



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 17 OF 2016

BETWEEN

EMMANUEL NGADE NYOKA.....APPLICANT

AND

KIDHEKA MUTISYA NGATA.....RESPONDENT

(Application for leave to file a Notice and Record of Appeal out of time against the judgment and decree of the Environment and Land Court, (Angote, J.) dated 19th December 2013

in

ELCCA. No. 5 of 2009)

RULING

The **applicant, Emmanuel Ngade Nyoka**, filed a suit against the **respondent, Kidheka Mutisya Ngata**, in the Senior Resident Magistrate's Court, Kilifi, in 1999 seeking *inter alia* an order for specific performance of a contract between the parties for sale of a plot of land known as **Plot No. Kilifi/Kijipwa/173 (the suit property)**. On 5th February 2009, the trial court entered judgment for the applicant and ordered specific performance of the contract. The respondent was aggrieved by that decree and lodged **Civil Appeal No. 5 of 2009**, which was ultimately heard by **Angote, J.** in the Environment and Land Court, Malindi.

On 19th December 2013 the learned judge allowed the appeal after finding that the suit property was agricultural land and that the relevant Land Control Board had not sanctioned the transaction as required by the Land Control Act. Consequently the learned judge held that the transaction was null and void and therefore an order of specific performance could not issue.

The applicant was in turn aggrieved by the decree of the High Court and lodged a notice of appeal evincing intention to lodge an appeal in this Court. However the applicant did not copy the letter bespeaking proceedings to the respondent's advocates as required by **rule 82(2)** of the **Court of Appeal Rules** and in the event, on 14th June 2015, the respondent filed an application for the notice of appeal to be deemed as withdrawn because no appeal had been filed within 60 days of the lodging of the notice of appeal. That application was heard and granted by this Court on 26th February 2016.

The applicant went back to the drawing board and on 11th March 2016 filed another notice of appeal. On 6th May 2016 he filed the Motion on Notice now before me, seeking extension of time and for the notice of appeal to be deemed to have been filed on time. The supporting affidavit, sworn by **Grace Okumu, Advocate** on 6th May 2016 narrates the background I have set out above. Before me learned counsel submitted that the delay in making the application was not inordinate; that the applicant has a right of appeal, which should as much as possible be facilitated; that the intended appeal is not frivolous; that the respondent had already obtained the proceedings and would be able to file the appeal immediately; and that the respondent would not suffer any prejudice.

The respondent opposed the application relying on his replying affidavit sworn on 5th July 2016. The substance of the replying affidavit and submissions of his learned counsel was that the notice of appeal lodged on 11th March 2016 was never served upon the respondent; that the applicant ought to have applied for leave before filing the notice of appeal; that the applicant had not applied for certified copies of proceedings as required by rule 82 of the Rules of this Court; that the intended appeal was frivolous; that the applicant no longer had any proprietary interest in the suit property having sold it to third parties; and that the delay in making this application was inordinate.

The jurisdiction of this Court to extend time is donated by **rule 4** of the Court of Appeal Rules, which provides as follows:

“4. 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 that act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

As has been stated time and again, the power of the Court to extend time is discretionary and that discretion is wide and unfettered. The only stricture is that the discretion must be exercised judiciously. From the outset, therefore the submission by the respondent that the applicant was obliged to seek extension of time before filing the notice of appeal has no basis because under rule 4, a party can seek extension of time whether before or after the doing of the act in respect of which extension of time is sought.

This Court considered the factors that guide it in the exercise of its discretion to extend time in **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, CA. No. Nai. 255 of 1997** and stated thus:

“It is now 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”.

And in **Tononoka Steels Ltd v. The PTA Bank, CA No. 295 of 1998, Lakha, JA** stated:

“It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, in so far as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits.”

The applicant's notice of appeal was deemed to have been withdrawn on 26th February 2016 and he filed a new notice on 11th March 2016 and this application on 6th May 2016. I do not think the delay is inordinate, although a more diligent party would have moved much earlier. The respondent's contention that the notice of appeal lodged on 11th March 2016 was not served upon him would not of itself

disentitle the applicant to extension of time; the applicant is seeking extension of time so as to regularize that notice of appeal, including service.

As regards whether the intended appeal is frivolous, the applicant has attached to the affidavit in support of the application a draft memorandum of appeal, which sets out the issues that he intends to raise before the full court. Among the issues is whether there was a competent appeal before the High Court and whether specific performance was available in the circumstances of this case. In ***Athuman Nusura Juma v. Afa Mohamed Ramadhan, CA No 227 of 2015***, I stated as follows regarding the role of a single judge in determining the merits of an intended appeal in an application for extension of time:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”. In the circumstances of this application, the issue raised by the respondent is not an open and shut issue, and I bear in mind that the respondent will be at liberty to apply to strike out any appeal that the applicant may finally file, if indeed there’s no right of appeal. In a situation like the one before me, I think it is always better to err on the side of caution.”

The combined effect of **Article 159** of the Constitution which emphasizes substance over form and procedure and the **overriding objective** whose aim is to enable the Court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases commends exercise of discretion in favour of the applicant. As the Court observed in ***Nicholas Salat v. IEBC & 6 Others, CA No. 228 of 2013***, that the general trend following the adoption of the overriding objective and Article 159 of the Constitution is that courts now strive, as much as possible, to hear and determine disputes on merit, without being unduly constrained by procedural lapses.

I also bear in mind that since appeals in Malindi are now heard in real time, the parties are not likely to suffer the prejudice that usually arise from delayed hearing and determination of appeals. In the premises, I exercise my discretion in favour of the applicant and allow the motion dated 6th May 2016. The applicant shall file and serve the notice of appeal upon the respondent **within 7 days** from the date of this ruling. The applicant shall thereafter file and serve the record of appeal **within 21 days** from the date of the filing the notice of appeal. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Malindi this 15th day of July, 2016

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR