**Mariaria and others v Matundura**

**Division:** Court of Appeal of Kenya at Kisumu

**Date of ruling:** 26 March 2004

**Case Number:** 301/03

**Before:** O’Kubasu JA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Appeal – Time – Extension of time – Delay of three and a half months – Delay attributable to*

*applicant’s previous counsel – Whether extension of time would be granted – Rule 4 Court of Appeal*

*Rules.*

**RULING**

**O’KUBASU JA:** Before me is an application by way of notice of motion brought under rules 4 and 42 of the Court of Appeal Rules in which the applicants are seeking the following orders: “1. That this Honourable Court be pleased to extend the time within which the applicant may file the notice of appeal and the record of appeal from the judgment and decree of the High Court of Kenya given by honourable Mr PKK Arap Birech on the 26 October 2001. 2. T hat the Court be pleased to make reasonable provisions for the costs of the application. This application is based on the following grounds: “(*a*) That the applicants filed the notice of appeal timeously and obtained a certificate of delay. (*b*) That due to some oversight the proceedings and certificate of delay were misplaced and when the same were traced the period between then and filing the appeal was too short to file the appeal. (*c*) That further there are some necessary documents that were left in the record of the superior court which were not easily accessible on time. (*d*) That it is just and reasonable to grant the prayers sought”. When this application came up for hearing on 25 March 2004 Mr *Soire*, for the applicant, stated that he was abandoning the prayer for leave to file notice of appeal out of time. He then proceeded to explain what led to this delay. The blame was put on Mr Masore the advocate who was handling this matter in the superior court and also prepared the papers for the intended appeal. In opposing this application Mr *Onsongo* for the respondent started off by pointing out that the application was defective since the prayer of notice was abandoned. It was Mr *Onsongo*’s view that the advocate for the applicants exhibited a sloppy and careless manner in dealing with this matter. Under rule 4 of this Court’s rules the Court has what has been referred to as unfettered discretion in granting leave. However, this discretion must be exercised Judiciary. How is this discretion to be exercised? In *Mutiso v Mwangi* [1997] LLR 630 (CAK) this Court stated: “It is now well settled that the decision whether or not to extend 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”. The Court then continued: “Bearing these principles in mind and applying them to the instant case the appellant took almost three and half months to file the present application after the appeal was struck out for the second time. In our judgment with respect to the period of delay of almost three and a half months, in any view of it is substantial. In *Samken Ltd and another v Tussel and another* [1999] LLR 898 (CAK) this Court found a delay of about three months long”. It is to be noted that the judgment of the superior court that the applicant with to challenge was delivered on 26 October 2001. A notice of appeal was filed within the prescribed time. The intended appeal should have been filed by the end of 2001 but the applicants obtained certificate of delay hence they had to lodge the record of appeal by 11 October 2003. That was not done. The reason given for that failure was that there was oversight on the part of the advocate and one of the applicants. In *Omar Transmotors Ltd and another v Onyango* [2002] LLR 3774 (CAK) Omolo JA dealing with an application similar to this one had the following to say: “Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their cost that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders”. Mr *Onsongo* urged me to consider the current application in the light of what was stated in the foregoing decision. In “*The Due process of Law*” 1980 London Butterworths at 93 Lord Denning said: “Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him, as for instance when a solicitor does not issue a writ in time, or serve it in time or does not renew it properly. We have seen I regret to say several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by this delay has been remedied as much as can be. I hope this will always be done”. I have given the background to this application as explained by Mr *Soire* and taking into account the principles to be applied in exercising my discretion under rule 4 of the rules I do not think the applicants have given sufficient explanation to warrant the Court’s discretion being exercised on their favour. It is true that the Court has unfettered discretion but like all judicial discretion must be exercised upon reason not capriciously. Even sympathy alone would not assist a party. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent. In view of the foregoing I am satisfied that this is not a proper case in which to exercise my discretion in favour of the applicants. Consequently, this application fails and the same is dismissed with costs to the respondent. For the applicant:

*JO Soire* instructed by *JO Soire and Co*

For the respondent:

*RB Onsongo* instructed by *Onsongo and Co*