



IN THE COURT OF APPEAL
AT ELDORET
(CORAM: GATEMBU J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. 56 OF 2015

BETWEEN

WINSTON MAKOKHA.....APPLICANT

AND

AGGREY WANJALA MUSIMA.....RESPONDENT

(An application for extension of time to file and serve a Notice of appeal

arising from the ruling and judgment of the High Court of Kenya

at Bungoma, (F. N. Muchemi, J.) dated 8th March, 2011

in

HCCC NO. 41 OF 1996 (O.S)

RULING OF THE COURT

1. By his application dated 20th June 2011, and filed in Court on 28th June 2011, the applicant seeks extension of time within which to file and serve a notice of appeal. He intends to challenge a judgment delivered on 8th March 2011 by the High Court at Bungoma dismissing his suit, HCCC No. 41 of 1996 (OS), against the respondent. Although the pleadings in that suit are not part of the record of the application before me, it emerges from the judgment of the High Court that the applicant sought orders to be declared the owner, through adverse possession, of the respondent's properties known as Title Numbers E. Bukusu/N. Sang'alo/2866, 2867 and 2868.

2. When the application came up for hearing before me, learned counsel for the applicant Mr. E. O. Kweyu referred me to the application and the supporting affidavit. He urged that following delivery of the judgment by the High Court on 8th March 2011 the applicant filed a notice of appeal on 14th March 2011; that the applicant later decided to engage the services of an advocate to act for him; that upon perusing the court file, the advocate discovered that the notice of appeal was filed away and not taken to the Deputy Registrar for endorsement and that the applicant therefore requires leave to file and serve a valid notice of appeal.

3. Opposing the application, learned counsel for the respondent Mr. Anwar referred me to the replying affidavit sworn by Ocharo Kebira advocate on 25th January 2016 and urged that the application is devoid of merit; that the applicant has not demonstrated the nature of the intended appeal; that in any event the intended appeal has no chance of success as the matters that were the subject of the suit in the High Court are res judicata in light of earlier court proceedings in which the matter was finally resolved and that the intended appeal is therefore frivolous.

4. Furthermore, counsel for the respondent argued, the applicant has not explained the reasons for delay; the applicant does not say when he made the discovery that the notice of appeal he filed had not been endorsed or when he instructed his advocates or indeed why there was delay in presenting the present application. Citing the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 (unreported)**, amongst other decisions, counsel argued that the applicant has not made out a case for the court to exercise its discretion in his favour. He urged me to dismiss the application saying that allowing the application will occasion great prejudice to the respondent as the judgment of the High Court has since been executed and the applicant evicted from the property.

5. In his brief reply, Mr. Kweyu argued that no prejudice would be occasioned to the respondent if the application were granted; that the applicant remains in occupation of part of the suit property; that there is no evidence before the Court to show the applicant has been evicted.

6. I have considered the application, the affidavits and the submissions by learned counsel. Although the applicant based his application on Rules 41, 42 and 43 of the Court of Appeal Rules, 2010 (the Rules), the power to extend time in an application of this nature is provided for under Rule 4 of the Rules. Rule 4 of the Rules, provides that:

“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 as a reference to that time as extended.”

7. There are many decisions of this Court providing guidance on the principles applicable when considering an application for extension of time to file a notice and record of appeal under Rule 4. The exercise of the power under that rule involves exercise of judicial discretion. The factors to be considered in exercising the discretionary power include: the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice. (See: **P N N vs Z W N [2014] eKLR**).

8. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (supra) to which counsel for the respondent referred, this Court stated:

“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 delay; secondly, the reason for 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.”

9. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR**, Waki, JA stated:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the

resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38.”

10. What then, are the circumstances in the present case? The applicant deposed that he “*filed a notice of appeal on 14th March 2011 in person with an intention of filing the records of appeal in 60 days as stipulated by the law.*” The respondent does not dispute that a notice of appeal was filed and served on 14th March 2011. That was done, undoubtedly, within 14 days from the date of delivery of the judgment and in accordance with the requirements of Rules 75(2) and 77(1) of the Rules.

11. The applicant then says he decided to engage an advocate, who, on perusing the court file discovered that the said notice of appeal was just filed away and not taken to the Deputy Registrar for endorsement. The applicant does not say when he engaged his advocate. Neither does he say when the advocate made the discovery that the notice of appeal was not endorsed by the Deputy Registrar.

12. Based on his averment in his affidavit, the applicant was aware that he had 60 days from the date of lodging the notice of appeal to file the memorandum of appeal and the record of appeal. Having filed the notice of appeal on 14th March 2011, he should then have filed his memorandum and record of appeal by 13th May, 2011. Mindful as he was of the time within which the memorandum and record of appeal should have been filed, he should have discovered, by 13th May 2011 at the latest, that he needed leave of the court to lodge a notice of appeal assuming as he did that he required such leave. Even though the present application is dated 3/6/2011, it was not filed until 28th June, 2011. Even if one was to grant the applicant the benefit of doubt and exclude the period prior to 13th May 2011, there is still unexplained delay of over one and half months in presenting the present application. For that reason alone, I would have been reluctant to allow the applicant’s application.

13. But there is another critical matter on which the application turns. It is common ground that the applicant filed and served a notice of appeal, which as already mentioned was filed and served within the period prescribed under the Rules. In that regard, the respondent deposed in his replying affidavit that “*the applicant’s notice of appeal was filed and served on the 14th March 2011.*”

14. Although the applicant considers that notice to be invalid for what he says is lack of endorsement by the Deputy Registrar, that notice has neither been withdrawn nor struck out. In those circumstances, to allow the applicant to file and serve another notice of appeal would mean that there would, in effect, be two notices of appeal by the applicant challenging the same decision.

15. The situation here has precedent. In a reference to the full Court from the decision of a single judge, the Court in **Ocean Freight Shipping Company Limited vs. Oakdale Commodities Limited Civil Application No. Nai. 198 of 1995** said:

“The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the Court, was heard by a single judge (Shah, J.A). The learned single judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought rightly, in our view, that what the applicant ought to have asked him to do was to extend time by such a period as would validate the notice of appeal lodged on the 21st August, 1992.”

16. In the case of **Dolphin Palms Limited vs. Al- Nasibh Trading Co. Ltd. and two others –Civil Application No. 112 of 1999**, Omolo J.A, in addressing a similar issue stated;

“The prayer is that I should extend time to enable the applicant to file a notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is valid one cannot be a decision to be made by a single judge; that is a province of a full bench. Mrs. Gudka at first told

me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of this Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 5 (2) (b), an application to strike out a notice of appeal can only be heard and determined by the Court not by a single judge.”

17. In **Pullin Harakchand Shah vs Southern Credit Banking Corporation** (2008) eKLR Onyango Otieno, JA, agreed with those views and stated:

“I do agree with the full Court and Omolo J.A. The notice of appeal filed on 20th July, 2007 is validly on record and to order another one to be filed out of time would mean two notices of appeal in support of one appeal. Further, it is not mine as a single judge to declare the notice of appeal filed on 20th July, 2007 as withdrawn. That is, as Omolo J.A rightly stated in the Dolphin case (supra), the work of a full bench and not a single judge. The best I can do, and I do, since the notice was properly filed, is to extend time such that it is validated for purposes of the record of appeal which was not filed within the time required after it was filed.”

18. And recently in **Robert N. Kamau and another vs. Kirika Kamunga, Civil Application No. 270 of 2014**, Murgor, JA expressed the same views.

19. The result is that, as the applicant’s notice of appeal of appeal filed and served on 14th March 2011 is neither withdrawn nor struck out, I decline to grant the prayers sought in the applicant’s application dated 20th June 2011 as to do so would result in two notice of appeal on record. The application is hereby dismissed. I make no orders as to costs.

Orders accordingly.

Dated and delivered at Eldoret this 14th day of June 2016.

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR