



**IN THE COURT OF APPEAL**

**AT NYERI**

**SITTING IN NAKURU**

**(CORAM: G.B.M. KARIUKI, JA (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 282 OF 2013**

**BETWEEN**

**KISHOR KUMAR NDANJI VARSANI.....APPLICANT**

**AND**

**NDEFFO LIMITED..... 1<sup>ST</sup> RESPONDENT**

**RAMJI NARAN PATEL.....2<sup>ND</sup> RESPONDENT**

**BOAZ OKELLO.....3<sup>RD</sup> RESPONDENT**

**KENNETH NDUNG'U.....4<sup>TH</sup> RESPONDENT**

**SINGH KAL VENDER SINGH.....5<sup>TH</sup> RESPONDENT**

*(Being an application for leave to lodged record of appeal out of time*

*against the Ruling of the High Court of Kenya at Nakuru,*

*(Ouko, J. as he then was) dated 10<sup>th</sup> February, 2011*

in

***H. C. C. No. 170 of 2009)***

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**RULING**

The applicant, **Kishor Kumar Dhanji Varsani**, filed in this Court on 31<sup>st</sup> October 2013 an application by way of Notice of Motion dated that day seeking an order for leave to lodge record of appeal out of time and further, for an order that the record of appeal filed on 11<sup>th</sup> October, 2013 be deemed to be duly

filed.

The notice of appeal is against the Ruling of the High Court at Nakuru (Ouko, J. as he then was) delivered on 10<sup>th</sup> February, 2011 in Nakuru H.C.C.C No. 170 of 2009.

The application came up for hearing on 25<sup>th</sup> April 2017 before me in chambers as a single Judge under **Rule 54 (1)** of this **Court's Rules**. Learned counsel **Mr. Opondo** appeared for the appellant and learned counsel **Mr. Waiganjo** appeared for the 1<sup>st</sup> respondent while learned counsel **Mr. Munyori** appeared for the 2<sup>nd</sup> to 5<sup>th</sup> respondents.

As indicated above, the impugned decision was made on 10<sup>th</sup> February, 2011 in Nakuru H.C.C.C No. 170 of 2009 in a ruling by the Hon. Mr. Justice Ouko, (as he then was) following which the applicant timeously filed a notice of appeal on 17<sup>th</sup> November, 2011 and also applied for the proceedings and copied his letter to the advocates on record for the respondents. The applicant avers in his affidavit sworn on 31<sup>st</sup> October 2013 in support of the application that the Deputy Registrar notified the applicant's advocates that the proceedings were ready for collection by his (Deputy Registrar's) letter dated 15<sup>th</sup> July 2013 and the applicant's counsel collected the proceedings on the same day, that is to say on 15<sup>th</sup> July 2013. This was two years and 5 months after the request made on 17<sup>th</sup> February 2011. The applicant avers that he sought and obtained a certificate of delay, a copy of which was annexed to the application marked "KKDV6". It shows that the time taken by the court in preparing the proceedings was from 17<sup>th</sup> February 2011 to 15<sup>th</sup> July 2013. It was prepared and made ready for collection on 24<sup>th</sup> September 2013. Under the Rules of this Court, the appeal should have been filed within 60 days of lodgment of the Notice of appeal or 60 days from the date of receipt of the proceedings on 24<sup>th</sup> September 2013. However, the applicant lodged the record of appeal in Court on 11<sup>th</sup> October 2013 which was 17 days late as 60 days after 24<sup>th</sup> September 2013 elapsed on 24<sup>th</sup> November 2013.

Mr. Opondo emphasized that the certificate of delay was issued nine (9) days after expiry of the 60 days allowed for lodging appeal. He urged the Court to grant the application as the delay was not inordinate.

On his part, Mr. Waiganjo opposed the application and relied on the respondent's replying affidavit sworn by Charles Rongo Mbugua on 20<sup>th</sup> April 2017. He pointed out that although the application was filed in 2013, it was not served until 8<sup>th</sup> March 2017. He submitted that the main suit in which the impugned ruling was made is still pending in the Superior Court and that the applicant will not suffer prejudice if the application is not allowed because the appeal arises from an injunction order. He urged me to dismiss the application as the same is academic.

Mr. Munyori did not oppose the application on behalf of the 5<sup>th</sup> respondent.

In reply, Mr. Opondo refuted the contention that the application is academic.

The applicant is the plaintiff in High Court Civil Suit No. 170 of 2009 (at Nakuru) in which the respondents are named as the defendants. He sought an order for injunction against the respondents and a declaratory order in relation to the 1<sup>st</sup> respondent's title to the suit property No. **BAHATI/KABATINI BLOCK 1/2806**. The High Court found no merit in the application and dismissed it in a ruling delivered (by Ouko J, as he then was ) on 19<sup>th</sup> November 2009.

The applicant was not deterred. He returned to the High Court and instituted another application seeking orders that the ruling of 19<sup>th</sup> November 2009 be reviewed and/or set aside and that pending the hearing of the application, the orders of injunction be reinstated. The application came up for hearing before Ouko J, (as he then was), who after hearing the parties and due consideration found it wanting in merit and dismissed it on 10<sup>th</sup> February 2011. It is this ruling that the applicant intends to challenge in his intended appeal. The applicant has relied on **Section 3A, 3B** of the **Appellate Jurisdiction Act** and **Rules 4** and **41** of the **Court of Appeal Rules, 2010** in seeking the extension of time.

This Court has unfettered discretionary power under Rule 4 of the Court of Appeal Rules to extend time limited by the Rules or by decisions of this Court or of a Superior Court. Rule 4 states:-

***“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”.***

This Court's discretionary power under Rule 4 (supra) is exercised judiciary within the object of serving the interest of justice. The policy of the Court is to sustain an appeal where possible. As long ago as 1986, Apoloo J.A, (as he then was), stated in the case of **GATU VS. MURIUKI [1986] KLR 211** that:

***“.....the Court ought to be inclined to exercise its discretion to enlarge time to appeal where the applicant has shown prima facie that he has an arguable case for consideration.”***

More recently, in the case of **WASIKE VS. KHISA [2004] KLR 197**, Githinji, J.A. re-echoed this policy when he held that:

***“the discretion of the Court under Rule 4 is unfettered and must be exercised judiciary and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable that would disentitle an applicant to an order for extension of time and whether or not delay is unreasonable depends on the circumstances of each case”.***

In **REBECCA WAMBUI NJOROGE versus ALICE WAGIKUYU NJOROGE [Civil Application No. Nai 243 of 2013]**, I indicated that:

***“.....the jurisprudence that has emerged from decisions of this Court on interpretation of Rule 4 shows that the factors to be considered in deciding whether to exercise the discretionary power in favour of an applicant includes the length of the delay; the reasons for the delay; the arguability of the intended appeal; the degree of prejudice to the other party if time is extended; the public importance or public interest of the matter; and generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 of the Constitution and also the need to ensure under Section 3A (1) of the Appellate Jurisdiction Act, Cap 9, that the overriding objective of the Act (Cap 9) and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. For the purpose of furthering the overriding objective pursuant to Section 3A (supra), the Court is enjoined to handle all matters for the purpose of attaining the aims set out in Section 3B(1) of the Act which include the just determination of the proceedings”.***

In dealing with applications for extension of time under Rule 4 (supra), the Court is cognizant that human errors or mistakes will continue to be made from time to time. In **GULAM HUSSEIN N. CASSAMANI & ANOTHER VS. SHASHIKANT RAMJI [Civil Application No. Nai. 1 of 1981]**, this Court acknowledged that human errors or mistakes including errors of legal advisors can constitute excuse for not acting within the timelines set in the Rules or in orders of the Court. In that case, C. B. Madan J.A, (as then was) held that errors by a legal advisor can be pardoned.

But in seeking the exercise of the Court's discretion to extend time, an applicant must show that he/she has been diligent and has acted with dispatch and that the delay is not inordinate or attributable to indolence on his part and that, *prima facie*, he has an arguable appeal and further that the respondent would not suffer harm that cannot be compensated by an award of costs if time to appeal is extended.

In this application, the appellant applied for the proceedings on 15<sup>th</sup> July 2013 and collected the same on 15<sup>th</sup> July 2013. The certificate of delay was issued on 24<sup>th</sup> September 2013. Why did the applicant not apply for extension of time immediately after collecting the proceedings on 15<sup>th</sup> July 2013? The

certificate of delay shows that it was ready for collection on 24<sup>th</sup> September 2013 and the applicant avers that the record of appeal could not be lodged in its absence before 15<sup>th</sup> September 2013 as the certificate of delay was not to hand. The applicant avers that he filed the record of appeal on 11<sup>th</sup> September 2013 but the Deputy Registrar marked it as lodged out of time. Annexure 'KKDV7' attached to the application shows the cover of the record of appeal as having been lodged and stamped in the Registry in October 2013. So what has the applicant done since lodging the record of appeal in October 2013 and filing the motion now before me on 3<sup>rd</sup> March 2013? First, it is not denied that the motion was not served and prosecuted. A diligent litigant who is interested in prosecuting his suit or application would not go into a slumber after filing the application. Although the germane period is that relating to the delay after procurement of the proceedings after delivery of the impugned ruling, the fact that an applicant is indolent in serving and prosecuting the application for extension of time and does not state why it has taken inordinately long to bring it to hearing cannot be ignored while weighing one thing with another so as to determine where the interest of justice will be better served. On 15<sup>th</sup> July 2013, the applicant had the proceedings and could have applied for extension of time. He waited for the certificate of delay which was collected on 24<sup>th</sup> September 2013. The record of appeal was filed on 11<sup>th</sup> October 2013, 17 days after the collection of the certificate of delay. Although this period does not reflect diligence considering that the applicant had had the proceedings from July 15<sup>th</sup> 2013 and therefore could promptly have completed compiling the record of appeal by inserting the certificate of delay, nevertheless the period cannot be said to be intolerably long or inordinate. As the record of appeal is ready, and as it is not the policy of the Court to shut out litigants from accessing justice where they are not culpable for the delay, I am inclined to extend time to lodge the record of appeal seeing that the intended appeal is not frivolous or unarguable. I do so cognizant that the intended appeal is interlocutory and is bound to delay determination of the dispute in the High Court. The issue for determination in the final analysis is about title to the land, the subject matter of the suit in the High Court.

The intended appeal in respect of which the notice of appeal was given on 19<sup>th</sup> November 2009, shall, if successful, merely result in temporary injunctive relief which shall not conclusively resolve the dispute between the parties. Doing the best I can and so as to ensure that the scales of justice are balanced, I allow the notice of motion dated 31<sup>st</sup> March 2013 and order that subject to and providing the record of appeal is served on the respondents as herein stated, time to lodge appeal is extended to the 11<sup>th</sup> of October 2013, this being the date on which the record of appeal was filed; the record of appeal shall be deemed to have been filed with the leave of the Court; the record of appeal shall be served on the respondents within 21 days from the date hereof and the Deputy Registrar shall ensure the appeal is fixed for Case Management within 60 days from the date of this order and that hearing of the appeal shall be fixed on priority basis.

The applicant shall pay to the respondents in any event the costs of this application to be agreed on between counsel and in absence of agreement, to be taxed.

***Dated and delivered at Nakuru this 31<sup>st</sup> day of May, 2017.***

***G. B. M. KARIUKI SC***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**