



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 215 of 2008

DR. MANASE ONYIMBI..... APPLICANT

AND

**THE BOARD OF MANAGEMENT OF KENYA MEDICAL
RESEARCH INSTITUTE.....1ST
RESPONDEN**

**THE DIRECTOR, ALUPE LEPROSY AND
SKIN DISEASE RESEARCH CENTER BUSIA (K).....2ND
RESPONDENT**

(Application for extension of time, within which to file a notice of appeal and record

*of appeal from the judgment and decree of the High Court of Kenya at Kisumu (Tanui, J.) dated
14th November 2003*

in

H.C.C.C. No. 154 of 2000)

RULING

The applicant moved the Court under **rules 4** and **42** of this Court's Rules seeking the following orders:-

“1. The Honourable Court be pleased to extend time for the Applicant herein, to lodge a Notice of Appeal and serve against the judgment and/or Decree of Hon. Justice B. K. Tanui, judge, dated and delivered on the 14th day of November, 2003, vide KISUMU HCCC NO. 154 OF 2000.

2. The Honourable Court be pleased to enlarge time to the Applicant herein, to lodge

and/or file Record of Appeal and serve against the judgment and/or Decree of Hon. Justice B. K. Tanui vide *KISUMU HCCC NO. 154 OF 2000*.

3. Consequent to prayer (1) herein being granted, the Applicant be granted leave to file and/or lodge the Notice of Appeal and Record of Appeal and serve within 14 days and/or such shorter duration, as this Honourable Court may deem fit and/or expedient.

4. Costs of and occasioned by this Application be borne by the Applicant.

The applicant's application is premised on the following grounds:-

“(a) That the Applicants’ previous Record of Appeal vide *COURT OF APPEAL CIVIL APPEAL NO. 34 OF 2005* was struck out by this Honourable Court on the 19th day of June, 2008.

(b) That striking out was due to the fact that *M/S MWAMU & COMPANY ADVOCATES* did not serve the Record of Appeal in time as prescribed by Law.

(c) That the Applicant is desirous to ventilate his Appeal, before this Honourable Court.

(d) That the Applicant intended Appeal raises several Salient and Pertinent issues of law, which ought to be adjudicated upon, with finality by this Honourable Court.

(e) That the Applicant is bound to suffer substantial loss and/or prejudice, if the instant Application is not granted.

(f) Conversely, the Respondent shall not suffer any loss and/or prejudice, whatsoever, if the instant Application is granted.

(g) That the Respondent shall be compensated by an order for costs.

(h) That the instant application has been made timeously, in good faith and with due promptitude.

(i) That the Applicant ought to be afforded opportunity to pursue his Constitutional right of Appeal.

(j) That this Honourable court is seized of jurisdiction to entertain the instant Application.

(k) That there exists sufficient and/or reasonable cause to warrant the instant Application.

(l) That this is a fit and proper Application to be allowed *Ex Dedito Justitiae*.”

The affidavit in support of the application dated 11th July 2008, is sworn by the applicant himself.

The brief history of this matter is that the applicant filed a suit at Kisumu, being Kisumu *High Court Civil Case Number 154 of 2000*, against the two respondent seeking:-

“(a) A declaration that the decision stopping the plaintiff's salary and dismissing him were completely wrong, null and void ab initio;

(b) A declaration and an order that the plaintiff be paid salary arrears from 25th June 1999 to date and terminal dues the plaintiff is entitled to; and

(c) Costs of the suit and the interest on (a) and (b).....”

The defendants (respondents) filed a joint defence in which they denied that the 2nd defendant is a legal entity with a capacity to sue and be sued. The defendants further averred that the plaintiff's claims are “*misconceived, bad in law and do not disclose a reasonable cause of action against the defendants.*” The 1st defendant averred further that the plaintiff committed a misconduct when he proceeded on an unauthorized leave from 11.6.1999, and thereafter absented himself from work from 25.10.2003, and that he had therefore deserted duty.

The learned Judge found that the suit against the 2nd defendant was without merit and dismissed it with costs. As far as the plaintiff's suit against the 1st defendant is concerned, the learned Judge found thus:-

“In the result I find that the plaintiff has not proved his case against the 1st defendant on the balance of probabilities. The suit is therefore dismissed with costs.”

The applicant was aggrieved by the learned Judge's judgment delivered on 14th November 2003. The court record shows that he lodged a Notice of Appeal in the superior court at Kisumu on 27th November, 2005, but did not file the appeal within the period allowed bylaw, due to the superior court supplying him late with the proceedings. He was therefore issued with a certificate of delay.

The applicant's advocate subsequently filed **Civil Application No. NAI. 80 of 2005** for extension of time to file a Notice of Appeal and the Record of Appeal out of time, but this was subsequently withdrawn. Another similar application for leave to file Notice and Record of Appeal out of time was filed. This was now **Civil Application No. NAI. 215 of 2005**. It was heard by Githinji, JA who delivered a Ruling at Kisumu on 1st December, 2005, allowing the applicant's application and directing that the Record of Appeal “*be filed and served within 14 days from the date hereof.*” He awarded the costs of the application to the respondent.

Apparently the applicant did not file and serve the Record of Appeal within 14 days, i.e. by 15th December 2005, as was directed by the Court. This prompted the respondent/applicant (*The Director, Alupe Leprosy and Skin Diseases Research Centre Busia (K)*) to move the Court to strike out **Civil Appeal No. 34 of 2005**, as having been filed out of time. The same was indeed struck out by this Court on 19th June 2008.

The applicant has once again moved this Court for extension of time to lodge and serve the Record of Appeal from the judgment of Tanui J, dated 14.11.2003, out of time.

The applicant appeared in person before me on 5th December, 2008, at Kisumu, to argue his application. His first complaint was that he had just been served with a replying affidavit that morning, within the court corridors, a claim to which Mr. Siganga, advocate for the respondent replied that the applicant did not give an address for service of court documents though there was a postal box number on his documents. Mr. Siganga conceded that he did not use that post office box number.

The applicant urged the Court to consider his application as the delay in filing the appeal by 15.12.2005, was caused by his advocate who was on record at the time. That subsequently he discharged his advocate and took charge of the case, but it took him sometime to get the file from the

advocate until he appealed to the advocate's father to assist him in retrieving his file.

The applicant prepared Notice of Motion application on 10th July 2008 and filed it as quickly as he could, in an effort to correct what his advocate did not do well.

Mr. Siganga for the respondent submitted that though the Court has unfettered discretion under **rule 4** of the court's Rules to extend time, before the Court can exercise that discretion, the applicant must disclose the facts and circumstances to enable the Court to exercise discretion in his favour. He asked the Court to refuse to extend time because of the length of the delay. That **Civil Application No. 34 of 2005** was struck out on 19th June 2008, and the present application was not filed until 21st July 2008, a delay of 32 days. Mr. Siganga complained that the applicant has not explained the delay in his supporting affidavit. He then quoted several decisions of this Court where the court had either extended or refused to extend time because of the delay.

The further submission of Mr. Siganga was on the issue of the appeal not succeeding. He said that the applicant had not attached a Memorandum of Appeal as he did in the application before Githinji, JA, as such the Court has no material on which to make a decision. He asserted that the respondent would be prejudiced if the applicant's application was granted.

The applicant submitted in reply that he was not aware that he was required to file the application within a stated period, as the previous one had been struck out. That he was acting in person, and he tried to file the application in the shortest time possible. That after the ruling of 19.6.2008, striking out his appeal, he discharged his advocate, but had difficulties in retrieving the file from the advocate, until his (*the advocate's parents*) intervened. Subsequently he prepared the application and lodged it in the Court registry on 11.7.2008 for assessment of costs, which was not done till 21.7.2008, when the documents were released to him. That according to him that caused the delay. The applicant said that he attached the judgment of the superior court and the ruling of Githinji, JA, but did not attach a Memorandum of Appeal because that was covered in the application before Githinji, JA, and those grounds are still the same.

This Court has dealt with many applications under rule 4 of the Court of Appeal Rules, for example in **PATEL v WAWERU & 2 OTHERS [2003] KLR 361 at Pp 362 – 3**, the Court had the following to say:-

“This is a matter in which the learned 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 inordinate delay. How does a single Judge exercise his discretion” In **LEO SILA MUTISO vs 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 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 succeed if the application is granted and fourthly the decree of prejudice to the respondent if the application is not granted.”

In this application the delay is said to be of 32 days, which the respondent's counsel submitted is “*unexplained*”, but this averment was contained in a replying affidavit served on the applicant just before

he entered the Judge's chambers to argue the application. No reason was given by the respondent's counsel why this was so, especially since he admitted that he had the applicant's postal box number.

The respondent's counsel also complained about the failure by the applicant to annex a draft Memorandum of Appeal to his application, but the applicant said that this was annexed to a similar application which was dealt with by Githinji, JA as already stated and he did not see the reason to annex it again. In his ruling the learned Judge (Githinji, JA) said the following about the draft Memorandum of Appeal:-

“Both the applicant and his counsel say that the appeal has high chances of success. The draft memorandum of appeal contains four grounds of appeal. It is true as Mr. Siganga, learned counsel for the respondent states that the grounds of appeal are very general. I also appreciate that the applicant's counsel did not show the specific issues the applicant intends to pursue in the appeal. Nevertheless I recognize that the appeal concerns loss of employment and concomitant benefits and that the Memorandum of Appeal raises some grounds of appeal.”

I have read through the applicant's affidavit in support to the present application. I find that **paragraph 13** thereof, contains the reasons for the delay in lodging and serving the Notice of Appeal in time. This is the ground with the applicant expounded on at the hearing. If the respondent's counsel served him in good time with the replying affidavit, perhaps he might have filed a supplementary affidavit to answer the issues raised therein.

Given these circumstances, I feel inclined to exercise my discretion in favour of the applicant and allow his application. I direct that the Record of Appeal be filed and served within a period of 14 days from the date hereof. The respondent will have the costs of this application.

Dated and delivered at KISUMU this 16th day of January, 2009.

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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