



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL (APPLICATION) NO. 270 OF 2014

BETWEEN

ROBERT NJUGUNA KAMAU.....1ST APPLICANT

MOSES MPESHA KOIKAI.....2ND APPLICANT

AND

KIRIKA KAMUNGU.....RESPONDENT

(Application for extension of time to file and serve a Notice of Appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Onyancha, J) dated 9th April 2014,

in

H.C.C.C. No. 598 of 2009)

RULING

This application relates to a Notice of Motion dated 13th October 2014 seeking orders for extension of time to be granted under **Rule 4** of the **Court of Appeal Rules 2010** within which to file and serve a Notice of Appeal in an intended appeal against a judgment of Onyancha, J delivered on 9th April 2014.

The brief facts of the case are that the applicants are the beneficiaries and personal representatives of L R No. Dagoretti/Mutuini/559 (***“the suit property”***) registered in the name of Paul Kamau Njuguna (***“the deceased”***). The applicants filed Nairobi High Court Succession Cause No. 21 of 1999 seeking orders to evict the respondent, from the suit property which they said he was occupying illegally, unlawfully and wrongfully. The respondent in his defence contended that he was the beneficial owner of the suit property which was ancestral land, registered in the deceased’s name, being the eldest son of their grandfather, to be held on trust under customary law. The respondent stated that he had filed for and obtained, a Grant of letters of administration in 1997, but that it was nullified by the High Court when it issued a grant in favour of the applicants. The respondent subsequently filed an application for revocation of the applicants’ grant based on the single ground that, the suit property had been bequeathed to him by the applicants’ step grandmother, Mikki who adopted the respondent from the applicants’ grandmother. This application was also dismissed.

The applicants contended that it was whilst seeking orders to evict the respondent from the suit property that the High Court dismissed the applicants' application for eviction. They were dissatisfied with the decision of the court below, as it failed to take into account various issues, in particular that, the respondent's alleged claim and beneficial interest was never ascertained, and that, the court established without any basis that the respondent was a brother and a beneficiary, of the estate of the deceased.

The applicant have advanced six grounds supported by the sworn affidavit of **Robert Njuguna Kamau** dated 13th October 2014, who deponed that a Notice of Appeal was filed on 16th April 2014, together with a request for certified copies of the judgment, but that their advocate had inadvertently failed to request for the typed proceedings, and to serve the letter of request on the respondents as required by the Court of Appeal rules. It was also contended that there were errors in the copies of the judgment that required to be rectified. The deponent concluded by stating that the delay was not deliberate.

When the application came up for hearing, **Mr. V.M Muia**, learned counsel for the applicant submitted that, due to the advocate's mistake, they did not request for the proceedings whilst requesting for certified copies of the judgment, and did not do so until 23rd May 2014. They also failed to serve a copy of the letter of request for proceedings on the respondents. Counsel further submitted that when they received the certified copies of the judgment and order, they discovered errors on the face of the record. For instance, the copy of the order indicated the date of issuance as 9th April 2013, issued instead of 9th April 2014. Despite notifying the Registry of the errors, the copy of the orders issued on 12th June 2014 and 16th June 2014 continued to read the 9th April 2013. The error was not corrected until 19th June 2014. The applicants thereafter applied for the certificate of delay which was issued on 16th September 2014 specifying 94 days as the time taken for preparation of the of the certified proceedings. Counsel lamented that the delay occasioned in correcting the error, and their failure to request for the certified proceedings was the reason for the delay in filing Memorandum of Appeal. Counsel concluded that the delay was inadvertent and not deliberate, and that the appeal was arguable as it concerned weighty land issues which require to be regularized by this Court; that the suit property had already been distributed amongst the beneficiaries, and that there had been no claim for adverse possession. That the respondent would not suffer any prejudice should the prayers for the enlargement of time be granted.

Under **Rule 4** of this Court's rules, it is settled that, a single judge has unfettered discretion on whether to extend time or not. In so doing, the Court should exercise this discretion judiciously, and not capriciously, in accordance with the guiding principles, having regard to the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court granted the extension sought, as outlined in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** – **Civil Application No. Nai 251 of 1997** where the court stated:-

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

In explaining the delay, various reasons were advanced by the applicants. One reason was that, when the applicants received the certified copies of the judgment and order, there were errors on the face of the record that took a number of days to rectify, while the other reason was that the applicants' advocate inadvertently omitted to request for the copies of the proceedings when applying for the certified copy of the judgment. The advocate also failed to serve the respondent with a copy of the request for proceedings.

In all fairness, one cannot attribute the delay caused by rectification of the record to the applicants or their counsel. This was a matter beyond their control. As for the delay caused by the failure to request for certified copies of the proceedings, and the failure to serve such request on the respondent, it goes without saying that, these are essential steps in invoking the appellate process under the Court's rules.

Having said that, it is observed that Mr. V.M Muia, learned counsel for the applicants unequivocally

sought to take responsibility for this oversight, and was candid about the inadvertence on his part despite the awkward circumstances in which he found himself.

At paragraph 8 of the affidavit in support of this application it was deponed:-

“...our advocates had inadvertently by sheer oversight not requested for the proceedings in the High Court when applying for certified copies of the judgment”.

In the circumstances, I will be guided by **Article 159** of the **Constitution** which enjoins us, not to pay undue regard to procedural technicalities, at the expense of substantive justice, **sections 3A and 3B** of the **Appellate Jurisdictions Act**, and the farsighted providence of Madan, J.A (as he then was) who whilst addressing mistakes of counsel in **Murai v. Wainaina (No. 4) 1982 KLR 38** stated thus,

“a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

Whilst in in **Kenya Cannery Ltd vs. Titus Muiruri Doge - Civil App. No. Nai. 64 of 1990 (unreported)** this Court stated:-

“This Court has held on many occasions that any litigant who wishes to be heard by this Court should not be prevented or penalized due to the mistakes of his Counsel. The advocate has admitted his mistake in failing to interpret the rules properly. This Court has also held that appeals relating to disputes in land should finally be determined by this Court”. (Emphasis mine).

Accordingly, I find that the delay in the circumstances of the case was not inordinate, and has been adequately explained.

Turning to the possibility of success of the intended appeal, it is clear that it relates to the very contentious and highly emotive matter of ownership of land, which is further heightened, in cases such as this, where land is the subject of family succession. I am satisfied that they are not frivolous issues which should be ventilated before this Court.

At this point, I find myself in a dilemma with respect to the application, as the applicants have applied for leave to file and serve a Notice of Appeal out of time, yet, there is a Notice of Appeal filed on 16th May 2014 already on the record. Is it possible for the applicant to apply for extension of time to file yet another notice of appeal? Will that not result in two notices of appeal on record?

In the case of **Ocean Freight Shipping Company Limited vs. Oakdale Commodities Limited – Civil Application No. Nai. 198 of 1995**, a full bench of this court dealt with a similar question from a ruling of Shah J.A as a single judge on the same issue. It stated as follows:

“The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the Court, was heard by a single judge (Shah, J.A). The learned single judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought rightly, in our view, that what the applicant ought to have asked him to do was to extend time by such a period as would validate the notice of appeal lodged on the 21st August, 1992. The applicant did not do so and the learned single Judge thought that:

‘So effectively I am asked to disregard the notice of appeal filed on 21st August, 1992, and allow

the filing of another notice of appeal out of time and then validate ex post facto, the appeal already filed without there being an extension of time to validate the notice of appeal filed on 21st August, 1992. I cannot do so. The applicant is taking too many short cuts.”

Again, in the case of *Dolphin Palms Limited vs. Al-Nasibh Trading Co. Ltd. and two others – Civil Application No. 112 of 1999*, Omolo J.A, in addressing a similar issue stated thus,

“The prayer is that I should extend time to enable the applicant to file a notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is valid one cannot be a decision to be made by a single judge; that is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single judge of this Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 5 (2) (b), an application to strike out a notice of appeal can only be heard and determined by the Court not by a single judge.”

In *Pullin Harakchand Shah vs Southern Credit Banking Corporation (2008) eKLR* Onyango Otieno, JA, also faced with a similar prayer, whilst agreeing with the views expressed in the *Ocean Freight case (supra)* and *Dolphin Palms case (supra)* stated thus,

“I do agree with the full Court and Omolo J.A. The notice of appeal filed on 20th July, 2007 is validly on record and to order another one to be filed out of time would mean two notices of appeal in support of one appeal. Further, it is not mine as a single judge to declare the notice of appeal filed on 20th July, 2007 as withdrawn. That is, as Omolo J.A rightly stated in the Dolphin case (supra), the work of a full bench and not a single judge. The best I can do, and I do, since the notice was properly filed, is to extend time such that it is validated for purposes of the record of appeal which was not filed within the time required after it was filed.”

I am in agreement with the considered views expressed by this Court in the above cases, and accordingly, I am persuaded to exercise my unfettered discretion to allow the application dated 13th October 2014 and order that the Notice of Appeal dated 10th April 2014 and lodged in Court on 16th April 2014 be and is hereby deemed to have been properly filed. The costs of this application shall be in the intended appeal.

Dated and delivered at NAIROBI this 20TH day of FEBRUARY, 2015.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR