



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 4 of 2016 (UR 3/2016)

BETWEEN

NICHOLAS OMONDI APPLICANT

AND

A ROCHA LIMITED RESPONDENT

(Being an application for leave to file and serve notice of appeal out of time and or for leave to have the notice of appeal filed and served out of time be deemed as duly filed and served on time in respect of the intended appeal against the Judgment of the High Court (Mutungi J.) dated 11th September 2015

in

ELC Case No. 596 of 2010 (OS)

RULING

1. By an amended Notice of Motion dated 10th May 2016, the applicant seeks leave to file and serve Notice of Appeal out of time and or leave to have the Notice of Appeal dated 10th September 2015 and served on 19th October 2015 be deemed to have been duly filed and served in respect of an intended appeal against the judgment of the High Court (Mutungi, J.) dated 11th September 2015.

2. The ground in support of the application as stated on the face thereof is that the High Court judgment was delivered on 10th September 2015 without notice and or knowledge of the applicant or his then counsel on record; that after the applicant’s then counsel became aware of the judgment he filed a notice of appeal on 12th October 2015 and duly served the respondent’s counsel on 19th October 2015; that on 20th October 2015 the applicant’s counsel wrote a letter to the High Court requesting for typed proceedings of the Judgment and inadvertently omitted to request for certified copies of proceedings as required under **Rule 82** of the Court of Appeal Rules; that the applicant’s then counsel advised that he should seek another counsel to represent him in the intended appeal; that the process of identifying another counsel took time; in addition, the applicant had financial constraints in engaging new counsel. A further ground in support is that the delay in filing and serving the notice of appeal and letter requesting for proceedings was neither inordinate nor deliberate on the part of the applicant.

3. The Notice of Motion is supported by three affidavits deposed by the applicant and learned counsels Ms Louis Wahome and a supplementary affidavit deposed by learned counsel Mr. Jeremy Njoroge.

4. The respondent filed a replying affidavit dated 3rd May 2016 deposed by learned counsel Ms Carolyn Karimi Nyaga. A point of law raised by the respondent in opposing the application is that there is no notice of change of advocates; that the present application was filed by the firm of J.M. Njenga & Co. Advocates on behalf of the applicant while the firm of L.Wahome Advocates was the firm that filed the Notice of Appeal dated 12th October 2015. It is urged that the firm of J.M. Njenga & Co. Advocates is irregularly on record and cannot file any valid pleadings as they have not filed a notice of change of advocates.

5. In opposing the application, the respondent urged that the then counsel for the applicant had notice and knowledge that judgment was to be delivered on 10th September 2015; that a notice for delivery of judgment dated 7th September 2015 was issued by the Deputy Registrar to all counsel; that the applicant's letter requesting for judgment was not served upon counsel for the respondent; that whereas the Notice of Appeal was filed on 12th October 2015 and the instant application filed on 13th January 2016, no explanation has been offered for the four (4) month delay in lodging the application; that the intended appeal has been overtaken by events as the applicant has been evicted from the suit premises; that the respondent stands to suffer prejudice if the application is allowed and that if leave is granted, the Court would be engaging in an academic exercise since the filing of the record of appeal is already out of time and no application has been made seeking extension of time to file and serve the record of appeal.

6. At the hearing of the application, learned counsel Ms V.M. Wambua appeared for the applicant while learned counsel Ms Carolyn Karimi Nyaga holding brief for Ngatia & Associates appeared for the respondent. Both counsel cited authorities in support of their submissions.

7. Counsel for the applicant reiterated that the ruling was delivered without notice to the applicant's counsel; that delay in filing the instant application was only 18 days and not inordinate; that whereas the Deputy Registrar issued a notice for delivery of judgment dated 7th September 2015, the said notice was never served upon counsel for the applicant; that the notice from the Deputy Registrar annexed to the Replying Affidavit and marked CN1 does not have a stamp from the applicant's counsel and bears a received stamp dated 9th September 2015 from the respondent's counsel and that the absence of a received stamp from the applicant's counsel is proof that the notice was not served upon the applicant.

8. On the issue that the firm of J.M. Njenga is not properly on record, counsel submitted that an appeal is a new and fresh proceeding and there is no need for counsel to file notice of change of advocate. The case of **Kenya Agricultural Research Organization -v- Stephen Ngaruiya Kanyanja, Civil Appeal No. 215 of 2015** was cited in support of submission that notice of change of advocate is not necessary when filing a notice of appeal. As regards the deposition in the replying affidavit that execution of the judgment and eviction of the applicant had taken place, it was submitted that execution proceedings should not be used to bar a party from urging his appeal. In response to the deposition in the replying affidavit that the time for lodging the record of appeal had lapsed, counsel submitted that the time had not lapsed as time begins to run when typed proceedings have been received which is not so in this case; counsel reiterated that the applicant has not received typed proceedings from the High Court and as such time has not begun to run.

9. Counsel for the respondent, Ms Nyaga, relied on the replying affidavit in opposing the instant application. It was reiterated that the applicant did not request for a copy of the proceedings from the High Court which action would have entitled the applicant to rely on the proviso to **rule 82** of the Court of Appeal Rules and a Certificate of Delay issued; that the time available to the applicant for lodging the record of appeal had lapsed; that the applicant has not made an application seeking extension of time to file and serve the record of appeal; that the High Court judgment has been executed and the intended appeal has been overtaken by events; that the supplementary affidavit deposed by Mr. Jeremy Njenga Advocate should be struck out as it purports to be a reply to an affidavit dated 3rd May 2016 allegedly deposed by Ms Carolyn Karimi Ngatia when there is no such person instead the person who swore the

affidavit dated 3rd May 2016 is Ms Carolyn Karimi Nyaga; that despite the error in name being pointed out, the applicant's counsel refused to withdraw the offending supplementary affidavit which should be struck out. Counsel emphasized that the explanation given by the applicant for failing to file and serve the notice of appeal within time was not satisfactory; that the firm of L.Wahome who acted for the applicant was aware that judgment was to be delivered on 10th September 2015 and a notice dated 7th September 2015 had been issued by the registry; that the applicant's then counsel L. Wahome did not write to the Deputy Registrar requesting to be advised on the judgment date; that execution has already taken place and the respondent has expended large sums of money in evicting the applicant from the suit property. Counsel pointed out that there is no draft memorandum of appeal filed to support the present application to enable the Court to weigh on the chances of success of the intended appeal.

10. Counsel for the respondent cited the case of **Sultan Hasham Lalji & Others -v- Ahmed Hasham Lalji & Others**, Civil Appeal No. 3 of 2003 where it was expressed that:

“Rule 23 (1) of the Court of Appeal Rules requires, among other things, that a party to application or appeal who changes his advocates should lodge with the Registrar and serve a Notice of Change of Advocates. Since the definition of an “appeal” in Rule 2 includes an “intended appeal” (as signified by a notice of appeal) then the respondents were required to file a notice of change of advocates.”

11. Dicta from the case of **Harry Njai -v- Gasper Walele & Others**, Civil Application No. NAI. 255 of 2010 was cited where this Court expressed:

“It is clear that the appeal which is yet to be filed will be hopelessly out of time. That situation could have been salvaged if there was proof that the respondent had, within thirty (30) days from the date of delivery of judgment, written a letter to the Deputy Registrar, bespeaking the copies of the proceedings and judgment and if such a copy of such letter had been sent to the applicant. In this case at the end of 30 days from 2nd November, 2007, no such letter had been written and a copy sent to the appellant. This was readily conceded. The allegation that the respondents were not aware of the date of the delivery of the judgment until 21st November, 2007, cannot be of any assistance to the respondents because, by the time they came to know of the existence of the judgment on 21st November 2007, thirty days had not expired. They still had about ten days within which such a letter could have been written and sent to the applicant. If they were able to prepare and file notice of appeal as they did, what could have stopped them from writing a short letter similar to the one they wrote on 25th October, 2010 and send a copy of it to the applicants? None at all. In our view, the sixty-day period for lodging memorandum and record of appeal started running from 21st November 2007 considering the extension granted by Ojwang J. and that that was the date when the notice was filed. If after the sixty days from that date the memorandum and record were not filed, then only compliance with the proviso to rule 81 (2) as spelt out above could have helped the situation. That rule is the same in the new Rules except it is now rule 82 and the letter is now required to be “served” upon the respondent instead of being sent to the respondent and rule 112 is now rule 115. Since the respondent failed to comply with it, nothing would salvage the appeal. Hence the notice of appeal no longer serves any useful purpose.

We have considered whether the recent amendments to Appellate Jurisdiction Act which introduced section 3A and 3B and whether the provisions of Article 159 of the Constitution could breath a new life into this matter, but with respect we are unable to find anything that would assist the respondents in this matter...”

12. This is a single judge matter and I have considered the application and the affidavits in support thereof as well as the replying affidavit and submissions by counsel and judicial authorities cited. This being an application for extension of time under **Rule 47(1)** of the Court rules, the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi**, (Civil Application No. Nai. 255 of 1997) (unreported), outlines the general principles for determining such an application as follows: - *“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 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” These factors were further enumerated in **Wasike -v- Swala (1984) KLR 591**, where it was stated that the factors to be taken into account concerning applications for extension of time include:

- a. length of delay,
- b. reasons for the delay,
- c. the chances of the appeal succeeding if the application is granted and
- d. the degree of prejudice to the respondent if the application is granted. (See also **Leo Sila Mutiso -v- Rose Hellen Wangari, Civil Application No. NAI 255 of 1997**).

13. A preliminary point that needs to be determined is whether the firm of J. M. Njenga representing the applicant is properly on record. The respondent submitted that a notice of change of advocates ought to have been filed by the firm of J.M. Njenga & Co. Advocates to take over the conduct of this matter from the firm of L.Wahome & Co. Advocates. In support of the submission, the respondent cited the case of **Sultan Hasham Lalji & others -v- Ahmed Hasham Lalji & Others, Civil Appeal No. 3 of 2003** where it was expressed that a party to application or appeal who changes his advocates should lodge with the Registrar and serve a Notice of Change of Advocates. Conversely, the applicant cited dicta from the case of **Kenya Agricultural Research Organization -v- Stephen Ngaruiya Kanyanja, Civil Appeal No. 215 of 2015** to support the submission that notice of change of advocate is not necessary when filing a notice of appeal.

14. I have carefully considered the Ruling and decision of Okwengu, JA in **Kenya Agricultural Research Organization -v- Stephen Ngaruiya Kanyanja, Civil Appeal No. 215 of 2015**. The learned appellate Judge expressed as follows:

“Rule 22 of the Court of Appeal Rules that deals with appearances provides that a party to any proceedings in the Court may appear in person or by advocate. This means that appearance is not limited to the advocates who represented the party in the court from which the appeal emanates. The appeal proceedings before this Court are separate proceedings in regard to which fresh instructions are necessary. The presumption that the same advocates must represent a party before this Court has therefore no legal basis. Indeed Rule 23 of the Court of Appeal Rules that provides for change of advocates states:

23. (1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar notice of the change and shall serve a copy of such notice on the other party or on each other party appearing in person or separately represented, as the case may be.

In my view such a change would only be necessary if a party wishes to change from an advocate who is already appearing for him in this Court.” (Emphasis).

15. In the instant application, the notice of appeal dated 12th October 2015 was filed by the firm of L.Wahome & Co. Advocates. A notice of appeal invokes the jurisdiction of this Court and it signifies an intended appeal. In my view, once a notice of appeal has been filed by an advocate, a notice of change of advocate must be filed if a new counsel is to take over the conduct of the matter. I concur with dicta by the learned appellate Judge Okwengu, JA in **Kenya Agricultural Research Organization -v- Stephen Ngaruiya Kanyanja, Civil Appeal No. 215 of 2015** where she stated that notice of change of advocate would only be necessary if a party wishes to change from an advocate who is already appearing for him in this Court. In the instant case, the firm of L. Wahome was already on record for the applicant and the firm

of J.M. Njenga could only come on record by filing a notice of change of advocate. Failure to file the notice of change renders the amended notice of motion dated 10th May 2016 to be incompetent and not properly on record. I hereby make a finding that the applicants Notice of Motion dated 10th May 2016 is incompetent and is hereby struck out.

16. In the event that I have erred in striking out the amended Notice of Motion, I hereby consider the merits of the application. In an application for extension of time, the substance is to place sufficient material before the single judge and to explain the reasons for delay in filing the notice or record of appeal within time. In the case of **Paul M. Waweru & 2 others [2003] KLR 361**, it was stated:

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under Rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned Judge explaining the reasons for what was clearly an inordinate delay.”

17. I am aware that the discretion I have to exercise under the Rules of this Court is unfettered. There is also a duty now imposed on the Court under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** to ensure that the overriding objective of civil litigation is the just, expeditious, proportionate and affordable resolution of disputes before the Court.

18. The applicant submitted that the period for delay is 18 days. It is not clear how the applicant computed the 18 days. At paragraph 2 (c) of the affidavit in support of urgency deposed by **Mr. Jeremy Njenga** and dated 11th January 2015 (sic), the 18 days is supposedly computed from 10th September 2015 when the judgment of the trial court was delivered to 12th October 2015 when the notice of appeal was filed. This period is not 18 days; it is more than 18 days. It remains unclear how the applicant computed the 18 days as the period of delay.

19. On the other hand, the respondent at paragraph 12 of the Replying Affidavit submitted that the period of delay is four (4) months computed from 12th October 2015 when the Notice of Appeal was filed to 13th January 2016 when the instant application was lodged.

20. The applicant explains the delay at paragraphs (d) and (e) on the face of the Notice of Motion to effect that he was seeking an alternative counsel for legal representation for purposes of the intended appeal and which process of identifying another advocate and financial constraints led to delay; that the delay was not inordinate and was occasioned by factors beyond the applicant’s control.

21. The respondent has urged that the instant application is incompetent because no draft memorandum of appeal has been attached to the application. In **Kiramburi -v- Githinji (1986) KLR 405 at 408**, this issue was considered and the court observed that it is important to give full information to the court and a sufficient statement of the nature of the judgment and reasons for desiring to appeal against it to enable the court determine whether or not a refusal of the application would appear to cause injustice.

22. I have perused the instant application and the supporting affidavits. There is no draft memorandum of appeal to enable this Court *prima facie* weigh the chances of success of the appeal. However, I observe that on the face of the application at paragraph (c) of the Notice of Motion it is urged that the High Court disregarded orders issued on 16th December 2003 in ***Nairobi High Court Succession Cause No. 361 of 2003 – In the Matter of the Estate of Daphine Millas Sheppard***. I am of the considered view that a *prima facie* sufficient reason has been given that may disclose an arguable appeal.

23. I note the dicta in **Charagu -v- Kaguru (1986) KLR 443** where despite the delay of 2 months from the day when the notice of appeal was due, the court exercised its discretion in favour of the applicant. In the present case, the delay is about four (4) months.

24. Notwithstanding the delay, a critical issue in this application is the failure by the applicant’s counsel to write a letter to the Deputy Registrar requesting for typed proceedings and such letter being served

upon the respondent. It is not in dispute that a letter requesting for proceedings was not written to the Deputy Registrar. Instead, a letter requesting for a certified copy of the judgment was written. The applicant submitted that failure to request for typed proceedings is an excusable error on the part of the then counsel for the applicant.

25. In **Murai -v- Wainaina (No. 3) (1982) KLR 33** it was held that an advocate's *bona fide* mistake, but not inordinate delay on the advocate's part, may amount to sufficient cause. However, I am also guided by dicta in **Harry Njai -v- Gasper Walele & Others, Civil Application No. NAI 255 of 2010** where this Court expressed that an appeal which is yet to be filed will be hopelessly out of time and that situation could have been salvaged if there was proof that the respondent had, within thirty

30. days from the date of delivery of judgment, written a letter to the Deputy Registrar, bespeaking the copies of the proceedings and judgment and if such a copy of such letter had been sent to the applicant.

26. In my view, the applicant has not given a satisfactory explanation why a letter requesting for proceedings was never written to the Deputy Registrar. At paragraph 6 (a) of the supporting affidavit deposed by

Nicholas Omondi dated 11th January 2015 (*sic*), it is stated that a letter requesting for the proceedings had been written. As it turns out, this is not so with the consequence that there is no satisfactory explanation for the failure to write the letter.

27. In totality, my evaluation of the facts and authorities cited lead me to rely on dicta and reasoning in the case of **Harry Njai -v- Gasper Walele & Others, Civil Application No. NAI 255 of 2010** as quoted above and I accordingly find that the instant application is incompetent for want of notice of change of advocate; the application is devoid of merit for lack of a satisfactory explanation for delay and for failure to request typed proceedings within the stipulated time lines. The final order is that the amended Notice of Motion dated 10th May 2016 be and is hereby struck out and dismissed with costs.

Dated and delivered at Nairobi this 4th day of November, 2016

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR