



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: MURGOR J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI. 257 OF 2013 (UR 187/2013)**

**BETWEEN**

**ESTHER NGENDO.....APPLICANT**

**AND**

**SARATTHA INVESTMENT.....1<sup>ST</sup> RESPONENT**

**ASEGRAL ABDULHUSSEIN MAMUJEE.....2<sup>ND</sup> RESPONDENT**

**FAKHRUDIN MOHAMMED ALI.....3<sup>RD</sup> RESPONDENT**

**MUHSINALI MOHAMMED ALI.....4<sup>TH</sup> RESPONDENT**

**ADAMALI MOHSINALI MOHAMED ESSAJI.....5<sup>TH</sup> RESPONDENT**

*(Application for extension of time within which to file and serve a Record of Appeal out of time from the ruling of S. Munyao J delivered on 26<sup>th</sup> February 2013in Eldoret*

*in*

***ELC No. 461 of 2012)***

**\*\*\*\*\***

**R U L I N G**

By a Notice of Motion dated 25<sup>th</sup> April 2014 the applicant, has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** within which to lodge and serve a record of appeal against a ruling of S. Munyao J, delivered on 26<sup>th</sup> February 2013.

The Notice of Motion before me is in respect of an Originating Summons (OS) filed in the High Court on 2<sup>nd</sup> July 2008. In the OS the applicant stated that she is an heir of the estate of the Late Jonah Njuguna Mwiko, and seeks *inter alia* a declaration that she was in personal occupation of property known as Title No Eldoret Municipality Block 7/107 for over 12 years prior to 1988; and a further declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' rights over the said parcel of land be extinguished by way of adverse possession upon the expiry of 12 years, during which period the applicant had open, peaceful and

uninterrupted occupation, of the parcel of land, having occupied it since 1965; and that upon the expiry of the 12 year period the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents held the land on trust for the applicant; and further that, the transfer made to the 1<sup>st</sup> respondent by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents was invalid and fraudulent.

In a decision delivered by Munyao Sila J on 26<sup>th</sup> February 2013, the learned judge dismissed the application having reached a finding that the applicant and her husband were tenants on the parcel of land, and as such could not claim to own the parcel of land by way of adverse possession.

Being aggrieved by the decision of the High Court the applicant filed a Notice of Appeal on 1<sup>st</sup> March 2013, and subsequently sought to obtain certified copies of the proceedings from the Deputy Registrar.

In an affidavit in support of the Notice of Motion and sworn by **Esther Ngendo**, the applicant, it was deponed that following the delivery of the ruling she was unable to instruct her advocate to file the appeal as she had taken ill. In addition, she had no funds with which to file the appeal. It was when she recovered from her illness that she was able to raise funds from relatives and friends.

In a replying affidavit sworn by **Mansoorali Sorathia** on behalf of the 1<sup>st</sup> respondent it was deponed that, the Notice of Appeal was not served on him, and that the contention that the applicant has been unwell was a falsehood as the applicant has attended court severally in the matter of a taxation following the delivery of the ruling.

In his submissions before me, **Mr. Omboto** learned counsel holding brief for Naikuni Ngaah Advocates for the applicant, stated that by the time of delivery of judgment, the applicant who is an elderly lady was ill. She also had to seek for financial assistance in order to file the appeal. Counsel further submitted that the applicant's counsel is based in Nairobi, and so did not learn of the delivery of the ruling until the expiry of the period stipulated for filing of the appeal. Counsel continued that, the applicant applied for the proceedings, which the Deputy Registrar delayed in issuing and which had occasioned further delay. Counsel emphasized that he had an arguable appeal, and that no prejudice would be suffered by the respondents.

**Ms. Mufuta** learned counsel for the respondents opposed the application. She relied on the replying affidavit of **Mansoorali Sorathia** sworn on 28<sup>th</sup> November 2013. Counsel begun by informing the Court that contrary to the procedure specified by rule 74 of this Court's rules, instead of the applicant seeking to enlarge time for filing of the Notice of Appeal, the applicant had only sought leave to file the draft record of appeal out of time. Additionally, the applicant had not served the respondents with the Notice of Appeal within the requisite 7 days. Counsel submitted that with regard to the time taken to prepare the proceedings and the ruling, no certificate of delay had been obtained. On the reasons for delay, counsel contended that there had never been any reference to ill health on the part of the respondent. Additionally, no medical records were attached, and there was nothing to show that the applicant suffered from any illness. Neither had the applicant provided any support for the contention that she lacked financial capability to file the appeal. Counsel concluded that the application was not well founded and should be dismissed with costs.

In considering the application, this Court has stated time and again that under rule 4 of this Court's rules, it is settled that, the discretion is wide and unfettered in determining whether to extend time or not. In so doing the Court should exercise its discretion judiciously and not capriciously when considering the length of 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 was stipulated 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.***

On the record, the applicant has included a Notice of Appeal dated 11<sup>th</sup> February 2013. The Notice of Appeal is not stamped by the High Court, and bears no evidence that it was lodged with the Registrar. The applicant's problems are further compounded by the omission to serve the Notice of Appeal on the respondents, contrary to the stipulations of Rule 76 (1) of this Court's rules.

In the application before me the applicant has only prayed for time to be enlarged to file the record of appeal out of time. A Notice of Appeal has not been filed, and there is no application seeking to enlarge time for filing of a Notice of Appeal.

In Civil Application No. Nai. 137 of 2004 Simon Muruchi Thiga vs Nation Newspapers Ltd Deverell JA stated thus,

***“The current application before me was filed on 21<sup>st</sup> June 2004. It seeks the following substantive order:-***

***1. That leave be granted to the applicant herein to lodge a record of appeal from the orders of the High Court date 29<sup>th</sup> September 2003.***

***It is to be noted that there is no request for any order relating to the Notice of Appeal. It would appear that the Notice of Appeal has long since been deemed to have been withdrawn in accordance with rule 82(a) since no appeal has been instituted within 60 days of the lodging of the Notice of Appeal in accordance with rule 81.***

***Unless and until there is an order granting leave to file a fresh Notice of Appeal it would be an exercise in futility to extend time for filing the record of appeal the pre condition for the filing of which is the existence of a valid notice of appeal. See the case of K and K Amman v Mount Kenya Game Ranch and others reported in East Africa Law Reports [2003] 1 EA 98 ) (CAK) which came before O’Kubasu JA in May 2003.***

***There being no extant notice of appeal in existence and no application for leave to file a fresh notice of appeal out of time I have no alternative but to dismiss the application with costs.”***

In the circumstances, without a subsisting Notice of Appeal on the record, or an application seeking leave to enlarge time to file a Notice of Appeal, this application is dismissed with costs.

However in the event that I am found to be wrong in arriving at this conclusion, I will address the arguments that were before me as to the length of the delay, the reason for that delay, whether the intended appeal is frivolous and whether the respondent is likely to be prejudiced by the extension sought.

In Grindlays Bank International (K) Ltd v George Barbuor Civil Application NAI. 257/95 following the House of Lords in Ratman v Camarasamy [1964] 3 ALL ER 933 this Court stated: -

***“The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”***

Has the delay been explained? On the explanation that the delay was occasioned by the inability to obtain the proceedings on time, there is no question that the ruling was delivered on 26<sup>th</sup> February 2013. A request for proceedings was made orally in the High Court on 20<sup>th</sup> February 2013. From the date of the ruling until the date of the application, the number of days delay can be computed as 279 days. There is

no certificate of delay available, and without such certificate, any delay cannot be attributed to the Registry.

The other reasons for delay advanced by the applicant are that, she was financially constrained and required assistance to file the appeal; that she had been ill and only recovered from 1<sup>st</sup> August 2013.

Yet, there are no particulars on the record to demonstrate the financial constraints faced. There is nothing to show what financial assistance the applicant sought, was in respect of court filing fees or her advocate's legal fees or both? In essence the applicant claims impecuniosity. Needless to say that, in this regard, **rule 117** of this Court's rules provides relief where an applicant can show that they are facing financial challenges. From the record, there has been no attempt made by the applicant to invoke this process.

On the question of her illness during this period, no details were provided regarding the nature of her illness, when she fell ill, or the length of time it took to recover. No treatment notes or medical receipts were made available to the Court. It is also not known whether or not the applicant was so seriously incapacitated and hospitalized at the time, to the extent that she was unable to communicate with her lawyer.

**In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98**, the Court stated thus:

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

Even with calling to aid Article 159 and Sections 3A and 3B of the Appellate Jurisdictions Act, the shortcomings in the applicant's application are such that these provisions cannot be salvaged so as to enable me exercise my discretion having regard to the requirements of rule 4 to extend time for filing of the record of appeal.

Accordingly, having taken all of the required factors into account in the exercise of my discretion under **rule 4** of this Court's rules, I have come to the conclusion that the application for extension of time fails.

I hereby order that the application by Notice of Motion dated 25<sup>th</sup> April 2014 is dismissed with costs.

**DATED and DELIVERED at ELDORET this 26<sup>th</sup> day of May, 2015.**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**