



IN THE COURT OF APPEAL

MALINDI

IN CHAMBERS (OUKO, JA)

CIVIL APPLICATION NO. 55 OF 2016

BETWEEN

MARIA CRISTINA MENON APPLICANT

AND

GIORGIO BERTI1ST RESPONDENT

RESIDORI MILVIA2ND RESPONDENT

(Application for extension of time to serve the Notice of Appeal and to file and serve the Record of Appeal out of time in an intended appeal from the Ruling and Order of the Environment and Land Court of Kenya at Malindi (A. Angote, J.) dated 7th day of November, 2014

in

Land Case No. 158 of 2010)

RULING

The cases of **Edith Gichugu Koine v Stephen Njagi Thoithi**, Civil Application No. 11 of 2014 and **Rose Waruino Muthemba v Kentazuga Hardware Limited**, Civil Application No 16 1998, cited by the applicant emphasise the well known point which was summarised in the oft-cited case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi** – Civil Application No. Nai 251 of 1997;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

It is firmly established that although a single Judge hearing an application under **rule 52 (1)** of the Rules of this Court does so on behalf of the full bench, he or she is precluded from expressing his or her view on the merits of the appeal or the intended appeal; that whether or not the applicant's intended appeal is

likely to succeed, is, unless it is demonstrated to be patently hopeless or frivolous, irrelevant for the purpose of the application for extension of time under **rule 4** of the Rules of this Court because such a decision cannot be reached by a single judge. It is however emphasised that the question of arguability of the appeal or intended appeal will be considered by a single judge where he or she is otherwise satisfied beyond peradventure, that the appeal or intended appeal is not arguable and that the full bench is highly likely to reach the same conclusion. Otherwise the order for extension of time ought to be liberally granted. The full Court, on a reference in Muchugi Kiragu v James Muchugi Kiragu & Another Civil Application No. NAI 356 of 1996, observed:-

"Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."

A suit instituted by the applicant seeking a declaration that she was entitled to a share of parcel of land known as **Chembe/Kibabamshe/743** which is registered in the name of the 1st respondent and an order directing the Kilifi Land Registrar to rectify the register, was dismissed for want of prosecution on the **7th November, 2014**. The applicant filed the notice of appeal on **29th** and not **19th November, 2014** as alleged by her, clearly out time by nearly a month. It was again served upon the respondents on **20th December, 2014**, out of the seven days time limited by rule 77 of our rules.

The second aspect of this application is that the applicant was unable to lodge the appeal within sixty days as stipulated under **rule 82** of the Court's rules due to delay by the High Court registry in furnishing the applicant with copies of the proceedings and ruling.

The applicant now seeks in the instant application that the notice of appeal served out of time be deemed as properly served; that time for filing and serving the record of appeal be extended.

The only objection raised by the respondents in their grounds of opposition is that the applicant has not explained the reasons for the delay.

Irrespective of the length of delay, long or short, so long as there is a sufficiently plausible reason for the delay, and it is demonstrated that no prejudice has been or is likely to be occasioned to the other side and the possible success of the appeal or intended appeal, the court will freely grant an application for extension of time.

There are two levels of delay for which the applicant seeks pardon and leave. It is reiterated that after the suit was dismissed the applicant, not only filed the notice of appellate but also failed to serve it on the respondent within the time stipulated by the rules. It was subsequently served after a delay of 23 days. What explanation has the applicant proffered for this delay?

"4.THAT the applicant filed a notice of appeal dated 19th November, 2014 against the said ruling and order of dismissal within time but by an oversight on the part of its part (sic) advocates, the same was served upon the respondent's advocates out of time on 20th December, 2014" (Emphasis).

That is the only reason advanced in the first part of the application. The delay may not be inordinate but is it a sufficient reason? G. B. M. Kariuki, JA in Aviation Cargo Support Limited v St. Mark Freight Services Limited, Civil Application No. 98 of 2013 made the following observation in a situation similar to the one before me;

"..... In normal vicissitudes of life, deadlines will be missed even by those who are

knowledgeable and zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”.

While this observation is correct, the Court has also maintained that when too many mistakes have been made, the Court will not hesitate to decline to extend time. See **Stephen Muriithi Gitahi v Jesse Mugo Gitahi**, Civil Application No. 51 of 1984 and the recent decision in **Kirpal Singh Sirha v Barclays Bank Ltd**, Civil Application No. 115 of 1986.

The period between the lodgement and service of the notice of appeal is 21 days, 14 for filing the notice and 7 for serving it. The process in this application ought to have been complete by 29th November, 2014 but was not until 20th December, 2014, a delay of over 20 days. In my view the explanation of oversight by the applicant's counsel, though natural is neither sufficient nor plausible. Coupled with what I will shortly be saying about the second delay there seems to be a pattern.

The reason for not lodging the appeal within 60 days of the date when the notice of appeal was lodged has been attributed to the delay by the court below to supply the applicant with the proceedings. The only letter on record bespeaking proceedings is that dated 23rd January, 2015. It has no court stamp to signify receipt. If it existed it was written over 3 months after the dismissal of the suit, and no explanation has been offered. A certificate of delay exhibited on record states that the applicant applied for the proceedings on 20th March 2015 contrary to the applicant's own letter of 23rd January 2015 aforesaid. Further the certificate explains that the proceedings were collected on 5th May, 2016 and that it had taken between 20th March, 2015 and 5th May, 2016 to prepare, certify and supply those proceedings. This application itself was instituted on 24th October, 2016. No good explanation has been offered for the delay between the time the notice of appeal was filed on 29th November, 2014 and the date the application was brought on 24th October, 2016, over two years of delay. Nothing has been said about the period between 5th May, 2015 when the proceedings are said to have been collected by counsel representing the applicant and 24th October, 2016.

It was the same common thread before the trial court. When asked to show cause why the suit should not be dismissed, the applicant explained the reason for delay not as oversight, as is the case in this application, but an alleged negotiations to settle the matter out of court, a fact the respondents expressed ignorance over. The learned Judge, in dismissing the suit noted that the suit having been filed on 15th December, 2010 and the respondents having filed their defence to it on 9th May, 2011, the applicant took no steps in terms of **order 11 rule 2** of the Civil Procedure Rules to list the suit for pre-trial directions and conference; and for over four years kept the respondents waiting until they took out a motion for the dismissal of the suit.

When the application to dismiss the suit was canvassed before the court below the applicant was duly represented by counsel. Though the date for the delivery of ruling being 7th November, 2014 was issued in the presence of counsel for the applicant, he did not attend court on that date to take. This is the pattern I alluded to earlier.

For these reasons, I come to the conclusion that the applicant does not deserve the equitable relief sought in the instant application. Accordingly the application is dismissed with costs.

Dated at Malindi this 31st day of March, 2017.

W.OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR