



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 23 OF 2015**

**BETWEEN**

**CHARLES MUCHEMI IKINYA..... APPLICANT**

**AND**

**FLORENCE WAMBUI KUNG'U.....RESPONDENT**

**(An application for extension of time to serve a notice of appeal out of time from the judgment & decision of the High Court of Kenya at Nairobi (Musyoka, J) dated 24<sup>th</sup> October, 2014**

**in**

**HC SUCC CAUSE NO. 1131 OF 1991)**

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

**RULING**

**Background**

1. Before me is a Notice of Motion dated **28<sup>th</sup> January, 2015** brought pursuant to **Rules 1 (2) and Rule 4** of the **Court of Appeal Rules** (the Rules), **Sections 3A and 3B of the Appellate Jurisdiction Act** and **Article 159 (2) (d)** of the Constitution. The applicant seeks the following orders:

*1. That this Honourable Court be pleased to Order an enlargement of the time within which to serve the Notice of Appeal dated the*

*5<sup>th</sup> November, 2014 in respect of the ruling made by the Hon. Justice Musyoka on the 24<sup>th</sup> October, 2014 dismissing the Applicants/appellant's application dated the 7<sup>th</sup> August 2013.*

*2. That the notice of Appeal filed on the 5<sup>th</sup> November, 2014 together with the letter requesting for proceedings dated 4<sup>th</sup> November, 2014 and belatedly served on the 7<sup>th</sup> January,*

2015 and 9<sup>th</sup> January, 2015 respectively be deemed duly filed and served within time.

3. *That the Honourable Court be pleased to make such further Orders as are necessary for the ends of justice in the matter.*

4. *That the costs of and incidental to this application be provided by this Honourable Court for in any event.*

2. The grounds upon which the applicant relies on in support of his application are firstly, his intended appeal raises several arguable points with very high chances of success; the Notice of Appeal was inadvertently not served within time together with the letter bespeaking the proceedings; the respondent will not suffer prejudice if this application is allowed whereas the applicant will suffer irreparable harm if this application is not allowed; the balance of convenience weighs in the applicant's favour in this matter owing to the subject matter involved as well as the grounds of appeal set out in the draft Memorandum of Appeal; it will be gravely injurious to the applicant if this application is not allowed and that it is in the interests of justice and fairness that this motion has been timeously brought.

3. The application arises out of an application dated 7<sup>th</sup> August, 2013 filed by the applicant for Review of an earlier ruling and order dated and delivered on 27<sup>th</sup> June, 2013. The application for review was premised on the ground that the court mistakenly found that the application dated 2<sup>nd</sup> March, 2012 had not been served upon the lawyers for the respondent herein; that there was no evidence adduced on the payment of the balance of the purchase price by the applicant whereas deposits of those amounts had been made in court and receipts thereto were part of the court record. The applicant/appellant in the said application deponed that he had entered into a sale agreement in respect of the portion marked D in the Mutation Form *L.R. No Dagoretti/Riruta/10* (the suit property) with the administrators of the deceased's estate; that he had paid all the money including the balance of the purchase price and that the court order of 3<sup>rd</sup> March, 1999 was to the effect that the suit property be transferred to his name on completion of payment.

4. The respondent (administratrix of the deceased's estate) opposed the application by filing a replying affidavit sworn on 24<sup>th</sup> October, 2013. She averred that the court's order of 3<sup>rd</sup> March, 1999 was very clear and was to the effect that she was to transfer the suit property to the applicant upon completion of payment of the purchase price by the applicant herein. She denied that the applicant has completed paying the purchase price.

5. A brief summary of the facts giving rise to the review proceedings are as follows; vide an application dated 2<sup>nd</sup> March, 2012 the applicant applied for an order empowering the Deputy Registrar to sign a transfer form and certain documents under the Land Control Act, to facilitate transfer of the suit property from the deceased estate to his name. The applicant alleged that he had completed payment of the purchase price as was ordered by the court on 3<sup>rd</sup> March, 1999. The learned Judge was satisfied that the applicant did not demonstrate that he had since completed paying the purchase price and therefore the applicant's application dated 2<sup>nd</sup> March, 2012 was dismissed on 27<sup>th</sup> June, 2013.

6. This was subject to the application for review. Musyoka, J heard the application and in his ruling dated 24<sup>th</sup> October, 2014, dismissed the applicant's application for review. Aggrieved by that decision, the applicant intends to appeal to this Court.

### **Submissions by counsel**

7. At the hearing of this application, Miss Agnes W. Njoroge appeared for the applicant. There was no appearance for the respondent. The court record indicates that the firm of Mwangi Chege & Company Advocates for the respondent was served with the Notice of Appeal on 13<sup>th</sup> April, 2015 and also with the current application on 2<sup>nd</sup> February, 2015 and no replying affidavit has been filed by the respondent. There was no appearance by or for the respondent at the hearing of the application.

8. Counsel for the applicant submitted that the current application seeks that the Notice of Appeal filed on 5<sup>th</sup> November, 2014, be deemed as properly filed and served or in the alternative there be an enlargement of time within which to file and serve the notice of appeal; that the main reason for the delay in filing and serving the Notice of Appeal and filing and serving the letter bespeaking the proceedings was the inadvertence of a new advocate in the firm who did not file the required documents on time; that the applicant has a good appeal with high chances of success which matter relates to a land dispute; that the appeal hinges on the determination of ownership of land which is an emotive issue in Kenya; that if the application is not granted the applicant stands to suffer great prejudice; that the proceedings have not been typed and the applicant is desirous of proceeding with the appeal; that the delay was caused by the mistake of counsel for the applicant which mistake should not be visited on the applicant. Counsel urged me to allow this application in terms of prayer

## Determination

9. I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. The intended appeal herein is in respect of the decision of the High Court dated 24<sup>th</sup> October, 2014 which dismissed the applicant's application for review. The discretion that I am being called upon to exercise in this application is under **Rule 4 of the Rules** which provides:

***“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 doing any act authorized or required by these Rules, whether before or after 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.”***

10. The principles guiding the court on an application for extension of time premised upon **rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance as stated in ***FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332/04 (unreported)*** the court stated that:

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure 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 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.”***

11. The impugned ruling was delivered on 24<sup>th</sup> October, 2014. The Notice of Appeal was timeously filed on 5<sup>th</sup> November, 2014 but was not served on the respondent. The current application was filed before this Court on 30<sup>th</sup> January, 2015, two (2) months and twenty five (25) days after the filing of the Notice of Appeal. Admittedly, the applicant is guilty of delay. The real point of the matter is the reason for the delay. The whole matter seems to depend upon whether or not, this court can properly look upon the delay as being an exceptional one. Counsel for the applicant submitted that failure to serve the Notice of Appeal in time was due to the fact that a new advocate in the firm representing the appellant who was instructed to effect service after filing the same, failed to retrieve the relevant copies from the High Court registry. That immediately after noticing that the documents were not retrieved, counsel instructed the said advocate to retrieve the same and belatedly serve the same upon the firm of Mwangi Chege & Company, advocates for the respondent.

12. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. In this case the delay can clearly be demonstrated to have been caused by the inactions of the law firm instructed by the applicant. This court in ***BAMANYA V ZAVER, [2002] EA 329***, held that errors or faults of counsel should not necessarily debar a litigant from enforcing his rights.

13. Based on the time frame within which the applicant filed the present application and the explanation given, I am of the view that the reason given by the applicant for not serving the notice of appeal within time is excusable in the circumstances of this case.

14. The applicant also contends that he has an arguable appeal. I have perused the Notice of Appeal and Memorandum of Appeal annexed to the supporting affidavit, I find the appeal is arguable as it raises an issue for determination as to whether the learned judge erred in dismissing the applicants application for review on the ground that the applicant had not fully paid the purchase price whereas there was evidence of payment. An arguable appeal does not necessarily mean one which will succeed. I also find that the respondent will not suffer substantial prejudice if the application herein is allowed. Lakha, JA stated in ***MWANIKI NJOROGE KAMAU & ANOTHER V LEE SHETH POONG, CIVIL APPLN NO. NAI 55 OF 1998 (unreported)***.

***“As it often happens, this application highlights two principles, each in itself is salutary.”***

***The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”***

15. In the circumstances of this case, the interest of justice demands that the dispute be canvassed before this Court so as to bring the matter to finality.

I find that the application herein has merit and I allow the same. Accordingly, I direct as follows:

***1. That the notice of appeal filed on 5<sup>th</sup> November, 2014 together with the letter requesting for proceedings***

***dated 4<sup>th</sup> November, 2014 and belatedly served on 7<sup>th</sup> and 9<sup>th</sup> January, 2015, respectively be deemed as duly filed and served within time.***

***2. That the applicant shall file the memorandum of appeal and record of appeal within sixty [60] days of receipt of the typed proceedings from the High Court.***

***3. The applicant shall serve the memorandum of appeal and record of appeal upon the respondent within seven [7] days of its being lodged in court.***

***4. Costs of the application to abide by the outcome of the intended appeal***

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2015.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**