IN THE COURT OF APPEAL

AT MALINDI

(IN CHAMBERS: OUKO J.A.)

CIVIL APPLICATION NO. 5 OF 2016

BETWEEN

FILIPPO FEDRINI …….…….. APPLICANT

AND

IBRAHIM MOHAMED OMAR ……..……...… RESPONDENT

(Being an application for extension of time to file and serve notice of appeal against the judgment of the Environment & Land Court at Malindi (Angote, J.) dated 23rd October, 2015)

in

E.& L.C.C.C.No. 107 of 2009)

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RULING

In an application,like this, brought pursuant to Rule 4 of theCourt of Appeal Rules for the enlargement of time to file and serve the notice of appeal,it is settled that it must be demonstrated that the delay is not inordinate;that the applicant was prevented by plausible reason or reasons from lodging the notice of appeal or the record of appeal within the prescribed period;that the other side will not be prejudiced if time is enlarged;and (possibly) that the appeal would probably succeed. See **Sila Mutiso V RoseHellen Wangari Mwangi, Civil Application No.255 of 1997**. On this last principle, it must be borne in mind that, although the court is not expected to determine whether or not there is a good arguable case on appeal, in some cases, however it may be material to have regard to the merits of the appeal because it may be futile to extend time to pursue a hopeless appeal. See **Africa Airlines International Ltd V Eastern & Southern African Trade & Development Bank(2003) KLR 140**.

It must equally be remembered that an application under Rule 4 aforesaid is an invitation to the single judge to judicially exercise his or her unfettered discretion in considering whether or not to extend time.

Finally,it is not every delay in taking any appropriate step required under the rules or directed by the court that would disentitle a party the right to seek to challenge any decision to this Court. It is only unreasonable and unexplained delay that is culpable. And whether or not a delay is unreasonable will largely depend on the circumstances of each case. See **Wasike V Khisa(2004)KLR 197**.

Applying these strictures to the application before me, it is noted that the Environment and Land Court at

Malindi (**Angote,J**) dismissed the applicant's suit on 23rd October,2015. In terms of the provisions of **Rule 75(2)** of the Court of Appeal Rules the applicant had 14 days, up to 13th November 2015 to lodge an appeal against the aforesaid decision and 7 days from the date of lodgmentof the appeal to serve the notice on the respondent. Instead, on 7th March 2015 he brought the present application for leave to lodge the notice of appeal out of time on the grounds that after hearing arguments of counsel for the parties by way of highlighting respective written submissions,the learned Judge reserved the judgment to be rendered on notice; that after failing to receive communication from the court regarding the date for the delivery of the judgment, on 15th February,2016 the applicant's counsel wrote to the Deputy Registrar of the trial court seeking a date for the mention of the matter before the trial Judge regarding the delivery of the judgment. Before the Deputy Registrar could respond, learned counsel for the respondent to whom the letter was copied replied indicating that the judgment had, as a matter of fact been delivered on 23rd October,2015.

The decision of the learned Judge has aggrieved the applicant,who now wishes to exercise his right of appeal to challenge it in this Court. He argues that the intended appeal raises fundamental questions of law and fact regarding the ownership of certain prime parcels of land in Casurina area in Malindi,which were ordered to be sold and part of the proceeds thereof being €368,000 be retained by the applicant and the balance be shared on a 50:50 basis between the parties.

The respondent opposed the application on the grounds that,in accordance with the court practice the date for the delivery of the judgment was posted on the court's notice board and on its website;that the applicant's advocate,like the respondent's ought to have been diligent by looking out on the notice board; that the applicant was guilty of inordinate delay; that the notice of appeal was not only filed out of time and without leave but it was also never served on the respondent;that the application is intended to deny the respondent the enjoyment of the fruits of the judgment entered in his favour;and that the application is frivolous, vexatious and amounts to an abuse of the court process. Although not part of the grounds in the application, learned counsel argued that the application was incompetent for the reason that the affidavit in support thereof was sworn by the advocate and not by the applicant. Other than the fact that this issue does not form part of the grounds relied upon,it is settled that an advocate is only precluded from swearing to contentious matters or to those matters in which he has no personal knowledge. See **Kenya Horticultural Exporters (1977)Ltd V Pape t/a Osirua Estate (1986)KLR 705**. All the facts deposed by **Mr. Gikandi** learned counsel for the applicant were clearly not controversial. They were matters, such as the date of the hearing,the letter he wrote to the Deputy Registrar, the letter he received from **Mr. Kariuki** of Kiarie Kariuki & Co. Advocates,all matters within counsel's knowledge. I find no substance in the objection.

I turn to the crux of the application. **Order 21 rule 1** of the Civil Procedure Rules provides that;

> ***"1. In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.***
>
> ***Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment."***

The learned Judge was clearly in violation of this provision for,first reserving the delivery of the judgment without specifying the date,a procedure which is abhorred and discouraged by**Order 21 rule 1**. By the aforesaid rule the learned Judge was required within the 60 days to render the judgment. The submissions were highlighted on 4th July 2015 and judgment delivered on 23rd October 2015,over 100 days. Secondly, there was failure by the learned Judge to record reasons for not delivering the judgment as prescribed,and finally he failed to notify the parties of the delivery date. While posting of such notices on the notice boards or websites are encouraged, they are only to augment the procedures and requirements laid down under the rules.

Learned counsel for the applicant,perhaps out of concern over the delayed judgment, took the initiative of inquiring from the court the date for its delivery. Counsel has deposed that he learnt of the delivery of the judgment on 25th February

2016. It therefore took the applicant ten days upon learning of this development to bring this application. Ten day in the circumstances of this case cannot be said to be unreasonable.

There can therefore be no doubt that the applicant acted diligently;that he caused no delay; that he has given a reasonable explanation for the delay;and that the respondent shall not be prejudiced by time for filing record of appeal being extended.

Accordingly I allow the motion dated 17th March,2016,deem the notice of appeal filed on 29th February 2016 duly filed and served and order that the record of appeal be filed and served within 14 days of the date of this order.

Costs will be in the intended appeal.

Dated and delivered at Malindi this 30thday of September, 2016

W. OUKO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR