



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 56 OF 2015

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

MICHAEL MURIUKI NGIBUINI.....APPLICANT

AND

EAST AFRICAN BUILDING SOCIETY.....RESPONDENT

(Application for extension of time within which to file and serve Notice of Appeal against the Ruling of the High Court of Kenya at Nyeri (Mativo, J) dated 21st day of October 2015

In

H.C.C.C. No. 292 of 1999)

RULING

The applicant **MICHAEL MURIUKI NGIBUINI** lodged an application by motion in this Court's registry on 30th November, 2015. The motion is brought under **Rule 4** of the **Court of Appeal Rules** and prays for orders;

“(a) That time within which to file and serve a Notice of Appeal be extended to a period to be set by this Honourable Court on the ground that due to pressure of work and/or inadvertence forgetfulness or on an assumption that same had been done failed to file and serve a notice of appeal against the ruling of the superior court within the time provided for by the rules of this Honourable Court.

(b) AND for an order that the costs of and incidental to this application abide the result of the intended appeal”.

In support of the motion, **STEPHEN RUPHINUS ADERE**, the applicant's learned counsel had sworn an affidavit on 20th November, 2015 in which he averred that after taking the ruling of the learned Judge of the High Court (Mativo, J) on 21st October, 2015, he sought and obtained leave to appeal and also applied for copies of the proceedings and ruling, for which he made payment. His client had

confirmed his intention to appeal. He then proceeded to swear as follows:

“6. THAT as I was waiting to receive the typed proceedings and certified and sealed order I embarked on other matters of practice handling other briefs some of which involved having to travel out of Nairobi where I am based.

7. THAT in the process my mind went out of this matter completely as I had assumed I have met all the requirements the main of which was to give a Notice of Appeal.

8. THAT as it took time to get the court order duly signed and sealed this file came up for bring up and as I perused it that is when it struck me that I cannot trace a copy of Notice of Appeal and on enquiry within the firm it was confirmed that same had not been done.

9. THAT the fault/mistake is entirely mine for which I beseech and implore court’s understanding of this human imperfection.”

The deponent then swore that the intended appeal has a good chance of success on the basis of some five grounds which he enumerated.

Upon being served with the application, the respondent filed a replying affidavit sworn on 15th January 2016 by **JACK KIMATHI**, its Legal Officer. He swore that the application dismissed on 21st October 2015 was to reinstate a suit that was dismissed on 22nd October, 2008. He stated that the notice of appeal should have been filed by 4th November 2015 yet this application was filed on 30th November, 2015 **“after a delay of 39 days”**. He doubted the applicant instructed his advocate to appeal without an affidavit from him confirming the same. He also asserted that the suit plot being **KARATINA TOWN BLOCK 1/107** was already transferred to a third party and therefore to allow the application would cause the respondent prejudice.

During argument before me, Mr. Adere reiterated the contents of his affidavit. He repeated that the omission and delay in filing the notice of appeal was due to an oversight on his part in that he assumed all along that he had already filed it and on time, realizing his error only when his file came before him on a routine bring up. He pleaded that it was all due to his mistake, forgetfulness and human imperfection which he sorely regretted, and was not due to sloppiness as such. He explained that he runs a one-man law firm and has a single clerk and the matter of the notice of appeal just slipped his mind in the usual hustle and bustle of practice. He then cited in aid the decision of the late Pall, JA in **HON. JOHN NJOROGE MICHUKI & ANOR. –vs- KENTANZUGA HARDWARE LTD [1998] eKLR** and of Ibrahim and Wanjala SCJJ in **NICHOLAS KIPTOO ARAP KORIR SALAT –vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS 2014 eKLR** for the principles that apply on a consideration of an application for extension of time. He also used the latter case to explain why it is that he did not file the notice of appeal, even out of time, and then regularize the same by this or like application.

Mr. Mohan would hear none of the applicant’s pleas and explanations. Basing his opposition on the replying affidavit, counsel was unimpressed that this application was brought, in his reckoning, after a delay of some 39 days, during which Mr. Adere was **“otherwise occupied”**. He asserted that the delay was inordinate and reiterated that the suit property was now in the hands of a third party and judicial discretion should not be used to the detriment of a third party who was not served with the application before Court.

Citing the ruling of O’Kubasu, JA in **MARIARIA –vs – MATUNDURA [2004] 2 EA 163**, Mr. Mahan contended that the applicant was undeserving of this Court’s favourable discretion and should instead seek damages from Mr. Adere for any loss or damage arising from his sloppy or careless conduct herein as was stated by Omolo JA in **OMAR TRANSPORTERS & ANOR. – vs – ONYANGO [2002] LLR 3774 (CAK)** which O’Kubasu JA accepted;

“Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn to their cost that the consequences of careless and leisurely approach to work by advocates must fall on their shoulders”.

He urged me to dismiss the application with costs.

In his reply, Mr. Adere agreed that there was delay but he stated that he could not file the notice of appeal before obtaining extension of time from this Court. He also explained that the delay in question was not of 39 days as stated by his learned counterpart, but 26. On whether the alleged third party should have been served, counsel stated that such party had no role to play in a **Rule 4** application. He also urged that the said third party should not unduly weigh on the Courts’ mind as his title flows from the respondent’s impugned right to sell the property and that is the matter to be canvassed in the appeal.

An application under **Rule 4** is a plea to the single Judge’s exercise of discretion. That discretion is free and unfettered to the end that orders will be made as the justice of the case may require. It is not a discretion to be exercised in a capricious manner in accordance with personal whim and inclination. Rather, it is exercised on the basis of sound principle as a judicial discretion. The matters that fall for consideration on such an application are now old hat. In **MWANGI – vs – KENYA AIRWAYS LTD [2003] KLR 486** the Court listed them as;

- a. **The length of the delay;**
- b. **The reason given for the delay;**
- c. **Possibly, the merits of the appeal or intended appeal; and**
- d. **The degree of prejudice likely to be suffered by the respondent by such extension.**

The list is of course not exhaustive and each case must be decided on its own merits bearing in mind the peculiarity of its circumstances. Moreover, being in the nature of an equitable relief, the conduct of the applicant and the candour with which he approaches the Court should also be relevant considerations.

It is not contested herein that the applicant did indicate his desire to appeal against the ruling of the High Court immediately it was read on 21st October, 2015. Acting ‘*ex abundanti cautela*’, his advocate sought leave to appeal in case it was required. It was granted. He also wrote to the High Court requesting the proceedings and ruling for purposes of appeal, and copied the respondent’s advocates. Mr. Adere freely and candidly concedes that the failure to file a Notice of Appeal, a simple yet critical document, was due to a fault or mistake of his own, attributable to nothing more than human error or imperfection. He sorely regrets the error and is mortified as he implores the court to excuse it.

He discovered his mistake and omission during a routine bring up of the file but did not immediately file a notice of appeal, even belatedly. The reason he gives is that on the authority of the **SALAT** ruling of the Supreme Court, such a filing would have been presumptuous and a nullity since one must first seek extension of time before he can file a time-barred notice. I have read that ruling of the apex court but, with respect, the sentiments expressed therein cannot apply to the filing of belated notices of appeal in this Court. **Rule 4** of the **Court of Appeal Rules**, pursuant to which a single Judge of this Court extends time, is clear on the point;

“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 on a reference to that time as extended” (*my emphasis*).

It is clear from the rule that an applicant has a choice to apply for extension of time before or after

he does the act for which extension is sought. I would opine that it is good practice and conduces to time economy for a party to file a notice of appeal, albeit out of time, without waiting for extension of time by the Court on application. I dare add that such a filing provides proof that indeed the applicant did act with alacrity or reasonable speed upon discovery of error or omission. It may also reduce or soften opposition by very fact that the delay is shortened and all the Court needs to do, in appropriate cases, is validate what has already been filed, thereby saving time.

Proceeding on the erroneous view that he could not file the notice before extension of time, the applicant filed this motion some 26 days or so past the time the notice of appeal should have been filed. I have considered whether this delay was inordinate and I am unable to agree with Mr. Mohan that it was, given the explanation given by Mr. Adere. I accept that a one-man firm out in Nairobi with a single clerk could in the nature of practice have had the filing of the notice of appeal slip the advocate's attention. While I am all for industry and attentiveness to duty on the part of advocates as professionals, service providers and officers of the Court, I am not sure it would be fair to say that Mr. Adere exhibited a slothful, sloppy or lazy attitude towards the handling of this matter. I accept his explanation that this was an unfortunate slip on his part born of human frailty. I cannot in conscience pass a judgment all too harsh on him in the circumstances, as to err sure is human, and to forgive is divine. In the contest between being a strict and uncompromising disciplinarian and a judge keenly aware of the frailties and limitations of the human condition, I am inclined to let the latter hold sway.

I think that I need not go into the merits of the intended appeal but from a perusal of the grounds deposed to at paragraph 10 of Mr. Adere's affidavit, I cannot say that it is entirely devoid of substance and therefore unworthy of consideration. At any rate, I take the view that as a matter of principle, a single Judge ought to avoid the temptation and decline the invitation to express any opinion on the appeal or intended appeal itself, a task for the bench that will hear it. Many Judges of this Court have taken that view before me and I am happy to do the same.

Finally, I am not persuaded that the respondent stands to be unduly prejudiced from an extension of time so that a notice of appeal is filed. The respondent seems to urge that a third party may be affected and ought to have been served with the motion. I do not agree. The Rules are clear that a party affected or likely to be affected by an appeal shall be served with a notice of appeal. In the present case, such notice of appeal can only be served if and when I extend time, and will have opportunity to defend his interests appropriately on the appeal itself.

The totality of my consideration of this application is that it is meritorious and I accordingly grant it. The applicant shall file and serve his notice of appeal within seven (7) days of the date hereof. He shall also file and serve the record of appeal within thirty (30) days of such service.

Costs of this application shall be in the intended appeal.

Dated and delivered at Nyeri this 17th day of February, 2016.

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR