



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 315 OF 2015

BETWEEN

GEORGE MWAI MBURU.....APPLICANT..

AND

MARY WAMAITHA KAITANY.....1ST RESPONDENT.

NAIROBI CITY COUNCIL.....2ND RESPONDENT

(An application for extension of time within which to file and serve the Notice of Appeal and Record of Appeal from the judgment of the High Court of Kenya at Nairobi (H.P.G Waweru, J.) dated 9th October, 2012

in

H.C.C.C No. 687 of 2012)

RULING

1. The applicant has brought the current application under **Sections 3A &3B** of the **Appellate Jurisdiction Act** and **Rules 4,42 & 43** of the **Court of Appeal Rules** (the Rules) seeking;

- ***Leave to file and serve the notice of appeal and record of appeal against the judgment of the High Court dated 9th October, 2012 in H.C.C.C No. 687 of 2012 out of time.***

2. The facts leading to this application are that by a lease agreement dated 17th March, 1997, the 1st respondent leased out two parcels described as Plots B1 & B2 along Kombo Munyi Road (suit properties) to the applicant for a period of 5 years 7 months. The lease was to terminate on 30th April, 2002. According to the applicant, before the lease was terminated the 1st respondent agreed to sell the suit properties to him at a consideration of three million; pursuant to the oral agreement, he paid part of the purchase price with the understanding that the balance would be financed by a loan to be secured by the title documents which were to be availed by the 1st respondent. However, the 1st respondent failed to produce the documents hence frustrating the agreement. Subsequently, the suit properties were allocated to the applicant by the 2nd respondent vide an allotment letter dated 12th November, 2002. It was the

applicant's case that the allotment extinguished/ invalidated any claim the 1st respondent had over the properties. It is on those grounds that the applicant filed suit against the respondents and sought *inter alia* a declaration that he was entitled to the suit properties.

3. The 1st respondent in her defence stated that the agreement for sale was in respect of one of the properties and the agreement had since been rescinded on account of the applicant's failure to raise the agreed purchase price. She challenged the alleged allocation of the suit properties as being null and void on the grounds that firstly, they had been done during the pendency of the suit; secondly, since she held title over the suit properties they were not available for allocation. The 1st respondent also filed a counter-claim wherein she sought *inter alia* vacant possession of the suit properties and mense profits at the rate of Kshs. 30,000/= per month from the date the lease determined until the date of vacant possession. The 2nd respondent on the other hand, maintained that the purported allocation of the suit properties to the applicant was fraudulent firstly, because the numbers of the plots indicated thereon were nonexistent and secondly, the suit properties had already been allocated to the 1st respondent.

4. Upon taking into consideration the evidence before him, the learned Judge dismissed the applicant's suit and allowed the 1st respondent's counter-claim vide a judgment dated 9th October, 2012. Aggrieved by that decision, the applicant filed a notice of appeal on 10th October, 2012 and requested for certified copies of the proceedings on even date. Thereafter, the applicant obtained an order of stay of execution on 3rd May, 2013 on condition that he paid the mense profits which had accrued as at the date of the ruling and to subsequently, pay the monthly accruing mense profits by the 10th of every month pending the hearing and determination of the intended appeal.

5. The certified proceedings were ready and collected on 24th July, 2013 by the applicant's advocates. Subsequently, an appeal being Civil Appeal No. 311 of 2014 was filed in this Court on 7th November, 2014. However, the same was struck out on 16th October, 2015 pursuant to an application by the respondents.

6. Turning back to the application, the grounds in support thereof were that firstly, the delay in filing the appeal was on account of misapprehension of this Court's rules by the applicant's former counsel; based on previous decisions of this Court, counsel was of the mistaken belief that the record could not be filed without the certified decree otherwise it would be rendered incompetent. The applicant's counsel filed the appeal on 7th November, 2014 upon obtaining the decree and certificate of delay, however, the same was struck out; therefore, mistake of counsel ought not to be visited upon the applicant. Secondly, that the 1st respondent does not stand to suffer any prejudice if the orders sought are granted because she continues to receive the mense profits as ordered by the High Court; the applicant has been in occupation of the suit properties for over 19 years and stands to be evicted if the orders sought are not granted. Thirdly, that the intended appeal has an overwhelming chance of succeeding.

7. In response, the 1st respondent deposed that it was manifest that the applicant had repeatedly been indolent and passive in pursuing this matter. The certified proceedings of the High Court were ready on 24th July, 2013 hence the applicant ought to have filed the record on or before 24th September, 2013; the appeal which was struck out had been filed more than one year after the receipt of the proceedings. After the appeal was struck out, the advocate on record wrote to the Deputy Registrar of the High Court on 26th October, 2015 to issue an eviction order against the applicant; on the same date and subsequently on 3rd November, 2015 the applicant filed applications in the High Court under a certificate of urgency seeking stay of execution of the decree; both applications were dismissed for want of prosecution. Thereafter, the applicant filed an application before this Court being Civil Application No. 262 of 2015 seeking extension of time within which to file the notice of appeal and record of appeal but withdrew the same on 23rd December, 2015. Since then the applicant has engaged in multiple suits both in the High Court and the Business Premises Rent Tribunal over the suit properties with the aim of evading the course of justice.

8. The 1st respondent submitted that the intended appeal has no probability of success. She deposed that

she continues to suffer because she has been kept away from the fruits of her judgment; in as much as the applicant was ordered to pay mense profits of Kshs. 30,000/= the same was not adequate since the applicant receives at least Kshs. 509,000/= per month as rent for the said properties.

9. Mr. Kamau, learned counsel for the applicant, submitted that the reason for the delay in filing the appeal had been explained by the applicant, that is, that his former advocate was under the misapprehension that the record could not be filed without the certified copy of the decree; the misapprehension was due to the earlier decisions of this Court which held that a decree was a primary document and failure to incorporate the same in the record rendered the appeal incompetent. To buttress his argument, counsel cited decisions of this Court in **Jedida Alumasa & 3 others -vs- S. S. Kositany (1997) eKLR** and **Premier Dairy Ltd. -vs- Amarjit Singh Sagoo & Another (2009) eKLR**. According to him, the intended appeal was arguable and the applicant had demonstrated that the 1st respondent would not suffer any prejudice in the event the order sought is granted.

10. Mr. Okeyo, learned counsel for the 1st respondent, in opposing the application, submitted that the explanation tendered for the delay ought to be tested. He argued that this Court's rules were amended in the year 2010 and the appeal that was struck out was filed in 2014 after the said amendment; that the certified proceedings were collected in July, 2013 and what remained was a certificate of delay and the certified decree; there was no reason given as to why the certificate of delay was not picked up sooner which was a clear indication of indolence on the part of the applicant's counsel.

11. Counsel for the respondent submitted that in as much as the general principle is that mistake of counsel ought not to be visited on the client, there are exceptions; one such case is where inconvenience will be visited upon the respondent. In this case judgment was delivered in 2012 and the respondent has not enjoyed the fruits thereof since then.

12. I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. There is no doubt that the discretion that I am being called upon to exercise in this application is under **Rule 4** of the Rules which provides:-

“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 doing any act authorized or required by these Rules, whether before or after 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.”

13. The discretion under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In **Henry Mukora Mwangi -vs- Charles Gichina Mwangi** in **Civil Application No. Nai. 26 of 2004**, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the

respondent if the application is granted.”

14. The applicant herein under **Rule 82** of the Rules was required to lodge the appeal with 60 days of filing the notice of appeal. It is not in dispute that the applicant herein filed the notice of appeal on 10th October, 2012. In computing time within which to lodge an appeal, **Rule 82** provides that any period certified by the Registrar as having been required to prepare proceedings should be excluded. See this Court’s decision in **Mariam Abubakar Ileri & another -vs- National Cereals & Produce Board Civil Application No. 9 of 2008.**

15. In this instant case, the applicant requested for proceedings vide a letter dated 10th October, 2012. The Deputy Registrar of the High Court vide the Certificate of Delay issued on 11th September, 2014 certified that the period which was required to prepare and supply the proceedings was between 10th October, 2012 to 24th July, 2013. It was also indicated in the Certificate that the proceedings were collected on 24th July, 2013. It is then clear that time within which the applicant was required to file the intended appeal commenced running on 24th July, 2013. The current application has been brought over 2 years after the lapse of the requisite time for filing the appeal. In my view whether this delay was unreasonable ought to be determined with the explanation given for the delay.

16. The applicant’s former counsel deposed that he did not file the record upon receiving the certified proceedings because he waited for the certified decree to be issued by the High Court which in his view was a primary document; the certified decree was issued on 11th September, 2014 and on 7th November, 2014 he filed the appeal which was struck out. Before the amendment of the **Appellate Jurisdiction Act** to incorporate the overriding objective of the Court in **Sections 3A & 3B** in the year 2010, the initial approach by the Court was to strike out appeals where primary documents were omitted from the record. This much is demonstrated by the following sentiments of this Court in **Premier Dairy Ltd. (supra)**:

“A certified copy of decree is a primary document. It is not one of those documents which under rule 85 of this Court’s Rules, may be brought in by filing a supplementary record of appeal or which if defective may be amended and brought in the filing of a supplementary record of appeal under rule 89(3) of this Court’s Rules. As we stated earlier, Mr. Amoko, for the appellant concedes that the record does not contain a certified copy of the decree. In view of what we have stated above, the omission is not curable....”

17. However, after the amendment the Court’s position with regard to omission of primary documents from the record of appeal changed as demonstrated by this Court’s sentiments in **Deepak Chamanlal Kamani & another -vs- Kenya Anti- Corruption Commission & 3 others [2010] eKLR;**

“So that as Lord Woolf says in the BUGIZZI Case, the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.

.....

We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under rule 89 (3) of the Court’s rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal.”

Based on the foregoing, I find that the misapprehension by the applicant’s former advocate was bona fide taking into account the earlier position of this Court. This explains the delay from the date the proceedings were collected that is, 24th July, 2013 to 16th October, 2015 when the appeal was struck out

for being filed out of time without leave of the Court.

18. Thereafter, the applicant through his former counsel filed an application dated 26th October, 2015 being **Civil Appl. No. Nai. 262 of 2015** for extension of time to file and serve the record of appeal. In my view the application was filed within reasonable time taking into account that the appeal was struck out 10 days before. In **Jedida Alumasa & 3 Others -vs- SS Kesitany Civil Application No. Nai. 337 of 1996** Bosire, Ag. J.A (as he then was) held,

“It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal.”

19. However, on 23rd December, 2015 the said application was withdrawn and this Court granted leave to the applicant to file another application hence the application before us which was filed on 29th December, 2015. The applicant attributed blame to his then counsel for filing an erroneous application and maintained that the current application was filed timeously after the withdrawal. I find that the delay is wholly attributable to the applicant’s former counsel and I am not prepared to condemn the applicant for such transgression. Madan, J.A. in **Murai -vs- Wainaina (No.4) [1982] KLR 38** stated,

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of 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 mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do.”

In view of the explanation given I find that the delay was not inordinate.

20. Having taken into account the issues raised by the applicant I find that the intended appeal is arguable. I also find that no prejudice would be occasioned to the respondents’ if the leave sought is granted.

21. The upshot of the foregoing is that I exercise my discretion in favour of the applicant and allow his application. Accordingly, leave is granted to the applicant to file and serve the record of appeal within 21 days of this ruling. The costs of this application shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 17th day of June, 2016.

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR