



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, J.A.)

CIVIL APPLICATION NO. 32 OF 2014

BETWEEN

THUWEIBA MAKHA 1ST APPLICANT

FATUMA MAKHA.....2ND APPLICANT

RUKIA MAKHA.....3RD APPLICANT

AZIZ MAKHA.....4TH APPLICANT

AND

AISHA JUMA 1ST RESPONDENT

MALIK ABU SHEE.....2ND RESPONDENT

(Being an application for extension of time by Order of Hon. Justice Sichale, JA. dated 14th February, 2014 to file and serve Record of Appeal from the Judgment of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 16th August, 2012 and delivered on 20th September, 2012 within 30 days,

in

H.C.C.A NO. 109 OF 2007)

RULING OF THE COURT

[1] On The 14th February, 2014, **Hon. Sichale, JA** sitting as a single Judge delivered a ruling in Civil Application No. 34 of 2013, in which she made orders as follows-

“The applicant shall have seven days from the date hereof to file and serve the notice of appeal. Thereafter the record of appeal is to be filed and served within thirty days from the date of filing the notice of appeal.”

[2] By an application dated 26th September, 2014, **Thuweiba Maka, Fatuma Maka, Rukia Maka and Aziz Maka** who were the applicants before Hon. Sichale, JA. moved the Court in Civil Application No.

32 of 2014 seeking orders:

“(i) That the Order of the Honourable Justice Sichale, JA. delivered on 14th February, 2014 be extended.

(ii) That the Memorandum of Appeal and record of appeal dated 5th September, 2014 be deemed to have been duly filed and served within time.

(iii) That costs of this application do abide the result of the said appeal.”

[3] The application was supported by an affidavit sworn by Thuweiba Maka wherein it was deponed that although the notice of appeal was filed within the period given by the learned Judge, the record of appeal could not be filed within the time given for two reasons: Firstly, the applicants were unable to get the High Court proceedings in time. Secondly, the applicants’ counsel was away in the USA for treatment. **Leonard Mmbayia**, a clerk in the firm of the advocates representing the applicants also swore an affidavit in support of the application, in which he reiterated that he unsuccessfully sought a certificate of delay from the Court but the same was not signed.

[4] The application was opposed through a replying affidavit sworn by Aisha Juma, who is the 1st respondent. Essentially, she relied on the advice of her counsel, upon which she contended that the notice of appeal was irregularly served outside the period given by the learned Judge; that the applicants has not exhibited any certificate of delay to confirm the alleged delay in procuring the proceedings of the High Court; that even assuming that there was a certificate of delay, under **Rule 82(2)** of the Court of Appeal Rules, the applicants could not rely on the certificate as the letter bespeaking the proceedings was not copied to the respondent, and that in any case, the certified proceedings were obtained in May, 2009 which was three months before the record of appeal was filed; that the court should not exercise its discretion in the applicants’ favour as the applicants are guilty of inordinate delay and the respondent will suffer great prejudice.

[5] Hearing of the motion proceeded before me as a single Judge. **Mr. Hayanga** appeared for the applicants while **Mr. Hamza** appeared for the respondents. In his submissions, Mr. Hayanga urged the court to grant the motion reiterating that the delay in filing the record of appeal was due to the delay in getting typed record of the High Court proceedings; failure to get a certificate of delay; and his absence from the country due to illness. Counsel further urged the court to exercise its discretion in the applicants’ favour as the dispute is between siblings and involves land, and no prejudice was likely to be suffered by the respondents.

[6] On his part Mr. Hamza accepted that the notice of appeal was filed within time, but maintained that it was served after time had expired and without any explanation or leave of the court. Although not disputing the illness of the applicants’ counsel, Mr. Hamza reiterated that the reasons given for the delay were not acceptable particularly as the applicants were given a lifeline by the court but failed to take advantage of it. He argued that by virtue of **Rule 83** of the Court of Appeal Rules, the appeal lodged by the applicants by way of notice of appeal is deemed to have been withdrawn by operation of the law and therefore there is no proper appeal before the court.

[7] In their motion, the applicants invoked **Rule 3 & 4** of the Court of Appeal Rules amongst others. **Rule 4** provides that:-

“The court may on such terms as it thinks just by order extend the time limited by this rule, 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.”

[8] In **Leo Sila Mutiso v Rose Kellen Wangari Mwangi, Civil Application No. Nai 251 of 1997** (Unreported) this Court considering the exercise of discretion under **Rule 4** of the Court of Appeal Rules stated 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 and 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.”

[9] In **African International Limited v Eastern and Southern African Trade & Development Bank [2003] 1 EA 1**, it was held that:

“All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include, the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended.

In an application for extension of time, the discretion which falls to be exercised is unfettered and should be exercised flexibly with regard to the facts of the particular case.”

[20] The sum total of the above is that an application for extension of time under **Rule 4** of the Court Rules, involves the exercise of unfettered discretion. Such discretion is not however exercised whimsically but must be exercised taking into account the circumstances of the particular case. In this case, the orders sought to be extended were made on 14th February, 2014, and the applicants given a maximum of thirty days to comply. The application for extension of time was filed on 29th September, 2014. This means there was a delay of about six months. The applicants have advanced two reasons for the delay. This is their counsel’s absence from the court’s jurisdiction on account of illness, and the delay by the High Court to furnish typed proceedings.

[21] With regard to counsel’s illness, this has been conceded to by the respondent’s counsel. What seems to be in issue is the length of time that counsel was out of the country for treatment. In this regard there was paucity of information as there was no affidavit sworn by the applicants’ counsel. Be that as it may, in her ruling dated 14th February, 2014, Sichale, JA. noted that that the applicants’ counsel had been indisposed, was in and out of hospital, and was still in crutches at the time he appeared before her. Indeed, even when the applicants’ counsel appeared before me, he was still using some form of support in walking. Thus, although, no medical report was produced, I have no reason to doubt counsel’s explanation from the bar that he was not able to attend to the applicants’ matter due to his illness, and that the illness necessitated his absence out of the country in pursuit of treatment abroad. This seems to have been the main factor in the delay as it affected the speed with which the counsel could pursue the typed proceedings from the High Court. The letter dated 14th February, 2014 annexed to the applicants’ supporting affidavit confirms that counsel did send a request to the High Court for typing of proceedings immediately after the ruling. The letter dated 27th May, 2013, also annexed to the applicants’ supporting affidavit also confirms that a request for certified copies of proceedings and judgment had previously been made on 27th May, 2013. These letters demonstrate efforts made by the counsel to obtain the proceedings. The copies of typed proceedings were crucial as the applicants could not prepare their record of appeal without it.

[22] The respondents have faulted the applicants’ attempt to rely on the delay by the court in supplying it with High Court proceedings, contending that the applicants did not comply with the mandatory requirements of **Rule 82(2)** of the Court Rules as the applicants did not serve it with a copy of the letter bespeaking proceedings. **Rule 82 (1) & (2)** of the Court of Appeals Rules states that:-

“82.(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

(a) Memorandum of appeal, in quadruplicate;

(b) The record of appeal, in quadruplicate;

(c) The prescribed fee; and

(d) Security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

[23] The effect of the proviso to **Rule 82(1)** is that a certificate of delay in regard to an application for copy of the court proceedings is intended for purposes of computing the sixty days period for lodging the appeal, such that the time certified as necessary for preparation and delivery of the proceedings is excluded from such computation. In the situation under consideration, six months down the road, no appeal had been lodged. It is appreciated that without the High Court proceedings the applicants were handicapped in preparing the record of appeal, however, no information was given as to when the proceedings were actually supplied so that it is difficult to know the exact period of delay that was caused by the failure to supply the High Court proceedings. Therefore, it can be concluded that no certificate of delay was issued by the court because the period of 6 months delay was not necessary for the preparation and supply of the High Court proceedings. This notwithstanding, as the applicants’ counsel could not prepare the record of appeal without the proceedings, the delay in providing court proceedings is a relevant factor in the exercise of this court’s discretion as to whether time should be extended.

[24] The respondents argued that the applicants having lodged a notice of appeal, failed to institute an appeal within the appointed time as no record of appeal was filed, and therefore in terms of **Rule 83** of the Court Rules, the applicants are deemed to have withdrawn their notice of appeal. In this regard, it is pertinent to set out **Rule 83 & 84** of the Court Rules:

“83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of appeal or record of appeal as the case may be.”

[25] In this case, the respondents have not activated the above provisions as they have not moved the court to deem the applicants’ appeal as withdrawn as required under **Rule 83**, nor have the respondents moved the court under **Rule 84** for the applicants’ appeal to be struck out. What is before the Court is in fact an application for extension of time for filing the record of appeal and this is what I have to address. The fact is that there has been a delay of about six months. The delay is aggravated by the fact that the applicants have already been previously indulged by the Court when time was extended on 14th February, 2014. Nevertheless, although I am alive to **Article 159(2)** that provides one of the guiding principles for the exercise of judicial authority as “*justice shall not be delayed*”, the circumstances of this case are rather peculiar and unfortunate. The applicants’ did what was necessary by engaging an advocate to pursue the

appeal. Unfortunately the advocate has been ill and had to go out of the country for treatment. This affected the speed with which the applicants' appeal could be pursued. Secondly, the matter involves a dispute over a house which the applicants contend form part of their late mother's estate. The applicants are in occupation of this house by virtue of an order for stay pending appeal issued on 6th November, 2014, and therefore, stands the risk of being evicted if the application for extension of time is not granted. On the other hand, although the respondents contended that they were suffering prejudice as a result of the delay, no such prejudice was actually identified or demonstrated.

[26] In the circumstances, it is appropriate that this Court once again exercises its discretion in the applicants' favour. Accordingly, I allow the application and order that the applicants shall file and serve the record of appeal within fourteen (14) days from the date hereof, failing which the appeal shall be deemed as withdrawn in accordance with **Rule 83** of the Court Rules. The applicants shall pay costs of this application to the respondents in any event.

Dated and delivered at Malindi this 31st day of March, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR