



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 227 OF 2015

BETWEEN

ATHUMAN NUSURA JUMA.....APPLICANT

AND

AFWA MOHAMED RAMADHAN.....RESPONDENT

(An application for extension of time to file a Notice of Appeal against the ruling and order of the High Court of Kenya at Mombasa, (Odero, J.) dated 28th April 2015 and delivered by Muya, J. on 8th June 2015

in

H.C.C.C. No. 174 of 2005 OS)

RULING

By his Notice of Motion dated 6th August 2015, the applicant, **Athuman Nusura Juma**, craves extension of time and for the Court to deem his notice of appeal, lodged out of time on 7th July 2015, to have been lodged on time. The notice of appeal is in respect of a ruling by the High Court at Mombasa (**Odero, J.**) dated 28th April 2015 and delivered on behalf of the learned judge by **Muya, J.** on 8th June 2015.

The short background to the application is that the dispute between the parties stated when the respondent, **Afwa Mohamed Ramadhan**, then the wife of the applicant, filed an originating summons in the High Court in Mombasa on 26th August 2005, seeking *inter alia*, determination of her share in the properties known as **Kilifi/Mtwapa/3820** and **Plot No. 151/XVII/Mombasa**. That suit was heard and dismissed by **Azangalala, J.** (as he then was) vide a judgment dated 5th March 2009. Aggrieved by the judgment, the respondent filed in this Court **Civil Appeal No. 162 of 2009**. By a judgment dated 16th March 2012, the Court found in her favour and awarded her 25% of the value of each property. The Court further directed that the properties be valued by a valuer appointed by the High Court.

A valuer was duly appointed and by a valuation report dated 9th August 2012, he assigned a value of Kshs 32 million to **Kilifi/Mtwapa/3820** and Kshs 30 million to **Plot No. 151/XVII/Mombasa**. After hearing submissions on behalf of the parties, Odero, J., by a ruling dated 25th April 2015, directed the applicant to

pay to the respondent within 90 days Kshs 8 million being 25% of the value of **Kilifi/Mtwapa/3820** and Kshs 7.5 million being 25% of the value of **Plot No. 151/XVII/Mombasa**. This ruling and order did not satisfy the appellant, who on 18th September 2014, applied for its review, contending that it did not comply with the order of this Court. Odero, J. heard and dismissed the application for review by a ruling delivered on 8th June 2015. It is in respect of that ruling that the appellant seeks extension of time to appeal to this Court.

The grounds upon which the application is based, as set out in an affidavit sworn on 6th August 2015 by the applicant's learned counsel, **Mr. Godfrey Mutubia**, and his submissions before me are that after hearing the application for review, Odero, J. reserved the ruling to a date to be notified. On 28th May 2015 his firm received a notice from the High Court indicating that the ruling would be delivered on 5th June 2015 at 9.30 am. A copy of that notice was annexed to the affidavit. On the appointed date and time, counsel proceeded to the court and was advised at the information desk that **Muriithi, J.** would deliver the ruling. However, upon getting to Muriithi, J.'s court, he found that the learned judge was not sitting and was advised that a new date would be notified for delivery of the ruling after which he left.

No further notice was served and the applicant and his advocates were not aware of the delivery of the ruling until 6th July 2015 when counsel received a letter from the respondent's advocates informing him, *inter alia*, that the ruling was delivered on 8th June 2015. He immediately proceeded to court and obtained a copy of the ruling on 7th July 2015 and on the same day he lodged a notice of appeal. By the time he lodged the notice of appeal, it was out of the 14 days prescribed by **rule 75** of the **Court of Appeal Rules** by some 14 days. On 28th August 2015 the applicant filed the application for extension of time in Nairobi because this Court was not sitting then.

In those circumstances, counsel submitted, the failure to file the Notice of Appeal on time was occasioned by delivery of the ruling without notice; that there was no inordinate delay in lodging the notice of appeal once the applicant's advocates learnt of the delivery of the ruling; that the intended appeal was arguable as demonstrated by the applicant's draft memorandum of appeal; and that on the whole, a case had been made out for extension of time. The applicant concluded by calling to his aid the rulings of this Court in **Eastleigh Mattresses Ltd v. Stephen Mihang'o Kariuki & 2 Others, CA No. Nai 208 of 204**, **Edith Gichugu Koine v. Stephen Njagi Thoithi, CA No. 11 of 2014 (Nyeri)**, and **Peter Kariuki M'Nkanata v. Sabela Ncekei Kirima, CA No Nai 140 of 2010**.

The respondent opposed the application vide her replying affidavit sworn on 6th November 2015 in which she narrated the historical background of the dispute, which I have summarized above. The substance of her response, as expounded and presented by her learned counsel, **Mr. Isaac Onyango** was that the litigation had dragged on for a long time; that it was finally settled on appeal by this Court which directed the two matrimonial properties to be valued and the respondent to receive 25% of the value; that the applicant had failed to co-operate and to contribute his share of the valuer's fees; that he had also filed spurious applications in a bid to delay conclusion of the matter; and that on the whole, he was employing all manner of delaying tactics.

On the question of the date of delivery of the ruling, the respondent conceded that the ruling was not delivered on 5th June 2015 as notified. However, she contended it was Muya, J. who was scheduled to deliver the rulings on behalf of Odero, J. on 5th June 2015 and that after waiting from 9.30 am to 2.30 pm the learned judge advised the parties that the rulings would be delivered on 8th June 2015 at 2.30 pm as he had an urgent assignment. She maintained that a clerk from the office of the applicant's advocates, who was known to her, was present when Muya J. changed the date of delivery of the ruling.

Mr. Onyango concluded by submitting that the applicant had not met the threshold for extension of time; that he had not made any efforts towards filing the appeal, such as applying for proceedings; that the intended appeal had no chances of success; and that since the intended appeal arose from execution proceedings, the applicant could only appeal with leave, which he had not obtained. In support of the respondent's position, counsel cited the rulings in **Peter Luka Ndutu v. Daniel Wambua Ndavi, CA No.**

Nai. 317 of 2007; Tamil Enterprises Ltd v. Official Receiver & Provisional Liquidator of Continental Credit Finance Ltd, CA No. Nai. 264 of 2004 and Njogu Macharia v Paul Wairuri Mwangi, CA No. 110 of 2006.

I have duly considered the application, the affidavits in support and in reply, submissions of learned counsel and the authorities they relied upon. **Rule 4** of the Court of Appeal Rules, which confers jurisdiction on this Court to extend time, is in the following terms:

“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.”

The nature of the Court’s discretion under that rule is wide and unfettered. The only qualification is that the discretion should be exercised judiciously. Previously the rules required a party seeking extension of time to provide **“sufficient reason”** to justify extension of time. That stricture was however removed by an amendment of the Rules in 1985. In **Fakir Mohamed v. Joseph Mugambi & 2 Others C.A. No. Nai. 332 of 2004**, the Court stated as follows regarding the discretion under Rule 4:

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 the 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 ...”

In **Mongira & Another v. Makori & Another, [2005] 2 KLR 103**, this Court, after referring to **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, C.A. Nai. 251 of 1997** which reiterated the above factors upon which the Court exercises discretion, stated thus:

“Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general”. Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.

There is no dispute that the ruling was not delivered on 5th June 2015 as notified to the parties in writing. I have perused the notice that was sent to the advocates for both parties and noted it was specific that the ruling would be delivered at 9.30 a.m. The respondent avers that she had to wait until 2.30 pm to be informed orally that the ruling would be delivered on 8th June 2015 and that a clerk from the offices of the applicant’s advocates, known to her, was present. The applicant’s counsel has, on the other hand, deposed that he went to take the ruling personally at 9.30 a.m. as advised by the court and that he left after he was told that Muriithi, J., who was scheduled to read it was not sitting. What is not in doubt is that there was some confusion on the part of the court, confirmed most vividly by the respondent who regretfully had to wait for 5 hours to learn of the date of the ruling. In the absence of a notice as previously issued by the court, and in view of the confusion I have adverted to, I have doubts whether indeed the applicant and his advocates were aware of the new date for the ruling, which doubt I would give to them. To that extent I am satisfied that the reason for failure to file the notice of appeal on time is satisfactorily explained.

I do not think, in the circumstances of this application, that the delay was inordinate or the conduct of the applicant dilatory, to warrant refusal to exercise discretion in his favour. He learnt of delivery of the ruling on 6th July 2015, obtained a copy thereof the next day and filed the notice of appeal the same day,

albeit out of time by some 14 days. The fact that the appellant went all the way to Nairobi to file the application for extension of time is not consistent with a party deliberately seeking to delay the dispute. The delay appears to have arisen between the filing and hearing of the application due to the modalities of transfer of the file from Nairobi back to Malindi, which cannot be blamed on the applicant.

The respondent urges me to find that the intended appeal is not arguable because the applicant has no right of appeal. On the other hand the applicant argues that the High Court erred by failing to appreciate that this Court awarded the respondent 25% of the actual, rather than the estimated value of each property. He contends further that the 25% is the actual value realized upon sale of the properties and not a value estimated by the valuer, which may not be realized from the market.

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.

Under the overriding objective too, I would lean towards exercising my discretion in favour of the applicant. The aim of the overriding objective is to enable the Court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases. (See *Kariuki Network Ltd & Another v. Daly & Figgis Advocates*, CA No. Nai 293 of 2009). As this Court stated, albeit in a different context, 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. (See *Nicholas Salat v. IEBC & 6 Others*, CA No. 228 of 2013).

I agree with the respondent that this litigation has now dragged on for a long time. But I also bear in mind firstly, that the applicant is entitled to exercise his right of appeal, and secondly, if and when such appeal is filed, it is possible to hear and determine it in Malindi in real time. The prejudice that the respondent is likely to be exposed to is therefore not insurmountable.

Taking all the foregoing into account, and the fact that this litigation must also come to an end sooner than later, I allow the motion dated 6th August 2015 and direct the applicant to file and serve a 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 1st day of July 2016

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR