IN THE COURT OF APPEAL

AT KISUMU

(CORAM: D. K. MUSINGA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 231 OF 2015

BETWEEN

NYAIGWA FARMERS' CO-OPERATIVE SOCIETY LIMITED ……. APPLICANT

AND

IBRAHIM NYAMBARE ……..……..... FIRST RESPONDENT

JEREMIAH MATARA …….....…….. SECOND RESPONDENT

JAMES MOGAKA MABUKA …….....…….. THIRD RESPONDENT

GESORA AKAMA SAMSON …….....…..… FOURTH RESPONDENT

(Application for leave for extension of time to file and serve Notice of Appeal, and Record of Appeal out of time from the ruling of (Okong'o, J.) delivered on 24th April, 2015 in the High Court Of Kenya at Kisii

in

ELC SUIT NO. 11 OF 2014)

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RULING

1. This is an application for extension of time to file and serve a notice and record of appeal out of time. The ruling sought to be appealed from was delivered on 24th April, 2015. The application was brought under **sections 3** and **3A** of the **Appellate Jurisdiction Act** and **rules 4, 41, 42 (1)** and **43 (1)** of the **Court of Appeal Rules.**

2. The affidavit in support of the application was sworn by **Senteu Marianyi Eliud,** an advocate in the firm of M/s. Migos Ogamba & Company Advocates, who are on record for the applicant. He deposed, ***inter alia,*** that the ruling in respect of the respondents' application to strike out the suit against them was scheduled to be delivered on notice but the trial court delivered the ruling on 24th April, 2015 without any notice to the applicant. The suit was struck out.

3. When the applicant's advocates learnt of the ruling, they filed an application for leave to appeal against

the ruling. The application was filed on 12th May, 2015. When it came up for hearing on 6th July, 2014, the Court **(Okong'o, J.)** stated that no leave was required to file an appeal from such a ruling as aforesaid. Instead, the applicant was directed to seek leave from this Court to file the intended appeal out of time, since the requisite time had expired.

4. The applicant contended that its intended appeal is arguable, but it will be rendered nugatory if stay of execution of the ruling pending hearing and determination of the intended appeal is not granted. The applicant added that the respondents will not suffer any prejudice if the application is allowed. Counsel cited, ***inter alia,*** this Court's decision in **DICKSON NDEGWA MBUGUA V CITY COUNCIL OF NAIROBI & 3 OTHERS [2010] eKLR** where the principles that guide the consideration of an application of this nature were considered.

5. **Edward Aboki Begi,** advocate, swore a replying affidavit on behalf of the 1st, 2nd, 3rd and 4th respondents. He contended that all the parties, through their respective advocates, had been served with a notice of delivery of the ruling. But even if the applicant had not been served with the notice, they became aware of it on 12th May, 2015, yet it took the applicant 108 days to file the present application, he stated.

6. Counsel further stated that the reason advanced for the delay was not plausible, saying that the applicant's advocate ought to have known that no leave was required to appeal against the High Court ruling. Mr. Begi pointed out that even after the application for leave was withdrawn, there was a further delay of 21 days before the current application was filed. That delay had not been explained and therefore leave to appeal out of time ought to be denied, he submitted. He cited, ***inter alia,*** this Court's decision in **KIRAGU V KIRAGU [1990] KLR 323** and the High Court decision in **BAGAJO V CHRISTIANS CHILDREN FUND INC. [2004] 2 KLR 73** in support of his submissions.

7. The respondents' counsel opined that the intended appeal is not arguable. He added that the respondents would suffer prejudice if this application is granted as that would lead to re- opening of the case, causing the respondents to use their own funds to defend the suit, whereas the applicant would use the society's funds to prosecute the suit.

8. As regards the prayer for stay of execution of the High Court ruling pending hearing and determination of the intended appeal, Mr. Begi stated that no execution had been commenced to warrant this Court to exercise its discretion to stay the same.

9. In his brief reply, Mr. Senteu submitted that there was no evidence that the notice of delivery of the ruling was posted to his firm's postal address in Nairobi. He pointed out that the respondents were represented by law firms that were based at Kisii, that is Aboki & Company Associates and Nyatundo & Company Advocates, and the notices were simply hand delivered by the court's process server to their respective offices.

10. As regards the mistake that he made as counsel in filing an application for leave in the High Court when such leave was not necessary, and which application caused unnecessary delay before the current application was filed, Mr. Senteu submitted that mistake of an advocate should not be visited on his client.

11. I have given due consideration to the submissions by counsel. The principles that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed. See **PATEL V WAWERU & 2 OTHERS [2003] KLR 361.**

12. Applying the aforesaid principles, it is not denied that there was a delay of about 4 months. The ruling sought to be appealed against was delivered on 24th April, 2015, notice of its delivery having been served upon the respondents' advocates only. There is no evidence that the applicant's counsel was ever served with the notice. Mr. Senteu deposed that his firm was not served with the said notice. I have no

reason to doubt that averment. As soon as the applicant's advocates became aware of the ruling they filed an application before the High Court seeking leave to appeal. That application was filed on 12th May, 2015, 18 days after delivery of the ruling. That was a mistake in law as no leave was necessary before an appeal could be instituted. That mistake cost the applicant some valuable time. Is the mistake fatal? I do not think so. In **MURAI V WAINAINA (No. 4) [1982] KLR 33**, madan, J.A delivered himself beautifully as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a 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 person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates."**

I respectfully adopt, that argument and pardon the mistake committed by the applicant's advocate.

13. As regards the chances of success of the intended appeal, the suit was struck out because the learned judge held that the High Court had no jurisdiction to grant the orders sought. The dispute involved, ***inter alia,*** a Co-operative Society and five of its officials and two other parties. The applicant stated that it was the registered proprietor of a parcel of land known as **L.R. No. Kisii Municipality/Block 111/105** and the 1st to 6th defendants in the suit had unlawfully sold and transferred the said property to the 7th defendant in the suit. Consequently, the applicant was seeking, ***inter alia,*** an order to compel the 1st to 6th defendants to remit the purchase price to it together with interest.

14. Citing **section 76** of the **Co-operative Societies Act,** the trial court agreed with the respondents that the suit should have been instituted in the first instance in the Co-operative Tribunal established under **section 77 (1**) of the **Co- operative Societies Act** and proceeded to strike out the suit.

15. The applicant was contending that since the claim related to sale of land, the High Court had jurisdiction to hear and determine the suit.

16. Looking at the rival arguments, all I can say is that the intended appeal is arguable, it is not frivolous. An arguable appeal is not one that must succeed, it is an appeal that raises issues that are worth of this Court's consideration.

17. As to whether the respondents shall be prejudiced if the order sought is granted, I agree that there will be some prejudice. However, given all the other factors that I have highlighted above, I think that it is in the interest of justice that the applicant be granted an opportunity to exercise its constitutional right of appeal.

18. As regards the applicant's prayer for stay of execution of the High Court ruling pending hearing and determination of the intended appeal, I agree with Mr. Begi that the order made by the trial court in its impugned ruling cannot be executed. Itis a negative order. The application for stay of execution is therefore bad in law and is consequently dismissed.

19. For reasons stated herein, I grant the application for leave to file an appeal out of time. The applicant should file and serve the notice of appeal within 14 days from the date hereof. The record of appeal should be filed and served within 30 days from the date of filing the notice of appeal. The applicant shall bear the costs of this application.

DATED and delivered at Kisumu this 28th day of January, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR