



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 265 OF 2019

BETWEEN

**KENNEDY ODHIAMBO OWITI (PRACTICING**

**AS ODHIAMBO OWITI COMPANY ADVOCATES).....APPLICANT**

AND

**JANE A. STAUSI, BETTY O. ASUNAH (PRACTICING**

**AS STAUSI & ASUNAH ADVOCATES).....RESPONDENT**

*(An application for extension of time for filing the Record Appeal lodged on 21<sup>st</sup> November, 2019 against the judgment and Decree of the High Court of Kenya at Kisumu (Maina, J.) delivered on 19<sup>th</sup> July, 2018*

*in*

*H.C.C.C No.13 of 2013)*

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**RULING**

By an originating summons filed at the High Court, the applicant sought the enforcement of a professional undertaking dated 7<sup>th</sup> November, 2012 given by the respondents, through payment of the outstanding amount thereunder of Kshs.1,881,696. The undertaking was given pursuant to a conveyancing transaction in which the parties in the instant application represented their respective clients. Maina, J., in a judgment dated 19<sup>th</sup> July, 2018 dismissed the applicant's suit which decision aggrieved him.

Consequently, the applicant evinced his intention to challenge the same by filing a notice under **Rule 75(2)** of this Court's Rules on 23<sup>rd</sup> July, 2018 and also sought certified copies of the proceedings on even date; that the said proceedings were availed by the High Court on 10<sup>th</sup> September, 2019; that the record of appeal was lodged on 21<sup>st</sup> November, 2019; that on 2<sup>nd</sup> December, 2019 the respondent filed a motion before this Court seeking the striking out of the record contending that it had been filed out of time and without leave.

According to the applicant, it was at that juncture that he realized that the record of appeal should have been filed on 9<sup>th</sup> November, 2019 and not 21<sup>st</sup> November, 2019, which constituted a delay of only 12 days; that the delay was occasioned by inadvertence on his part and was not deliberate; that all along he had acted with diligence from the time the impugned judgment was delivered and was keen on pursuing the appeal; that the appeal is arguable and should be ventilated on its merits; and that the inconvenience which may be occasioned to the respondents was capable of being redressed with costs.

It is on those grounds that the applicant brought the current motion for extension of time within which to file the record of appeal and an order deeming the record filed on 21<sup>st</sup> November, 2019 as properly before the Court.

On their part, the respondents were convinced that the application was aimed at defeating their application for striking out the record; that the applicant, being an advocate of the High Court was well versed with this Court's Rules and computation of time; that the 12 days' delay demonstrated flagrant and utter disregard of the Rules of procedure; that what was more, the blanket statement by the applicant to the effect

that the delay was due to inadvertence could not amount to a reasonable explanation as was noted in **Pauline Yebei & Another vs. Andrew W. Kiprono** [2020] eKLR; and that the appeal was frivolous.

From the record, it is clear that on 9<sup>th</sup> November, 2021 this Court directed that the current application for extension of time be heard prior to the respondents' application for striking out the record of appeal, for reasons that ought to be obvious.

An application for extension of time under **Rule 4**, such as this, invokes the Court's unfettered discretionary power and some of the factors that ought to inform my decision include, the length of the delay; the reason for the delay; the degree of prejudice to the respondents, if the application is granted, and, possibly, the chances of the success of the appeal should the application be granted. See **Habo Agencies Limited vs. Wilfred Odhiambo Musingo** [2015] eKLR.

It is common ground that the record of appeal in question, which was filed on 21<sup>st</sup> November, 2019 was 12 days late, taking into account the Proviso to **Rule 82(1)** of this Court's Rules which excludes the period taken by the court to prepare and deliver the court proceedings. The reason advanced for the delay was that the applicant inadvertently miscalculated the period within which he was to lodge the record of appeal.

Paying regard to the conduct of the applicant from the time the impugned judgment was delivered, the filing of the notice of appeal and the request for certified copies of the proceedings, all within the time frame set by the Rules, I entertain no doubt that he has shown interest, seriousness and diligence in pursuing the appeal. Any person can miscompute time. It is natural, unintentional and the applicant has candidly admitted it. Madan, JA in **Murai vs. Wainaina** (No. 4) (1982) KLR 33 observed that:

**"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily... 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"**

As a result, I find, first that the delay was not inordinate, and secondly, that it has sufficiently been explained. Being cautious not to make a determination on the merit of the appeal, I think the issues sought to be raised, as set out in the memorandum of appeal, deserve to be considered by this Court.

Accordingly, I exercise my discretion by extending the time within which the applicant should have filed the record of appeal and equally, deem the record of appeal lodged on 21<sup>st</sup> November, 2019 as properly before this Court. The costs of this application will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**