IN THE COURT OF APPEAL

AT KISUMU

(CORAM: F. AZANGALALA J.A IN CHAMBERS)

CIVIL APPLICATION NO. 6 OF 2015 (UR 5/2015)

BETWEEN

SOLOMON JUMA AMBUNYA..............APPELLANT/ APPLICANT

AND

JIMMY HABIL MKIMBO...RESPONDENT

(Being an Application for leave to file an Appeal out of time from a judgment and

decree of the High Court at Kakamega (Chitembwe, J.) dated 29th June, 2010

HCCA.NO. 167 OF 2000) (O.S)

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RULING

Solomon Juma Ambunya, the applicant was the unsuccessful party in a suit he filed by way of an Originating Summons in the High Court at Kakamega against ***Jimmy Habil Mkimbo***, the respondent. The High Court, ***(Said Juma Chitembwe, J.)*** handed down its decision on 29th June, 2010 dismissing the applicant's suit. The applicant contends, in the application before me, that he filed a notice of appeal against that decision on 29th July, 2010. He has exhibited a copy of that notice.

In the present application, expressed to be brought under ***rule 4*** of the Court of Appeal Rules, among other provisions invoked, the applicant principally, prays for two orders, the first one being that he be granted leave to file an appeal out of time and the second that the draft Memorandum of Appeal annexed to the application be deemed as duly filed upon payment of the requisite court fees.

In support of the application, the applicant has sworn an affidavit in which he substantially attributes the failure to file the appeal within the time stipulated in the rules of this court to his sickness. He has exhibited to that affidavit treatment notes from Kakamega Provincial General Hospital, two discharge summaries from Moi Teaching and Referral Hospital, a treatment card from Uasin Gishu District Hospital and a ***"To whom it may concern"*** note from the latter hospital.

Also exhibited are copies of a letter to the Deputy Registrar dated 26th July, 2010 bespeaking certified copies of proceedings and Judgment and a certificate of delay dated 28th July 2011.

Miss Rauto, learned counsel for the applicant, submitted before me that the failure to follow up the appeal by the applicant was precipitated by his being taken ill after the Judgment leading to his frequent visits and admissions to hospital and when he improved, the time within which to lodge the appeal had lapsed. Learned counsel further submitted that the applicant's medical bills resulted in his impecuniosity thereby rendering it impossible to lodge the appeal within time.

The applicant according to learned counsel, further suffered memory loss which compounded the situation.

Learned counsel contended that the applicant has an appeal with high chances of success and as the delay has been explained, she urged that my unfettered discretion, under rule 4, be exercised in favour of the applicant.

Mr. Amasakha, learned counsel for the respondent, submitted, in reply, that the applicant does not have an arguable appeal and had not adequately explained the delay in pursuing his appeal. Counsel took issue with the notice of appeal annexed to the application because the same was filed out of time without leave. Learned counsel also took issue with the reason given for the delay and contended that the same was tailor- made for this application as the applicant actively participated in other disputes with the respondent including Kakamega High Court CC No. 99 of 2010 which was determined in favour of the respondent on 15th October, 2014. In that case, according to learned counsel, the issue of sickness was never raised.

Mr. Amasakha, further submitted that the letter bespeaking proceedings and Judgment was never copied to the respondent and the certificate of delay could therefore not assist the applicant in explaining his delay in pursuing the appeal.

It is well settled that the Court has unlimited discretion under rule 4 to extend time for the doing of any act authorized under the rules of this Court. It is also well settled that the Court's discretion is judicial and must therefore be exercised on the basis of evidence and sound legal principles. In **Leo Sila Mutiso -vs - Rose Hellen Wangari Mwangi [Civil Application No. NAI 251 of1997] (UR)**, this, Court stated:-

> **"It is now 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."**

Of course the list given in the Leo Sila Mutiso case is not exhaustive. Each application is determined on the basis of its own peculiar facts and circumstances. The case of **Fakir Mohamed -Vs- Joseph Mugambi & two others [Civil Appl No. Nai 332 of 2004]** illustrates the point. There, the Court stated:-

> **"The exercise of this Court's discretion under rule 4 has followed well beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, possibly the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ..."**

The common feature is that the discretion although unfettered, like all judicial discretions, must be exercised on reason not caprice; the exercise must be not arbitray or oppressive- (See **Samken Limited and Another -Vs- Marcedes Sanchez Reu Tussel & Another [Civil Application No. NAL 21 of 1990] (UR).**

Turning back to the application at hand, the High Court entered Judgment against the applicant on 29th June, 2010 resulting in a decree whereby the applicant's Originating Summons for adverse possession was dismissed with costs. Upon the dismissal of the suit, the applicant appears to have instructed M/s **Mukavale** and Company Advocates to appeal. Under the provisions of **rule 75(2)** of this Court's Rules "the rules" the applicant was obliged to file his notice of appeal within fourteen days of the dismissal of the suit. The notice of appeal exhibited in this application was lodged on 29th July, 2010. That was about fifteen 15 days outside the fourteen 14 days allowed under rule 75(2). That delay has not been explained. The Notice of Motion before me does not seek to validate that lodgement outside the time allowed by the rules.

The applicant had also to explain the delay from 29th July, 2010 to 13th February, 2015 when the motion for extension of time was lodged in court. That is a delay of about 4 years and six months. The Certificate of Delay dated 28th July, 2011 would have explained the delay from 29th July, 2010 when proceedings were applied for and 28th June, 2011 when they were collected but the letter dated 26th July, 2010 bespeaking e proceedings and judgment was not copied to the respondent. Under rule 82(2) of this Court's rules, the applicant is in the premises not entitled to rely upon the provision to rule **82(1)** which excludes, from computation, the time taken to obtain proceedings as certified by the Deputy Registrar of the High Court. So, the period between 29th July, 2010 and 28th July, 2011 remains unexplained.

The principal reason advanced for the delay in pursuing the appeal is sickness.

The period which has been satisfactorily explained is the period when the applicant attended hospital and when he was admitted. The 1st document relied upon by the applicant is a treatment card issued by Kakamega Provincial General Hospital. The document shows that the applicant attended the hospital on 30th August, 2010. So, the delay between 29th June, and 29th August, 2010 was not explained. That is a period of 2 months.

The said document indicates that the applicant was referred to Moi Teaching and Referral Hospital. But the applicant did not go to that hospital immediately. The discharge summary from that hospital indicates that the applicant was admitted to the hospital on 20th December, 2010 and discharged on 15th January, 2011. The period between 28th August and 20th December, 2010 remained unexplained. That is a period of about 3 ½ months.

The next admission at Moi Teaching and Referral Hospital occurred on 17th February, 2014. That information is found in the discharge summary issued by that Hospital. The document indicates that the applicant was discharged on 8th March, 2014.

The period between 15th January, 2011 when he was 1st discharged and 17th February, 2014 when he was next admitted is unexplained. That is a period of about three (3) years. That delay was not explained especially as on the two occasions when the applicant was discharged it is indicated that he had ***"greatly improved".***

The treatment card from Uasin Gishu District Hospital and the note *"to whom it may concern "* from the same hospital do not indicate that the applicant had been admitted to that hospital at any time. The documents show that the applicant has liver cirrhosis and is undergoing treatment. But they do not suggest that the applicant could not attend to little concerns of life such as carrying out correspondence with his advocates. The sickness indeed did not prevent him from participating in Kakamega Environment and Land case No. 513 of 2014 ***[formerly Hcc No. 99 of 2010]*** between him and the respondent herein which was concluded on 15th October, 2014.

The applicant also explained the delay in pursuing the appeal on the ground of his impecuniosity. That in my view is not a valid excuse. Firstly, the applicant did not attempt to prove the same. Secondly ***rule 115(1)*** of this Court's Rules provides relief for deserving cases of impecuniosity. The rule is in the following terms:-

"115(1) if in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an applicant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may by order direct that the appeal may be lodged-

(a) Without prior payment of fees of Court, or on payment of any specified amount less than the required fees;

(b) Without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 107,

and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less the fee set out in the Second Schedule conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he may recover in or consequence of the appeal"

No application under the said rule was made.

Finally the applicant alleged that he also suffered memory loss and presumably because of that incapacity, forgot about pursuing the appeal. It is significant that the medical documents exhibited by the applicant do not mention memory loss. In my view such a condition should have had medical support especially as it was not admitted by the respondent.

I am alive to the fact that the subject matter is land and the matter should not be taken lightly. However, justice looks both ways and the successful party is as much entitled to enjoy the fruits of a judgment as much as the losing party should be given the opportunity to pursue an appeal. In this matter the applicant lost twice. First when his Originating Summons was dismissed and secondly when the respondent's suit for eviction *(Land and environment case No. 513 of 2014)* succeeded and against which no appeal has been preferred.

I am satisfied that the applicant had all the opportunity to pursue his appeal but made no use of that opportunity. His explanation as pointed out above does not stand scrutiny. I find the unexplained delay, which cumulatively covers a period of over three (3) years in ordinate.

I find the epithet that litigation must come to an end apt even in land matters. In the premises I am not inclined to grant the prayers sought. The Notice of Motion dated 11th February, 2015 is ordered dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2015

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR