IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 243 OF 2016

BETWEEN

JOSEPH MUTIO KINYAMBU.....APPLICANT

AND

PHILOMENA KANAI MULU.....RESPONDENT

(Being an application for leave to file Record of Appeal out of time in an appeal from the whole of the Judgment and decree of High court of Kenya at Machakos (Lenaola J.,) delivered on 21st May 2010

in

High Court Civil Suit No. 103 of 2005 (OS))

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RULING

[1] This is an application under ***Rule 4*** of the ***Court of Appeal Rules***. It was filed on 28th October, 2016 by Joseph Mutio Kinyambu (applicant.) He is seeking an order extending time for lodging a record of appeal against the judgment and decree delivered on 21st May, 2010. The application is supported by his own affidavit in which he deposes that he was represented before the High court by the firm of **P.M. Mutuku & Co. Advocates** when the judgment was delivered. The applicant states that he immediately instructed the said advocate to file an appeal and he was assured that all the necessary steps had been taken towards filing of the appeal. On 13th July, 2010 the applicant received a letter from the said advocates advising him the Notice of Appeal had been filed and requesting him to pay some Kshs.10,000 to facilitate the filing of the memorandum and record of appeal. Although he does not say whether he paid the said sum, he went on to say that he was surprised to find out that in August, 2012 when he confronted the said advocate to be shown the record of appeal, he was told the proceedings had not been typed because the court file was misplaced.

[2] It was at that point the applicant decided to change his advocate and he instructed the firm of **B.M Musyoki & Co. Advocates** who sought leave to come on record first and their application was allowed on 26th September, 2013. They were able to formally come on record on 15th October, 2013. However when the said advocate went to collect the proceedings, they realized they had not been typed. This prompted them to apply for proceedings by a letter dated 28th October, 2013. Nonetheless they did not succeed in getting the proceedings until the 26th July, 2016. This was confounded by a further huddle when they applied for a certificate of delay, the Deputy Registrar declined to issue one stating that the applicant's former advocates had applied for judgment and decree in 2010 and the first letter bespeaking of proceedings was written on 28th October, 2013. It is for this reason the applicant filed the instant application seeking leave to file the entire record of appeal out of time. The above grounds were highlighted by **Mr. Musyoki** learned counsel for the applicant when the application came up for hearing.

[3] Opposing the application was **Ms Kosgei** holding brief for the **Keyonzo**. Counsel relied on the respondent's replying affidavit that gave a chronology of numerous cases between her and the applicant that has been in the courts for 18 years. The dispute over a parcel of land measuring about 4 acres that forms part of Land Parcel Migwani/Mbondoni/1912 which was awarded to her in the judgment intended to be appealed against and where she says she has lived and derives a livelihood since 1969. The respondent contended that the applicant was complacent as judgment was delivered on 12th May, 2010 and the decree issued on 13th August, 2010. The Notice of Appeal was filed on 28th May, 2010 but the applicant did not apply for proceedings until three and half years after the judgment.

[4] What is more, the applicant did not obtain a certificate of delay from the deputy registrar of the High court, whereas the applicant was given a copy of the judgment and notice of appeal by his previous advocate way back on 13th July, 2010 but he has not explained why he did not comply with the request made by his then advocate nor what he did between that time to 18th September, 2013 to prepare a record of

appeal that involved only a few pages of typed proceedings. During the plenary hearing Ms Kosgei reiterated the above to oppose the application and pointed out that there was inordinate delay that the applicant has not bothered to explain. For instance his advocate wrote to him on 13th July, 2010 sending him a copy of the notice of appeal and judgment and requesting him for Kshs.10,000 for filing the memorandum and record of appeal but there seems to have been no action on the part of the applicant to facilitate the filing. According to the respondent, the blame attributed to the advocate is not supported by evidence. The delay up until the instant application was filed is also unexplained and it has been prejudicial to the respondent who would wish to enjoy the fruits of her litigation. Counsel urged the application be dismissed.

[5] The prayers sought in this application for extension of time call for exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; - ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)***:

> ***"It is now 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.".***

The above list is of course not exhaustive as held in the case of;-

> ***Mongira & Another vs. Mukaria & Another, 2005 2 KLR 103 at page 106-107***, where the Court again cited ***Leo Sila Mutiso***, (supra), and went on to state:
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> ***"Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. … To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".***

[6] With the above principles in mind, I now approach the application before me, to answer the question whether the applicant has offered justifiable reasons for the delay and whether granting leave will prejudice the respondent. When the judgment was delivered, counsel acting for the applicant then wrote to him a letter on 13th July, 2010 forwarding to him a copy of the Notice of Appeal, a judgment and asking a deposit of Kshs.10,000 to file the memorandum and record of appeal. Although the applicant laments that his advocate did not update him on the progress of the matter until August, 2012 he presents no evidence to show that indeed he had paid the advocate as requested, and secondly there are no letters written by him to the said advocate to show that he was following up the progress of the matter. Besides, when his new advocates came on record on 15th October, 2013 there is also no evidence to demonstrate that they were keenly pursuing the matter. They only annexed two letters dated 26th October, 2013 bespeaking of the proceedings and another letter coming one year later dated 16th October, 2014 inquiring about the proceedings.

[7] It is well to blame an advocate and I think nowadays since it was accepted by the courts generally that mistake by an advocate should not be visited on an innocent client, it has almost become a custom in every case where there is delay, it is attributed to a failure by an advocate. Ordinarily a mistake by counsel is usually excusable if it is genuine, does not cause prejudice to the other side. See the case of; - ***Belinda Murai & others vs. Amoi Wainaina***, ***(supra) Madan, J.A.*** *(as he then was)* explained what constitutes a mistake in the following words:

> ***"A mistakable is a mistake. It is no less a mistake because it is 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. 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 lawyer of experience who ought to know better. The court may not 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..."***

[8] What is even more ominous in this application is the fact that there is no certificate of delay either computing time from the letter of 26th October 2013 or from 2010 when the previous advocates are said to have applied for a copy of the judgment and decree. All in all th applicant seems to attribute the blame to his former lawyers in a very perfunctory manner. I think time has come when a litigant seeks exercise of courts discretion, while blaming the mistake of counsel, very high standard should be placed on the litigant to demonstrate that he was not the cause of the mistake by demonstrating with clear documentary evidence what efforts he put to follow his own appeal. After all it is the litigant who chooses his own counsel and if the respondent has to be prejudiced because of the applicant's poor choice the mistakes committed by counsel must leave no gaps that point at the applicant as the one who may have been the cause of delay. In my own analysis of the matter, I am not satisfied that the reasons advanced for the delay of over 3 years are not cogent and warranting an exercise of my discretion.

[9] On the issue of prejudice, the respondent eloquently explained how she has been involved with litigation with the applicant for 18 years. Besides the civil case, the matters have metamorphosed to criminal proceedings and a total of four different court proceedings were cited in her replying affidavit. The respondent would wish to see an end to litigation as the applicant is her brother in law.

[10] In my humble view this contention is not farfetched and for the very reason that this appeal involves a delicate relationship of members of the same family, the applicant should have taken all this into consideration and become diligent in ensuring that he properly instructed

his counsel, followed the process keenly to ensure the appeal was filed on time or the proper steps were taken in that direction.

[11] For the foregoing reasons, I find no merit in this application which is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of April, 2019.

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.