Deluxe Technologies Ltd v Kilonzo & 4 others (Civil Application E057 of 2022) [2022] KECA 915 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 915 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E057 OF 2022

K M'INOTI, JA

JULY 22, 2022

BETWEEN

DELUXE TECHNOLOGIES LTD ..... APPLICANT

AND

BEATRICE MULOKO KILONZO ..... 1ST RESPONDENT

PROMISED LAND GITHURAI SELF-HELP GROUP ..... 2ND RESPONDENT

SAMUEL NGUNJIRI GICHUKI ..... 3RD RESPONDENT

PETER KIIRU MWANGI ..... 4TH RESPONDENT

TERESIA MUSYOKI MWEU ..... 5TH RESPONDENT

(Application for extension of time to file Notice and Record of Appeal out of time from the Ruling and Order of the High Court of Kenya at Nairobi (Muchelule, J.) dated 22nd June 2021 in HC SUCC. C. No.13 of 1996)

RULING

1 The applicant, Deluxe Technologies Ltd seeks in its motion on notice dated 2nd March 2022, an order for extension of time to enable it lodge out of time a notice and record of appeal against the ruling and order of the High Court of Kenya at Nairobi dated 22nd June 2021. The ruling in question, rendered in High Court Succession Cause No. 13 of 1996, deprived the appellant of a parcel of land known as Donyo Sabuk/Komarock Block 1/84684 (the suit property) measuring approximately 11.09 ha, which the appellant had purchased for Kshs. 25 million from one of the beneficiaries in the succession matter.

2. The short background to the application is as follows. The succession cause related to the estate of Joseph Mweu Nzau, deceased. One of the joint administrators of the estate of the deceased was his son, Isaac Mwanthi Mweu (Isaac). The grant of representation was confirmed by the High Court on 18th

December 2017 and it was directed that the deceased's property known as Donyo Sabuk/Komarock Block 1/62 be divided among four beneficiaries, with Isaac getting 34 acres. Subsequently the suit property was curved out of Donyo Sabuk/Komarock Block 1/62 and registered in the name of Isaac on 2nd October 2018. On 7th June 2019, Isaac entered into an agreement for sale of the suit property to the applicant for Kshs 25 million. After conducting due diligence, the applicant paid the purchase price and obtained consent to transfer from the Matungulu Land Control Board, upon which the suit property was ultimately transferred and registered in its name on 27th June 2019.

3. Matters took a drastic turn when one of the beneficiaries of the estate of the deceased applied to the High Court to revoke the certificate of confirmation of grant on the grounds that she had neither been consulted nor provided for. In the ruling that the applicant seeks to appeal, the High Court allowed the application, revoked the certificate of confirmation of grant, rescinded the transfer of Donyo Sabuk/Komarock Block 1/62 or any subdivisions thereof, and directed the Land Registrar, Machakos to rectify the register and revert Donyo Sabuk/Komarock Block 1/62 into the name of the deceased. The effect was that instantly the applicant lost the suit property which it had purchased from Isaac.

4. More drama ensured next, precipitated by the conflicting legal advice that the applicant received from its erstwhile legal advisers, which has ultimately led the applicant to prefer this application for extension of time. After the ruling dated 22nd June 2021, the applicant, on the advice of its then advocates, Messrs. Matemu Katasi & Company Advocates, lodged a notice of appeal on 5th July 2021, which was within the period prescribed by rule 75(2) of the Court of Appeal Rules. Earlier on 1st July 2021 the applicant had applied to the Registrar of the High Court for certified copies of proceedings and judgment. This again was within the time prescribed by rule 82 (1) of the Court of Appeal Rules.

5 All was well, until the applicant's former advocates advised it to withdraw the notice of appeal, and instead file and pursue an application for review of the ruling of 22nd June 2021. Acting on that advice, the applicant withdrew the notice of appeal on 23rd September 2021. It appears that all did not go well between the applicant and its then advocates and on 21st February 2022 applicant changed its advocates to Messrs. Fred & Associates Advocates LLP who filed a notice of change of advocates on the same day.

6 Upon considering the matter, the new advocates gave the applicant diametrically opposed legal advice, namely that the application for review stood no chance and that he was better off abandoning it and pursuing the appeal as he had originally intended to do. The result is that on 21st February 2021, the applicant filed a notice of withdrawal of the application for review, thus forcing it to start all over again since the time for lodging appeal had long expired. On 2nd March 2022, the applicant filed the current application.

7. In its written submission dated 8th June 2022, the applicant sets out the above background and adds that the delay is not inordinate and is well explained.

8 On the period of delay, the applicant submits that it is not inordinate, being about nine months from the date of the ruling to the filing of the current application. The applicant relies on the decision in *John Karani Mwenda v. Japhet Bundi Chabari* [2021] eKLR where extension of time was granted notwithstanding a delay of 6 years occasioned by incorrect legal advice.

9 Regarding the reason for the delay, it is submitted that the applicant, not being versed in law relied on the legal advice from its Advocates. The applicant adds that it has acted in good faith relying on the offered legal advice and that unless this application is granted, it stands to lose a substantial amount of money for no fault of its own.

10 On the prospects of the intended appeal, the applicant submits that it is not frivolous and that among the issues it intendeds to canvass is that the learned judge erred: by ignoring section 93 of the *Law of Succession Act* which protects the rights of a purchaser from the holder of a grant when the grant is subsequently revoked, by making orders in respect of a subject matter that had ceased to exist, and by reaching a conclusion contrary to that reached in the same matter by a judge of coordinate jurisdiction.

11 Lastly on the respective prejudice that the parties stand to suffer, the applicant argues that it stands to lose the entire purchase price as well as the suit property and will thus be exposed to more prejudice if its right of appeal is not actualised.

12 None of the respondents filed any replying affidavit, grounds of objection or submissions. There is on record a hearing notice dated 3rd June 2022 notifying the parties' advocates that this application would be heard on 13th June and directing them to file their submissions.

13 I have anxiously considered this application. It is trite that the discretion of this Court to extend time is wide and unfettered, the only caveat being that the discretion should be exercised judiciously. In *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR, the considerations that guide the Court were stated as follows:

> "Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

14 As the applicant readily admits, the delay involved from the date of the ruling to the filing of the current application is about nine months. On the face of it that may appear inordinate, granted that a notice of appeal is a simple and straight forward document and the period prescribed by the rules for filing the same is 14 days. Nevertheless, the real issue before the Court can determine whether the delay is inordinate or not, is the reason proffered to explain the delay. In this case, the reason is the conflicting legal advice that the applicant received from its erstwhile advocates. The applicant has been quite forthright in that respect. I note that indeed the applicant had filed the initial notice of appeal and applied for proceedings within the prescribed time.

15 I am persuaded that the situation that the applicant finds itself in is what the late Madan JA (as he then was), had in mind in *Belinda Murai & 9 Others v. Amos Wainaina*, CA. No. Nai. 9 of 1978 when he famously stated:-

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts

of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice." (Emphasis added).

16 Equally relevant is the observation by Lakha, JA in *Tononoka Steels Ltd v. The PTA Bank*, CA No. 295 of 1998:-

> "It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, in so far as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits." (Emphasis added).

17. Accordingly, I am satisfied that the delay has been candidly and sufficiently explained as arising from a genuine blunder on points of law rather than from inaction or dilatoriness on part of the applicant's advocates.

18 It is not really my bailiwick to interrogate the merits of the intended appeal. All that I can say is that ***prima facie*** the intended appeal does not appear to me to be frivolous. As regards prejudice, it is clear that the applicant stands to lose a substantial amount of money and the suit property. Whatever the outcome of the intended appeal, the applicant should have its day in this Court. In the absence of material from the respondents to oppose the application, I am not able to say that they stand to suffer more prejudice that the applicant.

19 Taking all the foregoing into account, I find merit in this application and I allow the same. The applicant shall file and serve the notice of appeal within fourteen days from the date of this ruling. Costs of the application shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND OF DAY JULY, 2022

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR