



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 44 OF 2015

BETWEEN

POLA CHARO KANIKIAPPLICANT

AND

TEDDY DAVIS NGALARESPONDENT

(An application for extension of time to appeal out of time from the judgment and decree of the Environment & Land Court at Malindi (Angote, J.) dated 11th July 2014

in

E. & L.C.L.C. No. 36 OF 2013)

RULING OF THE COURT

Whether or not to extend time limited by the Court’s rules or by an order of the court or of the superior courts below, for doing any act is a matter of judicial discretion.

The applicant has sought by her instant notice of motion that she be granted leave to file record of appeal out of time on the grounds that the intended appeal raises weighty issues; that upon delivery of the judgment in question the applicant’s advocate immediately applied for copies of the proceedings and judgment but the same were not availed within a reasonable time as they were not ready; that they were finally availed together with a certificate of delay; that upon receipt of the proceedings this application was brought without further delay; and that the applicant has a fundamental right to bring this appeal to challenge the decision of the court below.

The application was opposed by the respondent who has deponed in a replying affidavit that the applicant has not been serious in pursuing the appeal after filing the notice of appeal; that after applying for certified copies of the proceedings and judgment the applicant failed to pay the requisite fees for this; that learned counsel for the applicant on 23rd June 2015 confirmed that he had received the proceedings and judgment; and that as a matter of fact the proceedings had been availed to the respondent on 22nd May, 2015. It was also argued that it was not procedural for the firm of Omangwa Angima Advocates to file a notice of change of advocates after the delivery of the judgment.

In the written submissions the applicant reiterates that certified copies of the proceedings and judgment were supplied to him after the expiration of the 60 days' period limited by the rules for the bringing of an appeal; that delay was caused by the court acknowledgement by the certificate of delay; that payment of proceedings is made upon delivery of the typed and certified copies of the proceedings and not before; that the applicant has been diligent in her pursuit of the appeal; and that the applicant ought to be granted the extension sought so as to enjoy the right to be heard.

The respondent for his part has maintained that application is full of confusion regarding what is being challenged on appeal, change of advocate and the certificate of delay; that the applicant unlike the respondent has not been serious; that the latter paid for and was supplied with the proceedings on the same he applied for them; that the firm of Omagwa Angina & Company Advocates are not properly on record; that the certificate of delay is not genuine; that even after being supplied with the proceedings the applicant took almost one month to make this application; and that this application is meant to delay the final conclusion of this controversy.

Under **rule 4** of the Court of Appeal Rules, I reiterate, the discretion vested in the court to extend time is unfettered and may be granted on such terms as the court may think just. In **Leo Sila Mutiso v Rose Helen Wangari Mwangi** Civil Application No. 255 of 1997 the Court laid down factors which may be taken into account in deciding whether to grant an application for extension of time. Those factors include the length of the delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and (possibly), the chances of the appeal succeeding. This list, as was observed in **Mongira & Another v Makori & Another** [2005] 2 KLR 103 is not exhaustive. The single Judge is at liberty to consider any other factor outside those listed in **Leo Sila** (supra), so long as the discretion is exercised judicially. It is equally true that a single judge hearing an application under rule 53 is precluded from expressing any definitive view on the merits of an intended appeal. Whether or not the applicant's intended appeal is likely to succeed is irrelevant for the purpose of the application for extension of time under Rule 4 unless the intended appeal is demonstrated to be patently frivolous. See **Hon. John N. Michuki v Rose Waruino Muthemba**, Civil Application No. NAI. 16 of 1998 (Pall, JA). That is why the word "***possibly***" in **Leo Sila** when describing the 3rd factor namely, the chances of the appeal succeeding.

The applicant filed and lodged the notice of appeal on 22nd July 2014, within the time prescribed by **rule 59(1)** of the Court's rules. Within 60 days from the date when the notice of appeal was lodged, an appeal, according to **rule 82(1)**, ought to have been instituted. No appeal was instituted within that period. Instead on 12th August 2015, one year later, the instant application was brought.

No length of delay can disentitle a party the right to be heard so long as the delay is explained to the satisfaction of the court and there is no prejudice to the other party. The applicant has urged me to find that the delay was not caused by her but by the court. Under the proviso to **Rule 82(1)** the delay attributed to and certified by the court will be taken into consideration, by exclusion of the days to have been taken up in the preparation of the proceedings, when computing the time within which the appeal ought to have been instituted. For a party to rely on this proviso it must be shown that, within 30 days of the decision intended to be challenged, the party applied for a copy of the proceedings in the court appealed from and that the application for such copy was in writing a copy thereof served upon the respondent. The Deputy Registrar, Environment & Land Court on 15th July 2015 issued a certificate of delay confirming that there was a written application dated 22nd July 2014 for certified copies of the proceedings and judgment from the applicant's advocates. The certificate further indicates that the proceedings were ready on 22nd May 2015 but had some errors which had to be corrected. After correction of those errors the proceedings and judgment were collected by the applicant's advocates on 26th June 2015. The certificate, however, erroneously concludes that "***the period between 22nd July 2015 (sic) and 26th June 2015***" was used by the court in the preparation, certification and delivery of the copies of the proceedings and judgment to the applicant. The respondent has not denied receiving his copy of the letter bespeaking proceedings. He has only taken issue with the fact that the applicant failed to demonstrate that she had paid for the proceedings; that the proceedings had been available from 22nd May 2015; and that they had no errors.

In view of the confirmation by the Deputy Registrar that the delay upto 26th June 2015 was caused by the court, the concern should shift to the period after that date. In my considered view the period between 26th June 2015 and 12th August, 2015 when this application was taken out is not inordinate. In view of the fact that the dispute involves land, the learned Judge of the Environment & Land Court having awarded to the respondent 3 acres of the applicant's land, it is only fair and just that the latter be given an opportunity to exhaust the appellate process, the delay having been caused by the court and in any case no prejudice has been demonstrated.

I allow this application and order the applicant to file and serve her appeal within fourteen (14) days from the date hereof. Costs of this application awarded to the respondent.

Dated and delivered at Mombasa this 22nd day of April, 2016

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR