



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CORAM: OKWENGU, J.A. (IN CHAMBERS)

CIVIL APPEAL NO.202 OF 2010

BETWEEN

GEORGE NGATA NJOGU.....APPELLANT

AND

JONAH GOODWIN KARIUKI KANIU.....1ST RESPONDENT

THE MUNICIPAL COUNCIL OF NAIVASHA.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

DIRECTOR OF PHYSICAL PLANNING.....4TH RESPONDENT

(Being an appeal for extension of time within which to lodge an appeal from the Ruling/Order of the High Court of Kenya at Nakuru (Maraga, J.), dated 10th February, 2010

in

H.C. Misc. C. Application No.6 “B” of 2009)

RULING

[1] **George Ngata Njogu**, who is now the applicant, was an interested party in Judicial Review proceedings that was brought in the High Court at Nakuru by **Jonah Goodwin Kariuki Kaniu**, who is now the 1st respondent. The proceedings in the High Court were concluded in favour of the 1st respondent when the High Court (Maraga J. as he then was) delivered a judgment on 10th February, 2010 and issued an order of mandamus compelling the Municipal Council of Naivasha, the Commissioner of Lands and the Director of Physical Planning (now the 2nd, 3rd and 4th respondents), to implement plan No.105 dated 17th August 1995 and restore plot No.158 to its original size and ground location in accordance with the approved plan No.105 of 17th August, 1995.

[2] The applicant who was aggrieved by the judgment of the High Court filed a notice of appeal on 15th

February 2010. The applicant has now lodged a notice of motion dated 14th June 2016, seeking to have time for lodging the appeal extended to 9th July 2010. Grounds stated and reiterated in an affidavit sworn by learned counsel Mr. Paul Amuga, who is representing the appellant, support the motion.

[3] In short, immediately after the delivery of the High Court judgment, the applicant's counsel wrote to the deputy registrar on 15th February 2010 bespeaking proceedings. However, the letter was not copied to the respondent's advocate. The advocate for the applicant was supplied with proceedings on 30th June 2010. The applicant subsequently obtained a certificate of delay from the Registrar of the High Court and lodged the memorandum of appeal on 9th July 2010. The applicant has now realized that due to a mistake made in his advocate's office, he is caught up under the proviso to rule 81 of the Court of Appeal Rules as, the letter bespeaking proceedings was not copied to the respondent's advocate. The applicant pleads that he has an arguable appeal which he is keen to prosecute and therefore prays that time be extended to enable him have his appeal heard and determined on merit.

[4] Mr. Joseph Karanja Mbugua an advocate representing the 1st respondent, has sworn a replying affidavit urging that the appellant's motion is misplaced and should be dismissed. This is because the motion is anchored on an incompetent appeal as the notice of appeal was filed after the statutory period; the application for extension of time was filed six years after the incompetent appeal was filed; and that the applicant has not given any satisfactory explanation for this delay. Mr. Karanja maintains that the failure to serve a copy of the letter bespeaking the proceedings on the respondent's counsel renders the whole appeal incompetent and an extension of time cannot cure this defect, and that the respondent is highly prejudiced by the appellant's indolence.

[5] During the hearing of the motion, Mr. Steve Biko who held Mr. Amuga's brief, urged the Court in the interest of substantive justice not to penalize the applicant due to a mistake made by his counsel. Mr Biko cited *African Airlines International Ltd vs Eastern & Southern African Trade & Development Bank (PTA BANKO [2003] eKLR;* and *Kenya Industrial Estates Limited vs Transland Shoe Manufactures Ltd & 2 Others [2000] eKLR,* in particular the Court's holding that even where there is inordinate delay the court can still extend time depending on the circumstances of the case. He urged the Court to exercise its unfettered discretion flexibly.

[6] On his part Mr. Karanja reiterated what he stated in his affidavit and urged the Court not to exercise its discretion in the applicant's favour because there are no good reasons for doing so. Mr. Karanja submitted that the applicant's motion was simply an attempt to steal a match against the respondent who had already given due notice to have the appeal struck out. In support of his submissions that the appellant had not given sufficient reasons for the inordinate delay, counsel relied on the following authorities and urged the Court to dismiss the appeal.

(i) *Diamond trust Bank Ltd vs Bidali [1995-1998] 1 EA 45*

(ii) *Maritim vs Kibaru [2005] 2 EA 162*

(iii) *Mawji vs Lalji & Others [1990-1994] EA 337*

[7] Learned counsel Mr. Odhiambo who was holding brief for the 2nd respondent supported the appellant's motion and urged the Court to allow the same. There was no representation during the hearing for the 3rd and 4th respondents although they were both served with the hearing notice.

[8] The applicant's motion for extension of time is brought under Rule 4 of the Court Rules. That Rule states as follows:

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

[9] The authorities that were provided by counsel for both parties were spot on, on the fact that the rule provides an unfettered discretion that should be exercised judicially and that in exercising such discretion, all relevant factors including the length of the delay; the reasons for the delay; the arguability of the appeal and the degree of prejudice to the respondent if time is extended should be considered. (**African Airlines International Ltd vs Eastern & Southern African Trade & Development Bank (PTA BANKO [2003] eKLR (Supra) and Mariara & Others vs Matundura [2004] 2 EA 163 and Diamond trust Bank Ltd vs Bidali [1995-1998] 1 EA 45**)

[10] Under Rule 82 of the Court Rules, the applicant herein, ought to have filed the appeal within 60 days of the date when he lodged the notice of appeal. However, the proviso to Rule 82 allows such time as certified by the Registrar of the High Court as required for the preparation and delivery of a copy of the proceedings to be excluded from the computation of 60 days provided two requirements are met. That is that the applicant had applied for copy of the proceedings within 30 days of the decision appealed from; and that the applicant had served a copy of the letter bespeaking the proceedings upon the respondent.

[11] The applicant met the first condition as he applied for copies of the proceedings on 15th February 2010, which was on the 5th day after judgment of the High Court. Nevertheless the applicant did not meet the second condition, as he did not serve the respondents with a copy of the letter bespeaking the proceedings. Under the proviso to Rule 82(2) of the Court Rules, the applicant would not therefore be entitled to have the time taken in providing him with copies of the proceedings excluded from the computation of time.

[12] The above notwithstanding the applicant obtained a certificate of delay from the Registrar of the High Court confirming that the period from 15th February 2010 to 30th June 2010 was required to prepare and supply proceedings. This was on the illusion that this period would be excluded so that his record of appeal including memorandum of appeal filed on 9th July 2010 would be filed within time. The applicant only appears to have woken up from this illusion when the respondent filed a notice on 13th June 2016 seeking the Court's leave to have the appeal struck out as having been filed out of time. This is what has necessitated the applicant's motion that was filed the following day on 14th June 2016.

[13] It is apparent that the applicant's motion for extension of time was filed over 6 years from the time the judgment subject of the appeal was delivered. The only reason that has been given for this delay is that a mistake was made in the office of the applicant's advocates by an assistant who prepared the letter bespeaking the proceedings and failed to copy the letter to the respondent's advocate, and that this fact only came to the advocates attention when the respondent's advocate filed a notice for the striking out of the applicant's motion as having been filed out of time.

[14] In **Murai v Wainaina (No. 4) 1982 KLR 38** the predecessor of this Court held that mistake of an advocate or legal advisor may amount to sufficient reason as per Rule 4 of the Court Rules that at that time required sufficient reasons to be established for grant of extension of time. The position now is a little different the Rule having been amended to give the single Judge unfettered discretion in determining an application for extension of time. However that discretion must be exercised judicially. This means that the discretion must be exercised having regard to the particular circumstances of the case including not only the length of the delay and reasons for the delay, but also the chances of the appeal succeeding and the degree of prejudice that the respondent may suffer if the application is granted. (**Patel v Waweru & Others [2003] KLR 361**).

[15] Although the application for extension of time was made slightly more than six years after the decision subject of the appeal, it is evident that the applicant acted with due speed and diligence in filing the notice of appeal and sending the letter bespeaking the proceedings to the Registrar of the superior court. The applicant acted with equal speed in making this application immediately it realized the mistake that had been committed. It was a simple but costly oversight on the part of the advocate's assistant. Going by the speed with which the notice of appeal was filed and the request for proceedings made to the court, it is evident that the applicant was desirous of pursuing the appeal. The intended appeal arises from a dispute over land. The applicant has filed a memorandum of appeal that raises several arguable issues.

It is desirable that the applicant be given an opportunity to have his day in the appellate court so that the matter can be brought to finality. I note that no prejudice is likely to be suffered by the respondent.

[16] In all the circumstances of this matter, I find it appropriate to exercise my discretion in the applicant's favour. Accordingly I allow the applicant's motion dated 14th June 2016 and order that time be extended for the applicant to file his appeal and that the appeal already filed be deemed as properly filed.

Dated and Delivered at Nakuru this 8th day of December, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR