



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civ Appli 6 of 2006

GEORGE CHEGE KAMAU APPLICANT

AND

ESTHER WANJIRA KAMAU RESPONDENT

(Application for leave to extend time to file and serve the Notice of Appeal and Record of Appeal out of time from the judgment and order of the High Court of Kenya at Nakuru (Justice Rimita) dated 28th June, 1999

in

H.C.C.C. NO. 415 OF 1998)

RULING

This is an application by way of Notice of Motion brought under **Rule 4** of the Court of Appeal Rules (the Rules). The applicant George Chege Kamau is seeking the following orders:-

“1. THAT the time within which to file and serve Notice of Appeal and Record of Appeal against the judgment and Orders of Mr. Justice D.M. Rimita dated 28th June, 1999 in case HCCC 415 of 1998 Nakuru be extended and the same be filed and served out of time.

2. THAT the costs be in the cause.”

The application is supported by the affidavit of the applicant and on the following grounds:-

“A. THAT judgment in the Case No. HCC 415 of 1998 was delivered on 28th June 1999 and by which judgment the defendant (applicant herein) was ordered to transfer to the plaintiff (respondent herein) half of the suit premises land parcel No. Ndundori/Miroreni Block 2/56.

B. THAT immediately after the said judgment was given the applicant did file notice of appeal against the said judgment on 1st July 1999, and also did apply for the copies of proceedings to prosecute the appeal.

C. THAT the applicant also did file various applications among them the applications for review for the said judgment.

D. THAT in the cause of the hearing of application for review, the appeal against the said judgment was abandoned in favour of proceedings for the review and; the Notice of appeal and also record of appeal that had been filed in the matter lapsed as can be verified in affidavit attached herein.

E. THAT the application for review was heard and determined against the applicant and an appeal was also filed against the decision.

F. THAT an application for extension of time to file an appeal on the matter of the review was heard by this Hon. Court and dismissed on 29th April 2005.

G. THAT it's the applicant decision to prosecute an appeal against the judgment of the Court but the time to file all the notice of appeal and record of appeal has now lapsed.

H. THAT the applicant has persistently pursued his rights in law in the suit premises in the apparent system since the date the said judgment was given on 28th June, 1999 to-date.

I. THAT the intended appeal raises serious issues of law of the judgment and the appeal has high chances of success if given chance as per the draft of memorandum of appeal annexed to the affidavit herein.

J. THAT the suit premises, the subject matter of the suit and appeal is matrimonial home of the applicant and to which the respondent has no connection; whatsoever and she does not live there. The applicant stands to loose irreparably if the intended appeal is not given the chance.

K. THAT the respondent has always been away that the applicant has persistently pursued his rights therein and the respondent stand to suffer no prejudices in this application if granted. The applicant does not live in the suit premises and has never been part of this suit premises."

When this matter came up for hearing before me on 25th September, 2006, Mr. Njanja, for the applicant, more or less repeated the grounds set out above and went on to emphasize that the applicant has been trying to assert his right. Mr. Njanja submitted that this was a very passionate dispute and that the applicant was unwell until *December, 2005* when he got better.

In opposing this application Mr. Kipkenei, the learned counsel for the respondent, pointed out that there had been inordinate delay in bringing this application. He referred to his own affidavit in which he gave history of this matter. He was of the view that the applicant was a dishonest man who was out to delay due execution by making numerous and frivolous applications. Indeed, Mr. Kipkenei was of the view that this application was an abuse of the court process.

From the material placed before me, it would appear that the dispute between the parties started way back in 1978. They have described themselves as "*husband and wife*" and also as "*joint tenants*". The dispute was riddled with unexplained delays, allegations of corruption and missing files. It is no wonder that this matter is still in Court in the year 2006.

I have considered the submissions by counsel appearing for the parties herein. It is now settled that an application under **rule 4** of this Court's Rules, a single Judge of the Court is called upon to

exercise his unfettered discretion but like any other judicial discretion, that discretion must be exercised with reason. The matters which are to be considered whether to grant leave for an extension of time are first the length of the delay, the reason for the delay, the chances of the appeal succeeding and lastly the degree of prejudice to the respondent if the application is granted.

In **PATEL V. WAWERU AND 2 OTHERS [2003] KLR 361** at **pp.312-3** this Court had the following to say in respect of **rule 4** of the Rules:-

“This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion” In **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI** – Civil Application No. NAI. 251 OF 1997 this Court stated:-

“It is now 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 this reference it has been shown that a delay of almost fifteen months was not explained to the satisfaction of the learned single judge. We asked Mr. Goswami severally to explain to us the delay but he failed to do so. The Rules of the Court must be complied with. As was said in RATMAN V. CAMARASAMY [1964] 3 ALL ER 933 by Lord Guest at p. 935:-

The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The foregoing sets out the manner in which this Court is to consider applications brought under **Rule 4** of its Rules.

In the present application, it cannot be denied that there was a long delay. But the question is whether that long delay has been adequately explained to the satisfaction of the Court. It has been shown that the applicant thought of an appeal then suddenly changed his mind and put all his hopes on review. He pursued review process until he came to a dead end. Still determined to pursue his right the applicant then turned to the appeal process. We have been told that this is a very passionate dispute between two people who once cohabited as husband and wife.

In **MUCHUGI KIRAGO V. JAMES MUCHUGI KIRAGU & ANOTHER** – Civil Application No. **NAI. 356 of 1996** (unreported) this Court said:-

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is 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 of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny

him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

I have carefully considered the long history of this dispute and bearing in mind the relentless efforts of the applicant in pursuit of this matter, I am of the view that this dispute ought to be allowed to be determined by the highest Court in the land. For these reasons, this application is allowed and the applicant is granted leave to file a *notice of appeal* within **seven (7) days** from the date hereof and the *record of appeal* be lodged and served within **thirty (30) days** from the date the notice of appeal is filed. Costs of this application which I assess at **Shs.5,000/=** to be paid to the respondent within **30 days** from the date hereof and in default execution to issue.

Dated and delivered at Nakuru this 29th day of September, 2006.

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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