must not be arbitrary or oppressive - see **Samken Ltd, Abercrombie & Kent Ltd and Mercedes Sanchez, Pall Trissel, Mohamed Osman Medin - Civil appeal No. Nai 21 of 1999** (unreported) do the applicants give for this delay of 260 days? That they relied on their advocate's advice and came to realize only too late that an appeal was necessary.

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 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."

Applying the above to the facts of this application it is obvious that there was a long delay which was unreasonable even according to Mr. Mulwa who appeared for the applicants. This delay of 260 days has been explained by merely stating that the applicants had relied on their counsel's advice. There is no magic in filing a Notice of Appeal and if indeed an appeal had been intended then when the applicants' counsel were filing application for review this could not have been overlooked. By filing an application for review the issue of costs must have been considered.

Having considered the foregoing I find that this is not a proper case in which to exercise my discretion in favour of the applicants. Consequently, this application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of December, 2000.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.