



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 274 OF 2013 (UR 187/2013)

BETWEEN

CHARLES SOO.....APPLICANT

AND

ALAN KARANJA WATHIGO..... RESPONDENT

(Application for extension of time within which to file and serve a Record of Appeal out of time arising from the ruling of Muketi S., J delivered on 20th December 2011at Kitale

in

Civil Appeal No. 13 of 2007)

RULING

By a Notice of Motion dated 12th August 2013 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 judgment of Muketi S., J delivered on 20thDecember 2011.

Briefly the facts of the case are that at all material times the applicant was the lessee of a Kenya Railways plot no 458 that was issued to him on a temporary licence basis. On 24th September 1990, the applicant assigned his licence to the respondent at an agreed consideration of Kshs 120,000/-. The applicant contends that the respondent paid an amount of Kshs 90,000/- for the assignment and the balance was paid in kind through the supply of timber. The respondent on the other hand contends that the sums paid to the applicant were in respect of rents.

Upon consideration of the entire evidence, the learned trial magistrate ordered the applicant to liaise with the Estate Manager of Kenya Railways to effect the assignment of Kenya Railways plot No. 458 Kitale Town in favour of the respondent.

The applicant being aggrieved with the decision of the trial court, filed an appeal in the High Court against the decision of the trial court.

The appeal came up for hearing in the High Court and was heard by S.M. Muketi J.) who dismissed the

appeal.

Being dissatisfied with the decision of the High Court the applicant filed a Notice of Appeal to this Court on 26th January 2012, which it served upon the advocates for the respondent and contemporaneously requested for certified copies of the judgment and certified copies of proceedings from the Deputy Registrar, to enable him file the Record of Appeal.

In an affidavit in support of the Notice of Motion sworn by **Mr. Charles Muinde Soo**, it was deponed that the certified copy of the proceedings was collected on 5th February 2013 by Victor John Momanyi, a clerk in the firm of Samba & Co Advocates, but a delay of 25 days occurred in the filing of the record of appeal as the advocates were unable to reach him on account of his having been ill.

In a replying affidavit the respondent, deponed that the application was ill conceived, as the delay in filing the record of appeal was well in excess of 18 months which was inordinate. The respondent concluded by stating that, the assignment from Kenya Railways had since been effected, and as a consequence, he undertaken developments on the plot with the consent of Kenya Railways and the then Municipal Council of Kitale.

Mr. Mogeni learned counsel for the applicant appeared before me on 29th October 2014. In his submissions, counsel contended that the delay in filing of the appeal was not inordinate. The matter concerned a temporary Licence over a Kenya Railways plot, which was incapable of being transferred since the licensor Kenya Railways had not been made a party to the agreement. The respondent had only shown that temporary structures had been erected on the property which are not evidence of ownership of the plot. There was also no evidence that the building plans had been approved, and that in any event, permanent structures are not permitted. Counsel submitted that the applicant had explained the delay. The proceedings and ruling were supplied on 5th February 2013. Counsel continued that there is an arguable appeal as the learned judge wrote a judgment comprising only five paragraphs, and further counsel's submissions were not taken into consideration. There were no findings of fact, and the grounds of appeal were not addressed. Counsel contended that the learned judge had dealt with the Summons for Direction which were not before her, at the time of writing of the judgment. In counsel's view the number of days delay were only 25 days, which was occasioned by the applicant's illness, and his inability to pay Counsel's fees.

Mr. Kiarie learned counsel for the respondent opposed the application. Counsel submitted that the judgment was delivered on 20th December 2011, and the Notice of Appeal was filed on 26th January 2012. Contrary to rule 82 of the Court of Appeal Rules, the letter requesting for the proceedings was not served on the respondent. Counsel continued that the applicant had 60 days within which to file the record of Appeal, and the last day would have been 26th March 2012. From 26th March 2012 to 27th September 2013 when the application was filed is a period of 18 months, which was inordinate. As to whether the delay was explained, counsel submitted that no explanation had been provided. In the supporting affidavit the applicant made no mention of lack of finances, and that though counsel for the applicant submitted that the applicant was ill, there was no mention of illness in the supporting affidavit. Counsel further submitted that it was not possible to ascertain the chances of success of the appeal as no Memorandum of Appeal was filed, and being a second appeal on grounds of law only, the matters of law to be appealed were not known. Counsel concluded that the dispute is 17 years old, and related to the assignment of a lease by Kenya Railways. The judgment had been perfected, and no stay of execution had been obtained. As a consequence the respondent is in occupation, has developed the plot, and continues to pay rent to the Kenya Railways. The respondent stands to suffer immense prejudice if the application is allowed. In counsel's view justice would be best served if the litigation on this dispute was to come to an end.

Under **Rule 4** of this Court's rules, it is settled that, a single judge's discretion is wide and unfettered in determining whether to extend time or not. In so doing, the Court should act judiciously and not capriciously in the exercise of its discretion, taking into consideration to the length of the 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. See **Leo Sila Mutiso V. Rose Hellen Wangari**

Mwangi– Civil Application No. Nai 251 of 1997.

The judgment was delivered on 20th December 2011, and the Notice of Appeal was filed on 26th January 2012. The applicant had 60 days within which to file the Record of Appeal, and the last day being 26th March 2012. The record of appeal was not filed until 27th September 2013, thus occasioning a delay of 18 months.

As to whether a delay is inordinate would be dependent on whether it has been adequately explained by the applicant. The applicant stated that the delay arose from illness and the inability to pay his counsel's fees. Yet from the record and the supporting affidavit, I can find no evidence to support these averments. Neither does the applicant provide an explanation as to the nature of his financial difficulties, and the extent to which they affected his ability to meet his advocate's fees.

As to the chances of success of the appeal, the applicant contends that the learned judge failed to provide a comprehensive judgment, as, instead of addressing the eight grounds of appeal, the learned judge dealt with Summons for direction, and simply dismissed the appeal.

In **Mwaniki Njoroge Kamau & Another vs Lee Sheth Poong Civil Application No Nai 55 of 1998 (unreported)** Lakha, JA stated,

“As it often happens, the 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.”

From the record, the applicant enumerated eight grounds of appeal which were strenuously canvassed before the High Court. Subsequent to this, the court delivered its judgment of which the entire decision was as follows:

“The appellant was dissatisfied by the learned magistrate's decision that he misdirected himself in both matters of law fact. The issue here is very simple. Was Kshs 90,000/- given rent or a purchase of an interest. There is an existing agreement that it was a transfer of interest. There is no ambiguity. The back peddling by the tenants not tenable. He received monies. Someone from railways testified that such transactions are common.

The application sought for orders that:-

- 1. THAT directions be taken in the above case.***
- 2. THAT costs of the application be provided for.***

The court has no reason whatsoever from the set of facts to interfere with the trial court's decision of the trial court upheld and the appeal is dismissed in its entirety with costs.”

When the grounds of appeal are compared with the judgment, there is a clear discrepancy between the issues that High Court was required to address, and the contents of the final judgment. It is evident that the learned judge did not respond to any of the grounds of appeal advanced by the appellant, and in further transgression, wrongly dealt with the appeal as an application for summons for direction, instead of delivering an opinion on the issues that were for determination before it. These circumstances have given rise to questions that will require to be ventilated on appeal, and of which, in my view, have a high chance of success. To close my eyes in the disregard of this glaring omission on the part of the High

Court, would be tantamount to condoning a grave miscarriage of justice.

For this reason, I will exercise my unfettered discretion to allow the application which I consider will not be of significant prejudice to the respondent, save for his having to contest the appeal at the appropriate time.

I order that the time for filing and serving a Record of Appeal is hereby extended by fourteen (14) days from the date hereof.

DATED and DELIVERED at ELDORET this 26th day of May, 2015.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR