IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJ.A.

CIVIL APPEAL NO. 200 OF 2008

BETWEEN

CHRISTOPHER MURIITHI NGUGU.....APPELLANT

AND

ELIUD NGUGU EVANS.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya

at Nairobi (Kubo J.) dated 17th July 2006

in

H.C MISC. APPLN NO. 80 OF 2004)

****

JUDGMENT OF THE COURT

Background

1. This appeal arises from the ruling and order delivered in the High Court in H.C Misc Application No. 80 of 2004. The ruling was on a chamber summons application dated 22nd December 2004 by the appellant, ***CHRISTOPHER MURIITHI NGUGU***, seeking leave from the Court to appeal against the judgment delivered by the High Court on 22nd September 2003 in Succession Cause No. 278 of 1994. The application was premised on the grounds that: *the appellant has a meritorious appeal; that the appellant has been eager to pursue the appeal; that the delay in filing the appeal is not inordinate and was occasioned by the laxity of the previous counsel of record; and that the subject matter of the suit is a parcel of land which the appellant is heavily invested in*.

2. A short summary of the dispute that resulted in the judgment is that ***LR NO. BARAGWE/THUMAITA/1207*** [the suit property], measuring 1¾ acres was subdivided and registered in the names of the appellant and **James Muriuki Muriithi** jointly. Following the death of **James Muriuki Muriithi** on 13th December 1992, his brother, ***ELIUD NGUGU EVANS*** (the respondent herein) petitioned for letters of administration in Succession Cause No. 278 of 1994 with the suit property being the only property due for administration. The appellant objected/protested against the grant and distribution thereof as he claimed to have jointly owned the suit property with the deceased and had fully

developed it by planting coffee and tea bushes.

3. The High Court in its judgment confirmed the grant and ordered that the suit property be divided into two portions of which the appellant was to receive 0.304 ha; and the respondent and his brother to share in equal shares 0.40ha.

Citing the authorities of ***RATNAM V CUMARAMY, [1964] 3 ALL ER 933*** cited in the Ugandan case of ***JANSON V SWAMIRI, [1972] EA 317.*** The learned Judge failed to find a satisfactory explanation given by the appellant accounting for the delay of 15 months in filing the appeal. The learned Judge found that the appellant had failed to illustrate his vigilance in pursuing the intended appeal and did not avail a copy of the draft memorandum of appeal or indicate his efforts in following up on his appeal through his first counsel on record. The learned Judge also noted that the judgment was neither signed nor certified and that the appellant's reference to the injunction issued to him in an interlocutory ruling did not bear the case number or the parties thereto. In exercising his discretionary power, the learned Judge dismissed the application seeking leave to file the appeal out of time and being a family dispute, ordered each party to bear their own costs.

4. Aggrieved by that ruling, the appellant filed this appeal, seeking orders that the ruling of the learned judge be set aside and the same be substituted with an order allowing the application dated 22nd December 2004. The appeal is based on six grounds: that the learned judge erred in law and in fact *by failing to consider the explanations by the appellant in the application and the supporting affidavit in regard to the delay in lodging the appeal; by failing to find that neither the appellant nor his counsel had been notified as to the availability of the typed proceedings pursuant to their application; by penalising the appellant for no mistake of his own contrary to established legal norms and principles, as specifically set out in the authorities cited before him; by laying great emphasis on maters irrelevant to the application before him, hence arriving at a wrong decision as a result; by refusing to allow the application despite overwhelming reasons and grounds to do so, and considering the subject matter of the dispute being ancestral land, with great sentimental value; and by purporting to decide or consider the merit or otherwise of the intended appeal, hence misdirecting himself and arriving at a wrong decision.*

5. When the appeal came for hearing before this Court, both parties were represented by learned counsel: Mwangi Kigotho represented the appellant whereas Macharia Muraguri represented the respondent.

6. On the ground that the learned Judge did not consider the reasons for the application given in the appellant's affidavit, counsel for the appellant argued that the learned Judge failed to consider that the appellant and the deceased **James Muriuki Muriithi** were registered jointly as owners of the suit property and therefore upon the death of the said **James Muriuki Muriithi** the land reverted to the appellant contrary to the decision of the lower court which purported to award him 0.304ha. Counsel submitted that the appellant instructed his previous advocate to apply for proceedings in a letter dated 11th October 2003 and file the appeal; that the previous advocate on record failed to lodge the appeal and it was in mid-December 2004 when the appellant realised the omission; that the lower court failed to inform the appellant that the typed proceedings were ready; that the appellant/litigant ought not be punished for the mistakes of his advocate; that the learned Judge went into the merits of the intended appeal and thus arrived at a wrong conclusion. Counsel urged the Court to allow the application to extend time to enable him file the appeal.

7. Mr Muraguri counsel for the respondent, opposed the appeal. He contended that the delay of 15 months was not explained and in addition to not presenting the proceedings before the High Court, a Certificate of Delay was not issued to explain the delay; that all that was attached to the application for leave to appeal out of time was the lower Court's judgment which judgment was not signed or certified; that the appellant had a duty to establish that he had an arguable appeal which he failed to do by not attaching a draft memorandum of appeal; that the intended appeal is not arguable; that the appellant's claim that the title document assigns the shares of the suit property held by the appellant and **James Muriuki Muriithi** was refuted; that the learned Judge exercised his discretion judiciously and found that the delay had not been explained; and that there was nothing presented before the Court to indicate that

the appellant's previous advocate on record was in error.

Counsel urged the Court to dismiss the appeal.

8. An application seeking leave to file an appeal out of time is dependent upon the discretionary power of the judge. This Court is slow to interfere with the decision of the High Court in exercise of such discretionary power and only does so in the circumstances set out in ***MBOGO V SHAH, [1968] EA 93*** that:

> ***"...A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."***

9. The appellant had relied on several of this Court's authorities in the High Court stating the general principle that justice is the paramount consideration to guide the exercise of the court's discretion; ***CATHERINE KARL V GUENTER OTTO KARL, CIVIL APPLN NO. NAI 152 OF 1998 (UR 57/98); RUTH WANJIRU META V PENINA NYAMBURA KIMANI, CIVIL APPLN NO. NAI 424 OF 2001; NURA AWADH BAWAZIR V CHRISTOPHER STEPHEN AKILANO AKIWUMI & GIULIANA DENTI STELLA, CIVIL APPLN NO. NAI 256 OF 2001.***

The learned Judge, though in complete agreement that the principle was sound, was quick to point out that its application would be influenced by the facts of each case.

10. The Supreme Court in ***NICHOLAS KIPTOO ARAP KORIR SALAT V IEBC & 7 OTHERS, SUPREME COURT APPLN NO. 16 OF 2014*** set out the underlying principles that a Court should consider in exercise of discretion to extend time:

> *i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
>
> *ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
>
> *iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
>
> *iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
>
> *v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
>
> *vi. Whether the application has been brought without undue delay; and*
>
> *vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

11. In considering the application before him, the learned judge was alive to the fact that there had been a delay of 15 months, which delay he was persuaded was not sufficiently explained. The learned judge was not convinced of the appellant's vigilance in pursuing the intended appeal between the time he applied for the lower court's proceedings on 1st October, 2003 and 22nd December, 2004.

12. The instant appeal relates to land, the Court of Appeal has in numerous cases accepted the contention that land matters are sensitive and emotive and should as much as possible be heard on merits (see ***ROBERT NJUGUNA KAMAU & ANOTHER V KIRIKA KAMUNGU, [2015] eKLR***). This Court has

however held that this does not mean that in all cases where land is the subject, that courts must exercise their discretion in favour of the suit being heard and determined.

13. In ***WASIKE V SWALA, [1984] KLR 591***, this Court stated:

> ***"A recent decision of this full court in a reference from a single judge also made it clear that it would, in the circumstances of that case, reverse the decision of the single judge of this court because the intended appeal related to land and because, although the applicant could not technically explain satisfactorily the delay or take advantage of the proviso to*** *rule 81(1),* ***nevertheless the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal.*** *John Kuria v Kelen Wahito, Nairobi Civil Application NAI 19 of 1983 April 10, 1984.*
>
> ***Here, again, the subject matter is land and Mucha Swala or his advocate have known all along that Cleophas Wasike is determined to institute his appeal."***

14. Applying this rule to the matter at hand, the mere fact that the suit relates to land cannot guarantee it being allowed to be heard as each case will depend on its peculiar circumstances. In this appeal, the inordinate delay by the appellant in bringing his appeal is a material consideration.

15. Regarding the mistakes of counsel, this Court in the recent case of ***TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY V JEREMIAH KIMIGHO MWAKIO & 3 OTHERS, [2015] eKLR*** has offered insight on the effect of mistakes by counsel and stated:

> ***"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.***
>
> ***….***
>
> ***Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance.***
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> ***Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on***

a. ***client."*** [Emphasis added]

16. In the case ***KETTEMAN & OTHERS V. HANSEL PROPERTIES LTD, [1988] 1 All ER 38***; in which an application was brought for belated amendment of the defence an amendment which had been necessitated by mistake of counsel, in his judgment, Lord Griffith stated that:

> ***"Legal business should be conducted efficiently.***
>
> ***We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings. Needless to say, the application to amend a defence on the basis of an inadvertent mistake by counsel was disallowed. To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit."***

17. The *ratio decidendi* deriving from this case is that parties should not have the errors of their advocates preclude them from obtaining justice unless these errors are reasonable and not negligent and an effort has been made to correct them. Applying this to the facts in the present appeal the learned Judge found that the delay of 15 months was inordinate and not sufficiently explained.

18. From the principles set out in ***Mbogo v Shah (supra)***, we find that the appellant has failed to illustrate how the learned Judge misdirected himself thus arriving at a wrong conclusion or how his decision was clearly wrong resulting in some injustice. From the record availed to us, the learned Judge did not delve into the substance of the appeal as claimed by the appellant. The learned Judge determined whether the delay that prevented the intended appeal being filed on time was justified enough to allow the same be filed out of time; the appellant blamed his previous advocate on record for failing to file the intended appeal on time; he did not provide any documentation or evidence to show that he had actively pursued his advocates to file the appeal. Whereas it is a general principle that a mistake by learned counsel should not always be visited upon a client, the learned Judge found the indolence on the part of the appellant, to be inexcusable. See: ***CHARLES MAINA MURIUKI V JAMLECK MUCHIRA WANJAU, [2014] eKLR***.

19. In the circumstances of this case, the learned judge exercised his discretion judiciously and this Court cannot therefore interfere with his determination. Accordingly, this appeal lacks merit and is dismissed. This being a family matter, each party to bear its own costs.

Dated and delivered at Nairobi this 19th day of May, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR