



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 339A OF 2019

BETWEEN

MONICA MUTHIKWA MASYUKO.....APPLICANT

AND

JAMES NGANDA MWANZA .....1<sup>ST</sup> RESPONDENT

STANDARD CHARTERED BANK LTD.....2<sup>ND</sup> RESPONDENT

*(Being an application for extension of time within which to file a Record of Appeal out of time from the Ruling of the High Court at Nairobi (W. Okwany, J) dated 14<sup>th</sup> May 2019*

in

*HCCC No. 393 of 2018)*

\*\*\*\*\*

**RULING**

The applicant brought an action against the respondents seeking to be granted an order of a mandatory injunction to stop the intended sale of a property known as **NAIROBI/BLOCK 99/75** and to restrain them or their agents from selling, and or transferring the suit property to anyone.

It was the applicant's case that the suit property was her matrimonial home with the 1<sup>st</sup> respondent; that the 1<sup>st</sup> respondent fraudulently and without her knowledge or consent charged the property to the 2<sup>nd</sup> respondent in order to obtain a loan; that after the 1<sup>st</sup> respondent defaulted in the repayment, the 2<sup>nd</sup> respondent threatened, in exercise of its statutory power to sell the suit property; that she stood to lose her proprietary interest in the suit property if the sale was to proceed.

In opposing the application, the 1<sup>st</sup> respondent asserted that he was the registered owner of the suit property. And to demonstrate this, he annexed to his replying affidavit a copy of the title deed. He explained that he acquired the suit property in 1997 and that sometimes in the year 2013 he obtained a loan from the 2<sup>nd</sup> respondent on the security of the property to finance their daughter's education; that he did so with the full knowledge and consent of the applicant.

He further averred that the applicant filed Miscellaneous Criminal Application No. 7 of 2015 in which she sought orders to institute private prosecution against him and the 2<sup>nd</sup> respondent on claims of fraud and forgery of her signature on the spousal consent forms when he applied for the loan; that a forensic report by the Kenyan Police disclosed that the applicant's signature on the spousal consent form was not a forgery but indeed hers.

The 2<sup>nd</sup> respondent, on the other hand, argued that the loan was regularly advanced to the 1<sup>st</sup> respondent; that all the loan documents were duly executed by the parties and that the 1<sup>st</sup> respondent defaulted in the loan repayment thereby prompting the 2<sup>nd</sup> respondent to invoke its statutory power of sale.

The learned Judge considered the rival arguments, reminding herself of the usual parameters to be considered in an application for temporary injunction, and noted that the applicant's main ground in the application was that her signature on the spousal consent form was forged; and concluded that, that claim having been upstaged by the document examiner's report in Chief Magistrates Miscellaneous Criminal Application No. 7 of 2015 in which it was shown that the impugned signature was in fact hers, there was no *prima facie* case to warrant the issuance of a temporary injunction. The Judge came to the ultimate conclusion that;

**“ ..... The upshot is that the plaintiff has not established the first condition for the grant of a temporary injunction as set out in the case of Giella -vs- Cassman Brown & Company Ltd [1973] EA 358. In the circumstances I do not have to consider the other conditions for granting injunctions as set out in the Giella case (supra)”.**

The applicant wished to challenge this outcome but failed to do so as the time prescribed for doing so had elapsed. According to **rule 75 (2)** of the Court of Appeal Rules, the applicant was required, within 14 days of the date of the decision of the court below to file and serve the notice of appeal, and thereafter, in terms of **rule 82**, she would have had sixty (60) days to lodge and serve the record of appeal from that date. She did neither. However, **rule 4** gave her a window to ask for the enlargement of time, and the Court would, if satisfied with the explanation for the delay and other parameters extend the time limited by the Rules.

The instant application has been brought pursuant to this rule or in the alternative **rule 82**. The alternative part of the prayer is unclear as no notice of appeal was ever lodged and no certificate of delay exhibited.

Since the **rule 4** aforesaid does not provide for factors a court ought to consider in an application for enlargement of time, the courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. For example in the *locus classicus* **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** (1999) 2 EA 231, the following parameters were laid down;

**“It is now well 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”.**

If the ruling was read on 14<sup>th</sup> May, 2019 and if this fact was unknown to her until sometimes in June, 2019 when she engaged another advocate, then the applicant was expected, indeed required to explain the delay of almost 5 months before she filed the present application in 25<sup>th</sup> October, 2019. I take note though, from the uncontroverted statements by both respondents that the applicant was personally in court on 14<sup>th</sup> May, 2019, in which case the delay was for a period of 6 months. This is not a short period when it is considered that the period for lodging the notice of appeal is only 14 days and also taking into account that the decision sought to be challenged on appeal was interlocutory. She has blamed her erstwhile advocate for failure to communicate to her the status of the case.

We have been reminded many times that even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, the court, as a custodian of justice, must always ensure the interests of both parties are protected. The common saying that mistakes of counsel should not be visited on a client is qualified statement. The one case frequently referred to in many of our local decisions in respect of this qualification is the English case of **Ketteman & others V. Hansel Properties Ltd** (1988) 1 All ER 38, in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that;

**“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps 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 lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”**

In **Three Ways Shipping Services (Group) Ltd V. Mitchel Cotts Freighters (K) Ltd**, Civil Appeal No. 49 of 2005, the same principle was emphasized thus:

**“The question of Advocates mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in “The due process of law” London Butterworths at p.93 said:-**

**‘Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damage against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately’ ”.**

The applicant has also attributed her failure to act in time to her involvement in a daughter's wedding. I do not want to comment on this, save to say simply that, she chose her priority.

It therefore follows that both the period of and the reason for delay are not acceptable or plausible. Though I am alive to the requirement that though the Court in **Leo Sila Mutiso** (supra) talks of the “possible” chances of the appeal succeeding if the application is granted, as a single Judge I must be careful not to delve into the merits of the appeal, a preserve of the full court. See **Athuman Nusura Juma V. Afwa Mohamed Ramadhan**, Civil Appeal No. 227 of 2015. A single Judge can, however, *ex facie* consider whether it will amount to a waste of judicial time to allow for time to appeal to the Court.

In this case it must be remembered that what is intended to be appealed is a ruling on an interlocutory application for injunction. The learned Judge considered the main ground the applicant was relying on, that her signature was forged and *prima facie* found that, on the basis of an expert opinion that it was hers.

Further, the 2<sup>nd</sup> respondent confirmed that after the ruling, it sold to a third party the property in issue on 17<sup>th</sup> December, 2019 at Kshs. 47 million. What purpose will it serve to enlarge time for the filing of a notice or record of appeal in the circumstances?

Thirdly, in the matrimonial proceedings, the issue of division of matrimonial properties is pending determination. The suit property is listed in those proceedings.

Finally, it was submitted by the respondents without rebuttal, that there were stay orders by the court below even as the applicant moved to this Court with this application.

Balancing the injustice to the applicant, in denying her an extension, against the prejudice to the respondent in granting an extension, I am of the considered view that the latter outweighs the former.

Consequently, this application fails and is accordingly dismissed. I make no orders as to costs.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**