



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & OTIENO-ODEK JJA)

CIVIL APPEAL (APPLICATION) NO. 185 OF 2014

BETWEEN

CHARLES GATHUMA MUNGE.....APPLICANT

AND

PETER ICHARIA MUNGE.....1st RESPONDENT

ICHAMU INVESTMENTS LIMITED.....2nd RESPONDENT

(Being Reference to a full Bench of this Court against the decision of a single Judge (Warsame JA) dated 10th July 2015 declining extension of time to file Notice and Record of Appeal

in

ELC No. 1189 of 2007 formerly HCCC No. 1044 of 2003)

RULING OF THE COURT

1. Occasionally, it is distressing for a court to consider and determine family feuds. The applicant, **Charles Gathuma Munge** and 1st respondent, **Peter Icharia Munge** are brothers. The dispute between the parties relate to Nairobi LR No. 9104/204 which property was originally registered in the name of the applicant but was transferred to the 1st respondent who then transferred it to the 2nd respondent, **Ichamu Investments Limited**.
2. The applicant filed suit against the respondents in 2003 alleging that the transfer of the property to the 1st respondent was fraudulent and the terms and conditions of transfer were not complied with. The respondents denied the allegations in entirety. Upon hearing the parties, the trial court delivered its judgment on 20th May 2014 dismissing the applicant's suit. Both parties were represented by counsel on the date of delivery of the judgment. The applicant was aggrieved by dismissal of his suit. Nevertheless, no notice of appeal was filed. After a delay of 37 days, the applicant's counsel filed a notice of appeal dated 14th July 2014. After a further 14 days' delay, the applicants counsel filed a Notice of Motion before this Court dated 31st July 2014 seeking extension of time to file the notice of appeal; an order was also sought to deem the notice of appeal dated 14th July 2014 to be properly filed.
3. The Motion for extension of time was heard by a single Judge of this Court (Warsame, JA). The learned Judge upon hearing the parties dismissed the application and declined to extend time. In dismissing the application, the Judge expressed himself thus:

“It is plainly obvious that the cause of the delay in this case is the lack of action of applicant's counsel, Mr. Mogeni. Counsel annexed a copy of his passport as evidence that he had travelled during the time that he ought to have filed the notice of appeal. This is no solution. As was stated by this Court in Bi-Mach Engineers Limited -v- James Kahoro Mwangi (2001) eKLR (Civil Application No. Nai 15 of 2011, UR. 10/2011), filing a notice of appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment.

Moreover, as was accurately pointed out by the respondents, Mr. Mogeni exited the country on 11th June 2014, seven days after the expiry time of the fourteen days provided for him to file his notice of appeal. He returned on 18th June 2014 and even then, did not take steps to file the notice of appeal. He did so three weeks later and took a further two weeks before he filed the present

application to regularize the notice of appeal....

Clearly, the delay in this case has not been sufficiently explained; in fact, it has not been explained at all and in view of that, the applicant has failed to place any material before me that warrants the exercise of my discretion in his favour. The application for extension of time is therefore rejected....”

4. Dissatisfied with the ruling and decision of the single Judge, the applicant has requested a reference to a full bench of this Court to consider the application for extension of time. This ruling is the decision of the full bench of this Court on the Reference.
5. At the hearing of the Reference, learned counsel **Ms Purity Makori** appeared for the applicant while learned counsel **Ms Sharon Liprop** appeared for the 1st respondent. Learned counsel **Mr. G. Kangethe** appeared for the 2nd respondent. Both counsel filed list of authorities.
6. The applicant in his skeleton written submissions identified three issues for determination in the Reference namely:
 - (a) *Whether inaction of counsel may prejudice a litigant’s claim;*
 - (b) *Factors to be considered while exercising discretion under **Rule 4** of the rules of this Court; and*
 - (c) *Instances where a full bench may interfere with a single Judge ruling under **Rule 55 (1) (b)** of the rules of this Court.*
7. Citing dicta in **Leo Sila Mutiso -v- Hellen Wangarir Mwangi, Civil Application No. Nai 255 of 1997**, the applicant submitted that the relevant factors to be considered in an application for extension of time is the length of delay; the reason for delay; the chances of appeal succeeding and the degree of prejudice (if any) likely to be caused to the respondent if extension is granted.
8. It was submitted in the instant appeal, that the delay in filing the notice of appeal was 37 days; and that such a delay is not inordinate. Counsel reiterated submissions before the single Judge repeating that the reason for delay in filing the notice of appeal was that counsel for the applicant (Mr. Mogeni) was out of the country within the period he was required to file the notice of appeal; the applicant has already filed the record of appeal within time; and the intended appeal has high chances of success as it raises legitimate issues.
9. On this Reference, the applicant submitted the single Judge did not judiciously exercise his discretion; the Judge only considered inaction on the part of counsel and failed to consider all other factors such as prejudice to be suffered by the applicant if extension is not granted and chances of success of the intended appeal. It was urged that the delay of 37 days was not inordinate. It was urged that counsel mistakenly failed to inform the applicant about the delivery of the judgment by the trial court; and that upon being notified, the applicant gave instructions for a notice of appeal to be filed.
10. The applicant citing the case of **Murai -v- Wainaina [No. 4] 1982 KLR 38** urged that the mistake of counsel should not be visited on a client. Also cited was dicta in **Ocean Freight Shipping Co. Limited -v- Oakdale Commodities Limited (1977) eKLR** where it was held that for a full bench to interfere with exercise of discretion, it must be shown that the discretion was exercised contrary to law i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant one or that on the facts and the law as they are known, the decision is plainly wrong. Counsel also quoted the case of **Edith Gichugu Koine -v- Stephen Njagi Thoithi [2014] eKLR** where it was held that a period of 2 months and 8 days was not inordinate taking into account that the notice of appeal had been filed.
11. The 1st and 2nd respondents in opposing the Reference relied on submissions they made before the single Judge and facts as deponed in the Replying affidavit to the Motion filed by the applicant before the single Judge. The respondents underscored the applicant was represented by counsel on the date of delivery of the judgment; the deadline for filing the notice of appeal was 6th June 2014 as stipulated under **Rule 75** of the **Rules** of this Court; that counsel for the applicant was inconsistent in his explanation for the delay; the applicant’s counsel in explaining the delay stated that he was out of the country while the passport exhibited by counsel shows he left the country on 11th June 2014; and that despite returning to the country on 18th June 2014, counsel still did not file the notice of appeal. The respondents submitted no convincing explanation had been given for the delay in filing the notice of appeal. It was urged that the intended appeal is frivolous and has no chance of success because the 2nd respondent is the registered and indefeasible owner of the suit property having paid consideration for the same; that the applicant voluntarily signed the instruments that transferred the suit property to the 1st respondent.
12. The 2nd respondent in opposing the Reference submitted that there is no prayer for any relief against it; that the applicant in his pleadings before the trial court acknowledged that he voluntarily signed the instruments of transfer of the suit property; and that the 2nd respondent has never entered into any contractual obligations with the applicant and consequently, the intended appeal stood no chance of success against the 2nd respondent. In any event, it was submitted the single Judge correctly held the delay in filing the Notice of Appeal was not satisfactorily explained.
13. We have considered the submissions by counsel and the authorities cited in this Reference. As was stated in **Donald O. Raballa -v- Judicial Service Commission & another [2018] eKLR**, a Reference is not an appeal and we may only interfere with the exercise of the discretion bestowed on a single judge under **Rule 4** of the rules on the basis of sound principles. These in substance are that the single judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of demonstrating the breach of any or all such principles is on the applicant. See **Ramesh Shah -v- Kenbox Industries Limited [2008] eKLR**.
14. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 others [2015]**

eKLR identified salient principles to be considered in an application for extension of time. The Court expressed itself thus:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;**
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;**
- 4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. whether the application has been brought without undue delay; and**
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

15. In the instant appeal, there are several issues that we need to consider. First, has the applicant satisfactorily explained the reason for delay in filing the notice of appeal; second, is the 37 days’ delay inordinate; third, has the application for extension of time been brought without undue delay; fourth, has the applicant demonstrated the respondent stands to suffer no prejudice if extension is granted?

16. On explanation for delay, the applicant’s counsel explained that he was out of the country when the period for filing the notice of appeal lapsed. This explanation is not accurate as the evidence tendered by learned counsel Mr. Mogeni clearly shows he was in the country when the period for filing the notice of appeal lapsed. At the risk of repetition, the period for filing the notice of appeal lapsed on 6th June 2014, the applicant’s counsel left the country on 11th June 2014. The applicant’s counsel having given an incorrect reason for delay, we find there is no explanation for the delay. To this end, the single judge did not err when he held the delay in this case has not been sufficiently explained; in fact, it has not been explained at all. We find that the first critical issue to be considered in an application for extension of time, namely reason for delay, was not fulfilled.

17. Counsel for the applicant urged us to find that inaction on part of counsel should not be visited upon the client. In **Kenya Industrial Estates Limited vs Samuel Sand & Another (2008) eKLR** Deverrell, JA stated that there were “numerous decisions of this Court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time. In **Lingam Enterprises Limited & Others -v- Radio Africa Limited Civil Application No. Nai. 175 of 2014 (UR 136/2014)** it was stated that if a litigant is prejudiced because of the conduct of counsel, the court should not lay the blame on the litigant.

18. We have considered the applicant’s submission on inaction by counsel. In **Rajesh Rughani -v- Fifty Investment Ltd. & Another (2005) eKLR** this Court expressed that if an advocate is simply guilty of inaction, this is not an excusable mistake which the Court may consider with some sympathy. Similarly, in **Bains Construction Co. Ltd. -v- John Mzare Ogowe (2011) eKLR** the court observed:

“It is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.

19. In the instant appeal, the applicant has not demonstrated what action he took after delivery of judgment to follow up his case; he has also not demonstrated what action he took to ensure the notice of appeal was filed when his advocate returned to the county. As was stated in **Habo Agencies Limited -v- Wilfred Odhiambo Musingo (2015) eKLR**, parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

20. We have held, just as the single judge did, that the period of 37 days’ delay has not been explained. We have also considered that despite the notice of appeal having been filed on 14th July 2014, there was a further delay of 14 days before the application to extend time was filed on 31st July 2014. This 14-day delay has also not been explained. We find that the application for extension of time was not timeously filed.

21. We have considered the applicant’s submission that the single judge neither considered the degree of prejudice to be suffered by the applicant if extension of time is not granted nor the chances of the intended appeal succeeding. In an application for extension of time, the *sine qua non* and the first consideration for extension of time is the explanation of the reason for delay. Without a satisfactory explanation for delay, there is no compelling reason to consider the degree of prejudice to be suffered by a party or if the intended appeal has a high chance of success. On our part, save for mere allegations, the applicant has not demonstrated to our satisfaction the degree of prejudice to be suffered if extension is not granted. We reiterate the applicant has not offered any explanation for the 37-day delay in filing the notice of appeal. On the whole, we are satisfied that the single Judge considered all the relevant factors in declining to grant leave for extension of time. We find no reason to interfere with the ruling by the single Judge.

22. For the foregoing reasons, we find that this Reference is lacking in merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR