



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 8 OF 2013

EDWARD NJANE NGANGA)

SAMUEL MWANGI NGANGA)..... APPLICANTS/APPELLANTS

VERSUS

DAMARIS WANJIKU KAMAU) JOSEPH KAMAU MWANGI) RESPONDENTS

RULING

1. Edward Njane Nganga and Samuel Mwangi Nganga (hereinafter referred to as the applicants) filed the notice of motion dated **9th September, 2015** seeking leave to file an appeal out of time against the judgment/decision of **Ombwayo J.**, delivered on 9th July, 2015.
2. The application is premised on, among other grounds, that the subject matter of the intended appeal is family land, that the subject matter of the intended appeal was transferred by the respondents without their consent; that there was delay in obtaining the documents required to prepare a record of appeal; that the aforementioned delay is not attributable to them and that it is fair, equitable and in the interest of justice that the parties to this dispute be heard by the court of Appeal. Further that the orders sought are not prejudicial to the respondents.
3. The application is also premised on the supporting affidavit of one of the applicants, Samuel Mwangi Nganga, sworn on 9th October, 2015. In that affidavit, the deponent has deposed that the judgment intended to be appealed from was read in their absence; that after they learnt about the judgment, they instructed their advocate to appeal against the judgment and that they applied for the documents required to prepare the record of appeal (a copy of the judgment, proceedings and decree) but there was delay in obtaining the said documents.
4. The deponent has annexed the following documents to the supporting affidavit:-
 - a) A copy of a letter to the Deputy Registrar of this Court, dated 16th July, 2015, through which the request for certified copies of proceedings was made;
 - b) Copies of receipts confirming payments in respect of the proceedings;
 - c) A copy of the notice of appeal filed on 20th July, 2015;
 - d) A copy of a letter to the Deputy Registrar of this court dated 22nd September, 2015 through

which the applicants sought a certified copy of the order/judgment hereto.

5. In reply and opposition to the application, the respondents filed the grounds of opposition dated 2nd November, 2015 in which they contend that this court has no power to extend time for filing an appeal in the Court of Appeal; that under **Rule 4** of the Court of Appeal Rules, only the Court of Appeal can grant the orders

sought and that the application is misconceived and an abuse of the court process.

6. When the matter came up for hearing, counsel for the applicants, **Mr. Ndiso**, informed the court that because the applicants were absent when the judgment was delivered, leave to file appeal was not sought. That notwithstanding, the applicants filed a notice of appeal on 20th July, 2015. Referring to **Section 95** of the Civil Procedure Act, **Order 50 Rule 6** and **Section 7** of Appellate Jurisdiction Act, Mr. Ndiso submitted that this court has jurisdiction to grant the orders sought.

7. With regard to the contention by the respondents that under **Rule 4** of the Court of Appeal Rules only the Court of Appeal has power to grant the orders sought, Mr. Ndiso submitted that **Rule 4** of the Court of Appeal Rules only comes into play where leave is denied by this court.

Analysis and Determination

8. Vide the grounds of opposition filed in reply and opposition to this application, it is contended that this court lacks jurisdiction to grant the orders sought. As the issue of the jurisdiction of this court to grant the orders sought is capable of determining the issues raised in the instant application preliminarily, I will determine it first. In so doing, I will adopt the judgment of **Munyao J.** in the case of **Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015)eKLR** which, in my view, correctly captures the legal position concerning the issue. In that case the judge stated:-

“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-

S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise

is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4 : Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-....

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

The matter indeed arose in the case of *Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR*. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-

"The application of 10th December, 2012 (the application for extension of time to lodge Notice of Appeal out of time), was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:- (Section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined..."

It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.

I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time..."

9. Having determined that this court has jurisdiction to hear and determine the application, I turn to the merits of the application.

10. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of *Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015)eKLR* thus:-

"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In MWANGI V KENYA AIRWAYS LTD, [supra], the court having set out matters which a single judge should take into account when exercising the discretion under Rule 4, held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in MONICA MALEL & ANOR V R, ELDORET CIVIL APPLN NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in HAYWOOD V COPE, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

11. In applying the guidelines set out above to the circumstances of this case, the judgment appealed from

was delivered on 9th July, 2015 and a Notice of Appeal in respect thereof filed on 20th July, 2015. Under **Rule 82** of the Court of Appeal Rules, the applicant was under an obligation to file his appeal within sixty days from the date he filed the notice of appeal. In this case, the notice of appeal having been filed on 20th July, 2015, the intended appeal ought to have been filed on or before 20th September, 2015.

12. For the reasons given in the application herein, to wit, judgment was delivered in the absence of the applicant's counsel and that the applicant was unable to obtain the documents required to prepare the record of appeal in the stipulated time, the intended appeal was not filed within the time stipulated by law.

13. The applicant has annexed to his supporting affidavit a letter dated 20th July, 2015 addressed to the Deputy Registrar of this Court requesting for a certified copy of the proceedings. Through a letter dated 22nd September, 2015 the applicant also applied for a certified copy of the order in the decision/judgment hereto. There is evidence of payment in respect of the documents requested. Counsel for the applicant informed the court that there was delay in obtaining the documents required to prepare the record of appeal and explained that the delay in obtaining those documents is not attributable to the applicant

14. I have considered the peculiar circumstances of this case. The judgment appealed from was delivered in the absence of the applicant/his counsel; there was no inordinate delay in bringing the application; other than arguing that this court lacks jurisdiction to grant the

orders sought, the respondents have not demonstrated what prejudice, if any they would suffer if the application is allowed. I am, therefore, inclined to exercise the discretion vested in this court in favour of the applicants as no substantial prejudice will be occasioned on the respondent.

15. Accordingly, I make the following orders:-

- a) The time within which the applicant ought to have filed an appeal to the Court of Appeal is extended by **forty-five (45)** days from the date of this ruling.
- b) If the applicant has not been supplied with the documents required to prepare the record of appeal, the applicant's counsel to liaise with the Deputy Registrar of this court and ensure that the same are supplied within **fifteen (15)** days of this order.
- c) If the applicant does not file the appeal within the time stipulated in (a) above the window granted to file the appeal shall automatically lapse.

Orders accordingly.

Dated, signed and delivered at Nyeri this 3rd day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ndiso for applicant/appellant

N/A for the respondents

Court assistant - Lydia