



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, JA. IN CHAMBERS)

CIVIL APPLICATION NO.58 OF 2015 (UR 48/2015)

BETWEEN

SALAMA BEACH HOTEL LIMITED.....APPLICANT

AND

MARIO ROSSI.....RESPONDENT

*(Being an Application for extension of time to file a fresh Notice of Appeal and Record of*

*Appeal from the Order of the High Court of Kenya at Malindi (Angote,J.) dated 9<sup>th</sup> May, 2014*

In

*High Court Civil Case No.84 of 2010)*

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**RULING OF THE COURT**

Aggrieved by **Angote J's** order directing the applicant, on 9<sup>th</sup> May 2014 to pay Kshs.14,000,000/= to the respondent as the value of a villa that the latter had agreed, by a consent, to construct for the former, the applicant filed Civil Appeal No.10 of 2015 to challenge the award. The respondent, for his part challenged the validity of the appeal and applied by a motion brought pursuant to **Rules 82 (1)** and **84** of the Court of Appeal Rules that it be struck out on the grounds that it was lodged out of time and was not accompanied by a certified copy of the order appealed from. The application which was opposed was argued before the full bench of this Court which found, *inter alia*, that the applicant was required by **rule 82** aforesaid to file the appeal within 60 days from the date the notice of appeal was filed; that the proviso to **rule 82 (1)** allows a party who intends to appeal and who has within 30 days of the decision sought to be appealed against, applied, in writing for proceedings and served a copy thereof on the opposite side, to omit, in computing the 60 days, the number of days certified by the High Court to have been taken in preparing the proceedings; that the rule disentitles an intended appellant who has failed to apply within the specified 30 days or to serve on the opposite party the letter bespeaking the proceedings, from reaping the benefits of the proviso; that the overriding objective was not available to the applicant where the appeal was filed out of time; and that the appeal was lodged after a delay of some seven months from the date of the notice of appeal.

The court relied on a total of five authorities that confirm how this Court has consistently treated appeals

brought out of time in similar circumstances. Those authorities are **Christine Wangare Munga vs David Mwaura**, Civil Appl.No.196 of 2013, **Ramji Devji Vekaria v Joseph Oyula** Civil Appl.No.154 of 2010, **Benedict Mwanzighe & another v Gasper Walele & 2 others**, CA No.255 of 2010, **Musyoka Mutie Makau v Peter Mutie Makau & another**, CA No.Nai 303 of 2013, and **Development Bank of Kenya & another v Francis Ndegwa t/a Muruguru Holdings Ltd**, CA No.28 of 2013.

The Court further held that the appeal was also incompetent for the reason that a certified copy of the order appealed from was not annexed to it contrary to **rule 87 (1) (h)** of the Court of Appeal Rules; that the applicant failed to utilize the provisions of **rule 88** to correct the omission by introducing, through a supplementary record, a certified copy of the order within 15 days of lodging the appeal; that even after this chance the applicant had another opportunity to file a certified copy of the order if it sought leave to do so; that up to the date of the hearing of the application to strike out the appeal, the applicant had not availed itself any of these easy and plain options; that since an appeal can only be against a decree or order, the appeal would be rendered fatally defective and incurable even under the overriding objective in the absence of a certified copy of the order appealed from, since certification required under the rule is intended to authenticate the order, therefore failure to annex a certified copy is not different from completely failing to annex one altogether. For this conclusion the court relied on **Floris Pierro v Giancarlo Falasconi**, CA No.145 of 2012.

With that the Court allowed the respondent's application, finding that Civil Appeal No.10 of 2015 was incompetent and proceeded to strike it out with costs.

About one month after the appeal was struck out the applicant brought the instant application praying that;

***“The Honourable Court be pleased to extend the time limited by these Rules for filing and serving a fresh notice of appeal and record of appeal.”***

In support of the application, the applicant relied on the very same grounds as those relied on in opposition to the respondent's application to strike out the appeal, namely, that after the decision of **Angote, J** awarding to the respondent Kshs.14,000,000/= the applicant sought, through several letters to the Deputy Registrar, to be supplied with certified copies of the proceedings and order to no avail; that they were only supplied on 6<sup>th</sup> January, 2015 after the time prescribed for the lodgment of appeal had elapsed; that the Deputy Registrar issued to the applicant certificate of delay; that the respondent conceded to the applicant's application for extension of time, and the court so ordered that time be extended and the appeal be deemed to have been filed within time and that this notwithstanding the court went ahead to strike the appeal out.

The application was resisted by the respondent who urged me to find that litigation must come to an end, this Court having made a decision on a similar application; that the primary documents that led to the striking out of the appeal have once again not been included in the proposed record of appeal; and that the court having granted leave to the applicant to file a proper record out of time the present application is *res judicata*.

Parties through their respective advocates filed written submissions which they relied on fully, not wishing to highlight them. In those submissions and in my own assessment, it is a common factor that the full bench of this Court in striking out the appeal firmly found that the appeal was filed out of time and secondly that a primary document was not filed along with the record of appeal. While the applicant, relying on **Trimborn Agricultural Engineering Ltd v David Njoro Kabaiku**, CA (APP) No.274 of 1998 submitted that, since there was a notice of appeal and record of appeal in place, time did not run during this period because there was a valid appeal for all intents and purposes; that in the event I was to find against that submission, then the delay would be explained by the pending of the proceedings in Civil Appeal No.10 of 2015; that the delay in bringing this application could also be explained by the fact that the applicant's directors are not residents of Kenya and it was not easy to obtain their depositions in the matter; and that the appeal has very good prospects of success.

The respondent in reply reiterated that the full bench having made findings regarding the appeal, a single judge could not set aside, review or overturn that decision; that the orders sought have already been dealt with and determined, rendering this application *res judicata* and that the applicant continues to be in breach of **Rule 87 (1) (h)** of the Court's Rules.

The main question being raised in the foregoing arguments is whether as a single judge, I can extend time within which the notice of appeal and the appeal can be lodged despite the finding of the full bench.

I reiterate that Civil Appeal No.10 of 2015 was struck out principally on two grounds; that the appeal was filed out of time and that a primary document, a copy of the order appealed from was not certified. This background must be borne in mind in considering the application. Under Rule 4 of this Court's rules a single judge has unfettered discretion to extend time, but like all other judicial discretions, the discretion of a single judge, on behalf of the full bench must be exercised judicially. The applicant is only required to place sufficient material before the single judge explaining the reasons and circumstances leading to the delay.

The single Judge in addition, as was stated in **Fakir Mohamed v Joseph Mugambi and 2 others** Civil (Appl. No.) NAI 332 of 2004, has no limit as to the factors to consider as long as they are relevant. Some of those factors that have been developed by judicial precedent include, the period of delay, the reasons 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 complying with time limits, the resources of the parties or whether the matter raises issues of public importance. All these are relevant, but not exhaustive factors a single Judge ought to take into consideration.

See **Leo Sila Mutiso v Rose Hellen Wangari Mwangi** Civil Application No.255 of 1997.

The full bench having found that the appeal as initially brought was incompetent, I do not see how the applicant will surmount that hurdle even if I was to grant the extension sought, without proof by the applicant that the two grounds upon which the appeal was struck out no longer exist; that the circumstances under which the appeal was struck out have been addressed. Without proof, for instance, that the letter bespeaking proceedings was served upon the respondent any subsequent appeal to challenge the decision of **Angote, J** of 9<sup>th</sup> May 2014 must fail as the certificate of delay will not be of any assistance. Secondly the copy of the order annexed to the affidavit in support of this application is still not certified. Although the question whether the appeal has any chances of success is one on which a single judge cannot make a definitive determination, it is, however clear from the foregoing that the appeal may "possibly" not succeed. See **Leo Sila Mutiso**, (supra).

In the end I come to the conclusion that there has been no plausible explanation for the delay; the decision of the learned Judge of the court below having been made on 9<sup>th</sup> May 2014, and the dispute having arisen in the year 2010 any further delay will be prejudicial to the respondent. The motion dated 5<sup>th</sup> November, 2015, for these reasons must fail. It is dismissed with costs.

**Dated and delivered at Malindi this 1<sup>st</sup> day of July, 2016**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**