



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B.M. KARIUKI, J.A. ( In Chambers))**

**CIVIL APPLICATION NO. 30 OF 2015 (UR 28/2015)**

**BETWEEN**

**PETER MWANGI MACHARIA**

**PATRICK GITHINJI MWANGI**

**STEPHEN MAINA KIMANGA .....APPLICANTS**

**AND**

**THIONG'O KIUNGA .....1ST RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 2ND RESPONDENT**

***(An application for extension of time to file and serve the Notice of Appeal and/or Record of Appeal out of time in the intended Appeal from the ruling of the High Court of Kenya in Nairobi (Ogola, J.) delivered on 19<sup>th</sup> December, 2014***

***in***

**H.C.C.C. No.722 OF 2010 (OS)**

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

**RULING**

1. In their application by notice of motion presented to this Court on 9<sup>th</sup> February 2015, the applicants, Messrs Peter Mwangi Macharia, Patrick Githinji Mwangi and Stephen Maina Kimanga seek leave to file and service notice of appeal and/or record of appeal out of time to facilitate filing of an appeal against the ruling of the High Court (E. K. O. Ogola, J.) delivered on 19<sup>th</sup> December 2014 in H.C.C.C. No.722 of 2010 (OS).
2. The application is supported by the affidavit of Peter Mwangi Macharia, the 1<sup>st</sup> applicant, sworn on 6<sup>th</sup> February 2015 and on the latter's supplementary affidavit sworn on 13<sup>th</sup> February 2015.
3. Neither Thiong'o Kiunga nor Kenya Commercial Bank Ltd, the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively has filed an affidavit in reply to the application.

4. When the application came up for hearing before me on 21<sup>st</sup> April 2015, Ms. C. N. Kihara, learned counsel for the applicants indicated that the application was conceded by the respondents.

5. Mr. D. Musyoka, learned counsel for the respondents, confirmed that his clients did not object to the prayers sought by the applicants in the notice of motion and that the respondents conceded the application.

6. The application shows that the applicants are intent on appealing against the ruling of the High Court (E.K.O. Ogola, J.) delivered on 19<sup>th</sup> December 2014 in absence of their counsel on record, Mr. Kihara of C. N. Kihara & Co. Advocates.

7. The impugned ruling was scheduled to be delivered on 14<sup>th</sup> December 2014 when the applicants' counsel's representative, one Miss Kibera, was in court but as the court file could not be located, delivery did not take place. Thereafter, the applicants' counsel was not served with a hearing notice to attend Court on 19<sup>th</sup> December 2014 when the ruling was delivered. Consequently, neither he nor his clients attended Court on that day

8. The applicants do not indicate in the affidavits sworn by the 1<sup>st</sup> applicant in support of the application the date when their counsel learnt of the delivery of the ruling. That date was vital as it should have reflected whether the applicants acted with dispatch when they filed the notice of appeal on 23<sup>rd</sup> January 2015, albeit out of time. Rule 75 of the Court of Appeal Rules required the notice of appeal to be filed within 14 days of delivery of the ruling. It should therefore have been filed by or before 2<sup>nd</sup> January 2015. Clearly, it was 21 days out of time. Whether the delay of 21 days in filing the notice of appeal was reasonable or not depends on the date when, after 19<sup>th</sup> December 2014, the applicants learnt of the delivery of the ruling.

9. The applicants seek in their application an order to file and serve notice of appeal and/or record of appeal out of time and in the alternative an order that the notice of appeal be deemed to have been duly filed and served.

10. The Court has discretionary power under Rule 4 of the Court of Appeal Rules on which the application is premised to extend the time limited by the Rules or by any decision of the Court or of a superior court. Rule 4 of the Court of Appeal states –

***“4. 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 the doing of any act authorized 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.”***

11. As a matter of policy the Court has a predisposition towards exercise of the Court's discretionary power to extend time to appeal where, prima facie, an applicant shows that he has an arguable appeal and the respondent would not suffer harm that cannot be compensated by an award of damages if time to appeal is extended. This policy was echoed by Apaloo JA, as he then was, in **Gitau v. Muriuki [1986] KLR 211**.

12. The factors to be considered in an application under Rule 4 (supra) include the length of the delay; the reasons for the delay; whether the applicant has an arguable appeal; the degree of prejudice to the other party if time is extended; the public importance of the matter in appropriate cases; and generally the requirements of the interest of justice under Article 48 of the Constitution which states –

***“the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”;***

and regard to human errors or mistakes including errors by legal advisors as was the case in **Gulam Hussein v. Cassmand & Another v. Shashikant Ramji** (Civil Application No. Nai 1 of 1981) where C.

B. Madan, JA, as he then was, held that errors by a legal advisor can be pardoned.

13. The Court has on numerous occasions had to consider the issue of extension of time under Rule 4 (supra) and in the latest decision in **Consolidated Finance Bank Ltd v. Kapurchand Devar Shah** [Civil Application No. Nai 256 of 2013 – [unreported] it was pointed out again that where an applicant has acted with dispatch and has an arguable appeal and there is no harm caused to the respondent in extending time that cannot be compensated, the Court ought to exercise its discretion to extend time.

14. The applicants' draft memorandum of appeal shows that there is an argument to be made on appeal whether the principle of *audi alteram partem* was breached in the impugned decision. In short, the appeal is not frivolous. It is arguable. In addition, the suit concerned the property known as L.R. No.36/500/VII (original No.36/47/VII) Nairobi which the applicants claim was registered in their names and was improperly sold by public auction when the applicants as chargors did not owe any debt to the 2<sup>nd</sup> respondent, the chargee.

15. As the respondents have consented to the application, and notwithstanding that the applicants have not stated the date when their counsel learnt that the Ruling was delivered on 19<sup>th</sup> December 2014, I am inclined to allow the application which I hereby do.

16. Accordingly, I allow the application and order that time for lodging the notice of appeal is extended to 23<sup>rd</sup> January 2015 and the notice of appeal filed on that date (i.e. 23.1.2015) is deemed to have been duly filed and served.

17. The costs of the application shall abide the result of the appeal but if no appeal is lodged, the applicants shall bear the same.

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

**G.B.M. KARIUKI SC**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**