IN THE COURT OF APEAL

AT MALINDI

(CORAM: M'INOTI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 17 OF 2015

BETWEEN

EDWARD CHARLES NGINYO……. APPLICANT

AND

HANS JURGEN ZAHTEN……1ST RESPONDENT

MELB NEKESA MASIKA……..2ND RESPONDENT

FARID AHMED SWALEH……..…….3RD RESPONDENT

HILMA ABDULLA AMIN…….4TH RESPONDENT

THE LAND REGISTRAR, KILIFI DISTRICT……..……5TH RESPONDENT

(Application for extension of time to file and serve memorandum and record of appeal against the judgment and decree of the High Court of Kenya at Malindi, (Angote, J.) dated 26th September 2014

in

ELC. C. No. 61 of 2011)

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RULING

In the Notice of Motion before me dated 17th April 2015 and taken out under ***rule 4*** of the ***Court of Appeal Rules***, the applicant, ***Edward Charles Nginyo*** craves leave to file and serve, out of time, a memorandum and record of appeal against the judgment and decree of ***Angote, J***. dated 26th September 2014. The application is supported by his affidavit sworn on 17th April 2015 and is opposed by the 1st respondent, ***Hans Jurgen Zahten*** and the 4th respondent, ***Hilma Abdulla Amin***, through their replying affidavits sworn, respectively, on 4th and 9 June 2015.

The short background to the application is as follows. On or about 5th August 1996, the appellant borrowed the sum of Kshs 3 million from the 1st respondent. To secure repayment of the money, a charge was registered on 29th August 1996 over the applicant's property, ***L.R. No. Kilifi/Mtwapa/79*** (the suit property), in favour of the 1st respondent. The money was to be repaid within one year at agreed rate of interest. Thereafter the applicant defaulted in repayment, upon which the 1st respondent sold the suit property by public auction to the 3rd respondent, who in turn sold and transferred the same to the 4th respondent on 25th January 2011.

On 3rd June 2011 the applicant filed ***E & L C C No. 61 of 2011*** seeking, as far as it is now relevant, declarations that the charge over the suit property was fraudulent and illegal; that the registration of the 4th respondent as proprietors of the suit premises was fraudulent and illegal; that he was the *bona fide* owner of the suit property; orders for cancellation of the 4th respondent's title; eviction of the 4th respondent from the suit property; and a permanent injunction to restrain the respondents from interfering or dealing with the suit premises.

The respondents (with the exception of the 2nd respondent who did not take part in the proceedings) defended the sale of the suit property as proper and within the law and the 4th respondent in particular pleaded that she was a bona fide purchaser for value without notice.

Angote, J. heard the suit and in a judgment dated 26th September 2014, found for the respondents and dismissed the suit. Aggrieved by the outcome, the applicant decided to exercise his undoubted right of appeal and towards that end, filed a notice of appeal on 10th October 2014, within the time prescribed by ***rule 75(2)*** of the Court of Appeal Rules. On the same date, he applied in writing to the Deputy Registrar, High Court for certified copies of the proceedings and judgment to enable him lodge his intended appeal. That application was also made within the time prescribed in the proviso to ***rule 82***.

The Certificate of Delay was issued on 13th March 2015 and it indicates that the proceedings were collected on 12th February 2015. On 24th April 2015 the applicant filed the present application for extension of time to file and serve the record of appeal. The main ground in support of the application is that the applicant was unable to file the appeal within time because of the delay in obtaining certified copies of the proceedings.

Mrs. Ngugi, learned counsel for the applicant urged me to extend the period for the filing and serving of the record of appeal because the delay involved was not inordinate or intentional. She contended that the subject matter of the intended appeal was a valuable 12-acre property and that the intended appeal had overwhelming chances of success, raising such issues as whether there was a lawful charge between the appellant and the 1st respondent; whether the sale of the property in purported exercise of the 1st respondent's power of sale had legal basis; and whether the property was sold by private treaty or by public auction.

Lastly learned counsel submitted that the respondents stood to suffer no prejudice because the 4th respondent was in possession of the suit property. The rulings of this Court in ***HON. JOHN NJOROGE MICHUKI & ANOTHER V. KENTAZUGA HARDWARE LTD, CA NO NAI 16 OF 1998*** and ***KEZIAH STELLA PYMAN & 2 OTHERS V. PAUL MWOLOLO MUTEVU & 8 OTHERS, CA NO. NAI 42 OF 2013*** were cited in support of the argument that the court's discretion in an application for extension of time is unfettered.

The application was opposed by ***Mr. Hamza,*** learned counsel for the 1st and 3rd respondents who also held brief for ***Mr. Taib***, learned counsel for the 4th respondent. Learned counsel first contended that the applicant's counsel was not properly on record, having not filed a notice of change of advocate as required by ***rule 23(1)*** of the Court of Appeal Rules.

Next it was submitted that the applicant had not given any or any good reason for the delay in applying

for extension of time had been given. It was argued that the appeal should have been filed immediately the proceedings were received on 12th February 2015. That was not done, it was submitted, and no reason had been given to explain why the application was not filed until two months later. The applicant could not rely on mistake, it was contended, because no mistake was deponed in his affidavit.

Mr. Hamza also submitted that the application was incompetent and even if extension of time were to be granted, it would serve no purpose because by dint of ***rule 83***, the Notice of Appeal was deemed to have been withdrawn the moment the appeal was not filed on time. Therefore the applicant had to first apply for extension of time to file a fresh Notice of Appeal before applying for extension of time to file and serve the record of appeal.

Counsel concluding by urging me to disallow the application because no basis for exercise of discretion in favour of the applicant had been established. He relied on the ruling of the Supreme Court in ***FAHIM YASIN TWAHA V. TIMAMY ISSA ABDALL & 2 OTHERS, SC CA No. 35 of 2014*** on the factors to be borne in mind in an application for extension of time, which he submitted were singularly lacking in the present application.

Subject to the fact that it must be exercised judicially, the discretion of this Court to extend time is unfettered. Before it was amended in 1985, Rule 4 required the applicant in an application for extension of time to show *"sufficient reason"* why time should be extended. The 1985 amendment removed that stricture and allowed the court to extend time *"on such terms as it thinks just"*. While the amendment did not mean that all and sundry applications for extension of time would be granted, its manifest intention was facilitate the hearing of deserving appeals and to avoid shutting appeals out of this Court on account of mere errors or lapses which did not impinge on the jurisdiction of the Court or fundamentally prejudice a respondent.

The post 1985 approach was succinctly stated in ***FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS CA NO. NAI 332 OF 2004*** as follows:

> ***"The exercise of this Court's discretion under rule 4 has followed a 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 …"***

And in ***MUCHUGI KIRAGU V. JAMES MUCHUGI KIRAGU & ANOTHER CA NO. NAI. 36 OF 1996*** the Court laid emphasis on the need, in deserving cases, to give intended appellants the opportunity to agitate their grievances, in the following terms:

> ***"Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it."***

In this application, Mr. Hamza is right to point out that the 60 days prescribed by rule 82 for lodging the record of appeal starts to run, for an appellant who has complied with the conditions stipulated in the proviso to that rule, from the date when the certified copies of proceedings are availed. That means that the appellant had 60 days from 12th February 2015 to lodge the record of appeal. Instead of so proceeding, the applicant appears to have labored under the impression that he was late and had to seek extension of time.

It is readily conceded by the respondents that in the High Court the applicant was representing himself. Clarity on the law does not appear to have crystallized even after he instructed counsel to represent him in pursuing the intended appeal. Right up to the hearing of the application, his counsel appeared to firmly believe that an application for extension of time was necessary upon receipt of the proceedings on 12th February 2015. That explains why it was not deponed in the supporting affidavit that there was a misapprehension of the rules.

I am satisfied that there was an honest mistake on the part of the applicant and his advocates that this application was necessary. This, in my view, is the kind of blunder that ***Madan, J.A.*** (as he then was) memorably spoke about and declared to be excusable in ***BELINDA MURAI & 9 OTHERS V. AMOS WAINAINA, C.A. NO. NAI. 9 OF 1978.*** In light of that, I do not find the delay inordinate or unexplained.

Decisions of this Court do not bear out Mr. Hamza's reading of rule 83 and his contention that the notice of appeal filed by the applicant was deemed to have been withdrawn once the appeal was not filed on time, and that before making this application, he was obliged to apply first for extension of time to file a new notice of appeal. In ***DOLPHIN PALMS LTD V. AL-NASIBH TRADING CO. LTD. & OTHERS, CA NO. 112 OF 1999, Omolo, JA*** expressed himself as follows on the issue:

> ***"The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single Judge; that is the province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was no notice of appeal."***

Shah, JA was of the same mind in ***TRIMBORN AGRICULATURAL ENGINEERING LTD V DAVID NJOROGE KABAIKO, CA (APP) NO. 274 OF 1998,*** when held that where there is a defective Notice of appeal on record, such notice remains on record until it is truck out by the Court.

Indeed, when the ruling of Omolo, JA in was referred to the full Court, the Court upheld the learned judge and stated:

> ***"As rightly pointed out by Mr. Khatib, for the first respondent, the court must be moved to make the order declaring a notice of appeal "deemed to have been withdrawn". Rule 82, in pertinent part, provides that:***
>
> > ***'If a party who had lodged a notice of appeal fails to institute an appeal within the appointed time, (a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising therefrom of any of persons on whom the notice of appeal was served'.***
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> ***We concede that there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase "unless the court otherwise orders" clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules. That is the conclusion the single Judge came to. We have no basis upon which to fault him on that. The reference therefore fails and is dismissed with costs".***

I note that although the wording of rule 83 has slightly changed from that of the former rule 82 quoted above, I do not see any fundamental difference to justifying a view different from that expressed by the Court.

I do not think that much turns in this application on the failure by the applicant's advocates to file a notice

of change of advocates once they were appointed to act for the appellant who previously had been acting in *propria persona*. That is not the kind of procedural infraction that goes to jurisdiction or which has occasioned the respondents prejudice. As the name suggests, the document contemplated by ***rule 23(1)*** is for notification purposes, so that it is clear at any one time who has to be served with process or who bears responsibility for pertinent actions in the course of the litigation.

On the chances of the appeal succeeding, it is not a matter that I need to belabour. Both in ***LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI, CA NO. NAI. 255 OF 1997*** and ***FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS*** ***(supra)*** this Court stated that the chances of appeal succeeding are ***"possibly"*** a consideration. Clearly a single judge cannot under rule 4 be expected to determine definitively whether or not an intended appeal will succeed; all the judge is called upon to do is to satisfy himself or herself that the intended appeal is not flimsy or frivolous. I am satisfied that the applicant has an arguable appeal which he ought to have an opportunity to agitate before the full court.

Lastly on the prejudice that the respondents are likely to suffer, it is not disputed that the 4th respondent has possession of the suit property. I in particular bear in mind that before the Court of Appeal in Malindi, it is possible for the appeal to be filed and heard and determined immediately, thus obviating or minimizing any prejudice that might arise from delayed disposal of the intended appeal.

Taking all the foregoing factors into account, I allow the motion dated 17th April 2015 on condition that the applicant shall file and serve upon the respondents within seven days of this ruling:

i. the record of appeal; and
ii. notice of change of advocates

Costs of this application shall abide the outcome of the intented appeal. It is so ordered.

Dated and delivered at Mombasa this 19thday of June, 2015.

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR