BENJAMIN G. NDEGWA ..... APPLICANT

VERSUS

DR. & DR. MRS. C. N. MURUNGARU ..... RESPONDENT

R U L I N G

Before me is an application by way of Notice of Motion expressed as brought under Section 79G of the Civil Procedure Act, orders L rule 1 and XLIX rule of the civil procedure rules. In this application the applicant, **Benjamin G. Ndegwa**, seeks the following two orders:-

"**(a) THAT the applicant herein be granted leave**

to appeal out of time to this court against the ruling and order of the Senior Resident Magistrate – Nyeri CMCCC No. 248 of 2005 delivered on 12th January 2006.

(b) The cost of this application be provided for".

The application was founded on the grounds that the delay in filing the appeal was occasioned by the fact that his initial appeal against the ruling aforesaid being Nyeri HCCA No. 4 of 2006 was struck out vide a judgment delivered on 14th May 2009. That the intended appeal is meritorious and has high chances of success. Finally, it was in the interest of justice that the application be allowed.

The application is supported by the affidavit of the said **Benjamin G. Ndegwa** who depones in pertinent paragraphs as follows:-

"**1. .....**

2. THAT on 12th January 2006 the Senior Resident Magistrate delivered a ruling upholding the Respondent's preliminary objection, thereby striking out my suit with costs to the defendant.

3. THAT consequently, on 25th January 2006, I filed an appeal, Nyeri HCCA No. 4 of 2006, against the aforesaid ruling.

4. THAT subsequently, I filed the record of appeal, took directions on the mode of hearing and the appeal proceeded to hearing by way of written submissions, and the judgment reserved for 14th May 2009.

5. THAT subsequently while attending a two week seminar at Mombasa, from the 13th to the 27th of May, (sic) my advocates on record informed me, which information I verily believe to be true, that judgment was delivered on 14th May 2009, striking out my appeal aforesaid as the Order appealed from had not been extracted and included in the Record of Appeal.

6. THAT my advocates on record could therefore not file this application on time as I was not within Nyeri and could thus not sign the Affidavit in support of the application for extension of time.

7. THAT my intended appeal against the lower court's judgment has overwhelming chances of success, as shown in the Memorandum of appeal.

8. THAT the failure to file the appeal in time was therefore for genuine reasons aforementioned. I therefore pray that I be allowed to appeal out of time.

The application was resisted by the respondents, **Dr. & Dr. Mrs C. N. Murungaru**. In his replying affidavit dated 23rd July 2009, **Dr. C. N. Murungaru**, where relevant deponed as follows:-

"**1. .....**

2. .....

3. THAT the ruling to which the appeal relates was delivered on 12th January 2006 and it is now four years down the line.

4. .....

5. .....

6. THAT the Applicant subsequently filed an appeal HCCA No. 4 of 2006 and directions were eventually given that the appeal to be heard by way of written submissions.

7. THAT submissions were filed and judgment delivered on 14th May 2009.

8. THAT I am informed by my advocates which information I verily believe to be true that the intended appeal is therefore Res judicata, the same having been heard and determined and judgment delivered.

9. THAT I am informed by my advocates which information I verily believe to be true that litigation must come to an end.

10. THAT without prejudice to the foregoing, the Applicant is guilty of inordinate delay in filing this application.

11. .....

12. .....

13. THAT I am informed by my advocates which information I verily believe to be true that the Applicant has not demonstrated that the intended appeal has any chance of success.

14. .....

15. .....

16. .....

17. THAT I am informed by my advocates which information I verily believe to be true that he power to extend time is discretionary and the Applicant must therefore satisfy the court as to its compliance with the set down principles."

The application came up for hearing interpartes before me on 27th July 2009 when **Ms Nderitu** appeared for the applicant, while **Ms Mwangi** appeared for the Respondents. The two counsel agreed to have the application canvassed by way of written submissions. I endorsed that agreement. Consequently respective parties filed and exchanged written submissions which I have carefully read and considered.

The dispute in this matter started in the Chief Magistrate's Court at Nyeri in Civil Suit No. 248 of 2005. In that suit, the applicant had described the respondents in the heading of the plaint as "**Dr. & Dr. Mrs C. N. Murungaru"** and in the body of the plaint, it was stated that the "**Defendants are male and female adults...."** On the basis of this description, the respondents successfully raised a preliminary objection at the hearing of the suit and as a result the learned Senior Resident Magistrate struck out the applicant's plaint because it did not allegedly comply with order VIII (1) (c) of the civil procedure rules. Angered by that ruling, the applicant came to this court by way of appeal being Nyeri HCCA No. 4 of 2008 against the said ruling. The appeal was subsequently heard by way of written submissions. Judgment was

delivered on 14th May 2009. By that judgment **Kasango J** struck out the appeal as being incompetent on the grounds that the applicant had failed to extract and include in the record of appeal the order appealed from. As the appeal had not been dismissed but merely struck out, the applicant felt that he could have a second bite of the same cherry, hence, this application.

It must be pointed out that the law is now settled as regards the principles to be applied by this court when considering an application of this nature. The starting point is that the court has unfettered discretion when considering such an application. However, like all judicial discretion the court has to exercise such discretion upon sound reasons and not capriciously. Among the matters to be considered are first, the period of delay, second, reasons for delay, thirdly, the court would consider whether the appeal or the intended appeal is arguable and that it is not frivolous. Fourthly, the court has to consider if the respondent would be unduly prejudiced if the application was to be granted. These are the main principles to be considered but as has been constantly stated this list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the court should not be restricted in its operations. See generally **Sila Mutiso v/s Rose Hellen Wangari Mwangi, Civil application number 257 of 1997** (UR), **Moses Masika Wetangula v/s John Koyi Waluke & 2 others (2003) eKLR** and **Patel v/s Waweru & 2 others (2003) KLR 361**.

In the present application before me there is a supporting affidavit by the applicant. He confirms that his appeal was struck out on 14th May 2009 for want of decree or order appeal from in the record of appeal. However the instant application was filed on 29th May 2009, a delay of about 16 days. The applicant has explained away that delay by saying that he was during this period away in Mombasa attending a seminar. Apart from that bare assertion there is no evidence documentary or otherwise to back it up. The seminar must have been over something and there must have been some documentary evidence of sorts with regard to the same. Why could the applicant not bring forth such evidence to back up his assertion. In the absence of such evidence I am not satisfied that the reasons for the delay have been sufficiently explained although the period of delay would appear not to be inordinate.

In striking out the appeal, the court stated that the order appealed from had not been made part of the record of appeal. One would have expected that in this application the applicant would explain why the said order had not been made part of the record of appeal then. The applicant has not even stated that he is now in possession of the order and if I was to allow the application he will be in a position

to make it part of the record. As it is therefore, I am not sure whether if I was to grant the application, the applicant would readily have the order. A party seeking the discretion of the court has a singular duty to disclose all material facts to enable the court to make an informed decision. In absence of such vital explanation, I cannot see how I can exercise my discretion in favour of the applicant.

Is the intended appal arguable? I am unable to tell. Apart from the memorandum of appeal and the judgment of **Kasango J** annexed to the affidavit in support of the application, the proceedings and ruling of the subordinate court were not annexed. Consequently having not read the same it would be presumptious of me to tell whether or not the intended appeal is arguable. It was the duty of the applicant to bring forth such material. He did not, hence he has to suffer the consequences. The memorandum of the

intended appeal and **Kasango J's** judgment cannot assist me in this regard. It is trite law that whoever alleges must prove? It is not sufficient to merely allege in written submissions that the intended appeal is arguable. There must be some material that will inform the court's decision in that regard.

The respondent claims that the intended appeal if allowed to go forward will be res judicata. They submit that after the applicant's suit was struck out, an appeal was filed being Nyeri HCCA No. 4 of 2006. The same was subsequently heard by way of written submissions and judgment delivered. To that extent, the applicant's right of appeal was spent once the appeal was heard and determined as aforesaid. If the application was allowed, it would result in having an appeal that had already been heard and determined being heard afresh. I do not think

that the respondents are right in this submission. It is trite law that a suit or appeal struck out is not the same thing as being dismissed. A matter which has been struck out can be reintroduced and heard on merits subject of course to law of limitation and such like impediments. The appeal herein was struck out not on the merits but on a technicality. That technicality was not canvassed before the judge. It occurred to the judge as she prepared the judgment. It would appear therefore that the court acted on the issue suo moto. It can thus not be said to be res judicata as the issues raised in the memorandum of appeal were not finally determined by court.

For all intents and purposes, this matter was concluded on 12th January 2006 when the learned magistrate delivered her ruling subject of course to the appeal. That is a period in excess of 3 years. It cannot therefore be said that no

prejudice would be occasioned to the respondent. It is not in the interest of justice to have a matter tied around the neck of a litigant as a sword of democles for that period for no apparent reason of his own but due to the error, mistake and or negligence on the part of an advocate.

As was said in **Ketterman v/s Hansel Properties Ltd (1988) 1 ALL E.R. 38**.

"**..... We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their heads rather than allowing an amendment at a very late stage of the proceedings.....**"

I subscribe to this holding generally and I believe that it is appropriate here. This is it. Nothing has been advanced before me to justify exercising discretion in favour of the applicant.

In the result, and for all these reasons, I must refuse to exercise my discretion in favour of the applicant. Consequently, I dismiss this application with costs.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE