IN THE COURT OF APPEAL

AT ELDORET

(CORAM: J. MOHAMMED, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. 93 OF 2018

BETWEEN

RICHARD NAFWIKI MAKANDA.................APPLICANT

VERSUS

JOB WEKESA ....RESPONDENT

(Being an application for extension of time to appeal and validation of notice of

appealfrom the Judgment and decree of the High Court of Kenya

at Bungoma, (Mukunya, J.) dated 22nd day of February, 2018

in

H.C.C.C. NO. 31 OF 2011 *(O.S)*)

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RULING

Background

[1] By a Notice of Motion dated 19th October, 2018, the applicant, **Richard Nafwiki Makinda** seeks the following orders expressed to be brought under Rule 4 of the Court of Appeal Rules, 2010 (the Court Rules) that:-

> ***"(1) That the Honourable Court be pleased to extend the time for the lodging of the notice of appeal, applying for certified proceedings and appeal from the decision of the Superior Court dated the 22nd February, 2018 made in Bungoma HCCC. No. 31 of 2011 O/S – Job Wekesa v Richard Nafwiki Makanda by the Hon. Justice Samuel Mukunya.***
>
> ***(2) That upon the grant of the extension of time, the court be pleased to order the validation of the notice of appeal and application for certified proceedings made by the applicant.***
>
> ***(3) That the costs of this application to abide the outcome of the appeal."***

[2] The grounds on which the applicant relies in his application to file the record of appeal out of time and deem the notice of appeal as properly filed are set out in the applicant's affidavit in support of the motion where he depones that he was not aware that the judgment had been delivered as his erstwhile advocates did not inform him that the impugned judgment was delivered on 22nd February, 2018; that he was informed in September, 2018 that the impugned judgment had been delivered by which time the period within which he should have filed the Notice of appeal and Record of Appeal had lapsed.

[3] The respondent filed a replying affidavit opposing the application for extension of time to file and serve the Notice of appeal and Record of appeal out of time.

[4] The respondent's main ground of opposing the application is that the applicant's counsel was aware of the date the judgment was to be

delivered as they were served with the Judgment Notice; that upon delivery of the judgment on 22nd February, 2018, the respondent's counsel filed a bill of costs on 5th April, 2018, that a taxation notice was served on the applicant's erstwhile advocates on 18th April, 2018; that the applicant's counsel on record were duly served with the taxation notice and were therefore aware of the judgment of the Environment and Land Court; that the applicant's application is not merited and will deny the respondent the fruits of his judgment.

Submissions by counsel

[5] At the hearing of the application, both parties were represented by counsel. **Mr. T. N. Mogambi** represented the applicant while **Mr. E. Musumba** represented the respondent.

[6] **Mr. Mogambi** submitted that the applicant was unaware that the impugned judgment had been delivered until September, 2018; that his erstwhile advocates did not inform him of the delivery of the judgment; that the applicant instructed another firm of advocates, **Ms Wambua Kigamwa & Company Advocates** to represent him after delivery of the impugned judgment and the advocates now on record have since requested for proceedings; that the intended appeal raises triable issues; and the respondent will not suffer any prejudice if the application is allowed.

[7] **Mr. Musumba** opposed the application and relied on the respondent's replying affidavit filed on 4th December, 2018. Counsel submitted that nothing has been placed before the Court to confirm that the applicant's erstwhile advocates failed to advise the applicant that the impugned judgment had been delivered; that the applicant has not indicated the steps that he took to get in touch with his erstwhile advocates regarding following up on the delivery of the judgment; that after the applicant learnt that the impugned judgement had been delivered he took no steps to file the instant application until 17th October, 2018; that a delay of about 240 days is inordinate without sufficient explanation; that the respondent will suffer prejudice if the application is granted as he will be denied the fruits of his judgment. Counsel urged the single Judge to dismiss the application.

Determination

[8] I have considered the application, the affidavits on record, the submissions, the authorities cited and the law. The discretion that I am called upon to exercise in this application is provided under **Rule 4** of the Court of Appeal Rules.

Rule 4 provides as follows:-

> ***"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 of a superior court, for the doing of any act authorized or required by these 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."***

[9] The parameters for the exercise of such discretion are clear. In the case of **Njuguna V. Magichu & 73 others [2003] KLR 507**, Waki, JA. stated as follows:-

> ***"The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis."***

[10] Further, in the case **Wasike V. Swala [1984] 591**, this Court stated:-

> ***"As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors;***
>
> ***"a) That there is merit in his appeal.***
>
> ***b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and;***
>
> ***c) That the delay has not been inordinate."***

[11] On the issue whether there is merit in the appeal, the applicant's draft memorandum of appeal raises various grounds *inter alia* whether the consent of the Land Control Board having been granted to sub-divide and transfer the suit land, the respondent's claim would be in an action for adverse possession or would lie in an action to enforce the contract for the sale through specific performance. An arguable appeal is not necessarily one which will succeed.

[12] On the issue of whether the respondent will be prejudiced if the application to extend time is granted, counsel for the respondent submitted that the extension of time will be prejudicial to the respondent who has been deprived of the fruits of his judgment.

[13] The impugned judgment was delivered on 22nd February, 2018, the Notice of Appeal was filed on 4th October, 2018. **Rule 75** of the Court Rules provides that a Notice of appeal should be filed within 14 days of delivery of the judgment. There was therefore a delay of 226 days.

[14] On the reason for the delay, the law does not set out any minimum or maximum period of delay. All that it requires is that any delay should be satisfactorily explained. There has to be valid and clear reasons upon which discretion can be favourably exercisable.

[15] It is the applicant's claim that his erstwhile advocates were to blame for failing to inform him that the impugned judgment was delivered; and that the mistakes of counsel should not be visited on him. There is however no documentary evidence that was availed to the Court to support this contention. There is also no evidence to confirm that the erstwhile advocates failed to inform the applicant of the delivery of the impugned judgment or that a taxation notice had been served on them or that the applicant followed up on his matter regarding the delivery of the impugned judgment. There has been no explanation given as to why the advocate also withheld the information from the applicant. The delay of 226 days is therefore inordinate and inexcusable.

[16] I am guided by the case of **Habo Agencies Limited V Wilfred Odhiambo Musungu [2015] eKLR,** where Waki, JA stated as follows:

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

[17] Further**,** in the case of **Annah Mwihaki Waireruru V Hannah Wanja Wairuru, [2017], Okwengu, JA**. stated as follows:-

> **"What the applicant is presenting appears to me to be not just a case of an inadvertent omission or innocent mistake by her counsel, but a serious case of negligence as the advocate not only ought to have advised the applicant of the ruling but also ought to have taken action to respond to the application filed by the respondent of which he had indeed been served. This is the kind of mistake that this court cannot condone. An advocate is an officer of the court who is expected to be upright and dependable. Whereas is alleged herein the advocate has conducted himself in a manner that is not consistent with what is expected from an officer of the court, this Court cannot cover up such misconduct by treating it lightly."**

[18] In the circumstances of this case, I find that the application has no merit. In the result, I dismiss the Notice of Motion dated 17th October, 2018 with costs.

Dated and delivered at Eldoret this 7th day of February, 2019.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR