**Maritim v Kibaru**

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

**Date of judgment:** 30 September 2005

**Case Number:** 362/04

**Before:** O’Kubasu JA

**Sourced by:** LawAfrica

*[1] Appeal – Extension of time for lodging and serving appeal – Applicable principles – Rule 4 – Court*

*of Appeal Rules.*

**JUDGMENT**

**O’Kubasu JA:** This is an application, by way of notice of motion, stated to have been brought under “rules 4, 42, 74 and 76 of the Court of Appeal Rules” in which the applicant, Simon Towett Maritim, is seeking the following orders:

“1. That time within which to lodge and serve notice and record of appeal from the decision of the superior court, in Nakuru High Court civil case number 253 of 1996, be extended as this Honourable Court may deem fit.

2. That costs of and incidental to this application abide the result of the intended appeal.” The application is based on various grounds stated therein and on the applicant’s affidavit running into 19 paragraphs in which the applicant sets out the reasons why there was a delay in filing the notice of appeal and the record of appeal. There is then a long replying affidavit of 32 paragraphs sworn by the respondent, Jotham Muiruri Kibaru. This application was argued with considerable force by both Mr *Oduor* for the applicant, and Mr *Kahiga*, for the respondent. From the material placed before me, it would appear that there can be no dispute that there was a long delay, of about seventeen (17) months. It is also admitted that soon after the judgment of the superior court was delivered the court file went missing. Efforts were made to reconstruct a skeleton file. The applicant changed his advocates and the new firm of advocates did not move with speed in putting things into place. All this contributed to the delay in taking essential steps. Each counsel put in a number of authorities in support of his respective position in this application. It is now settled that in an application under rule 4 of this Court’s Rules, a single judge of this 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 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 others* [2003] KLR 361 at paragraph 362-3,this Court had the following to say in respect of rule 4 of this Court’s 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 Mutiso v Mwangi* Civil application number Nairobi 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 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 timetable for the conduct of litigation. The above passage has been quoted with approval by this Court in Grindlays Bank International (K) Limited v Barbour Civil application number Nairobi 257 of 1995 and Trade Bank Limited (In Liquidation) v LZ Engineering Construction Limited and another Civil application number Nairobi 282 of 1998.” The foregoing is an appropriate summary of the authorities cited in this application. In the present application there was a delay of about seventeen (17) months. The applicant was not informed of the outcome of his case immediately the judgment was delivered by the superior court. The court file of the superior court went missing. There was the issue of the applicant changing his advocates and the new firm of advocates had to start the process of coming on record and, hence, had to make the necessary applications. The dispute herein relates to land, which as we are told by Mr *Oduor* for the applicant, is an emotive issue. In *Kiragu v Kiragu and another* Civil application number Nairobi 356 of 1996 (UR) 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 an 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 background to this matter and bearing in mind that the dispute has its origin in the infamous land clashes of 1992, I am of the view that this matter ought to be finally determined by the highest court in the land. For these reasons, this application is allowed and the applicant is ordered to file his notice of appeal within seven (7) days from the date thereof and the record of appeal to 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 KShs 5 000, to be paid to the respondent within 30 days from the date hereof and in default execution to issue.

For the appellant:

*Mr Oduor*

For the respondent:

*Mr Kahiga*