IN THE COURT OF APEAL

AT MALINDI

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

CIVIL APPLICATION NO. 11 OF 2015

BETWEEN

ROBERT SHUME…….…….....….....…..1ST APPLICANT

KAZUNGU DZOMBO…….……..……...2ND APPLICANT

NICHOLAS NGOLO GONA……...….....3RD APPLICANT

LUCY BUYA……..……4TH APPLICANT

AND

SAMSON KAZUNGU KALAMA……..……..……RESPONDENT

(Application for extension of time to file and serve the record of appeal against the judgment and decree of the High Court of Kenya at Malindi, (Angote, J.) dated 4th April 2014

in

ELC. C. No. 144 of 2011)

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RULING

On 4th April 2014 ***Angote, J***. delivered judgment in ***Malindi Environment & Land Court Case No. 144 of 2011*** and ordered the applicants, ***Robert Shume, Kazungu Dzombo, Nicholas Ngolo Ngona,*** and ***Lucy Buya*** to be evicted from ***Plot No. 7651/2 (original No. 570/2) (the suit property)*** which they claimed to be their ancestral land or otherwise entitled to by adverse possession under the ***Limitation of Actions Act***. The learned judge held that the respondent, ***Samson Kazungu Kalama*** was the registered proprietor of the suit property and therefore entitled to exclusive and unimpeded right of possession, free from interference and vexation by the applicants.

Aggrieved by the judgment and decree, the applicants lodged a notice of appeal on ***11th April 2014,*** well within the time prescribed by ***rule 75(1)*** of the ***Court of Appeal Rules***. On ***24th April 2014*** the applicants applied for certified copies of the judgment and ruling, again well within the time prescribed by the proviso to ***rule 82***. On the same day, they paid a deposit of ***Kshs 1000/-*** vide ***Receipt No. 5973847*** for the

preparation of the proceedings.

By a letter dated ***9th March 2015***, the Deputy Registrar, High Court advised the applicants' advocates that the certified proceedings and judgment were ready for collection upon payment of assessed fees. On the same date the advocates collected the proceedings and paid ***Kshs 4,000/-*** vide ***Receipt No. 6559497.***

On 23rd March 2015, the applicants filed the application now before me for extension of time to file and serve the record of appeal. Strictly speaking, as of 23rd March 2015 when the application for extension of time was filed, the applicants were still within time because in computing the 60 days within which the appeal is to be lodged, the period certified by the registrar as having been required for preparation of the proceedings is excluded. All that the applicants had to do was obtain a certificate of delay and they would have had 60 days from the date of receipt of the proceedings to file the appeal.

Labouring under that misapprehension, the appellants did not even lodge the appeal and apply for the same to be deemed to have been filed on time, as is clearly allowed by rule 4 of the Rules of this Court. Their learned counsel, ***Mr. Phillip Kaingu*** was of the view that before the applicants could lodge their appeal, they had first to apply and obtain the leave of this court extending time.

Against that background, the applicants' counsel relying a supporting and a supplementary affidavit sworn by the 1st appellant respectively on 20th March 2015 and 21st April 2015 urged me to exercise discretion in favour of the applicants and extend time for filing the appeal. It was submitted that the delay in making the application was not inordinate or intentional and that the applicants' intended appeal had overwhelming chances of success, which they should get an opportunity to agitate. It was also contended that the applicants were serious about pursuing their appeal with urgency and diligence, as evidenced by their prompt payment of the required deposit and fees and collection of the proceedings once the court notified them. Given the opportunity, counsel concluded, the applicants would be able to lodge and serve the record of appeal within seven days.

The respondent did not file any replying affidavit to controvert the factual basis of the application. Instead, he filed grounds of objection on 7th April 2015 contending that the application was misconceived, defective, incompetent and bad in law; that the applicants were guilty of inordinate and unexplained delay; that their intention was merely to delay the respondent's enjoyment of the fruits of his judgment; that they had not established a basis for extension of time; and that they had come to court with dirty hands, having failed to vacate the suit property as ordered by the High Court.

Mr. Gicharu Kimani, learned counsel who held brief for ***Ms. Chepkwony*** for the respondent also raised rather technical objections to the application to demonstrate why in his view the application was incompetent. He contended that the applicants' advocates had not filed a notice of change of advocates; that the applicants' supplementary affidavit was filed without leave; that the annextures to the supplementary affidavit were not properly marked and that the authority donated by the other applicants to the 1st applicant to swear the affidavit on their behalf was merely attached to the affidavit without being separately filed in court.

Counsel concluded by submitting that the applicants had not shown the efforts they had made to obtain the proceedings and that there was no evidence before the court that the record of appeal was ready. Leave to extend time being discretionary, it was submitted, the applicants were undeserving of exercise of discretion in their favour as they had come to court with dirty hands.

The first issue is the jurisdictional remit of the Court under rule 4. The rule provides as follows:

> ***"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."***

Consistent decisions of this Court have affirmed that subject to being exercised judicially, the jurisdiction of the Court under that rule is otherwise unfettered. Some of the considerations that the Court will take into account in determining whether or not to exercise the discretion include the period of delay, the reason for the delay, the prejudice that the respondent stands to suffer in the event that the application is granted, whether the matter raises issues of public importance and (possibly) the chances of success of the intended appeal. (See. ***FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS C.A. No. NAI 332 of 2004*** and ***LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI, CA NO. NAI. 255 OF 1997).***

In ***MUCHUGI KIRAGU V. JAMES MUCHUGI KIRAGU & ANOTHER, CA NO NAI 36 OF 1996*** this Court stated as follows regarding its general approach under rule 4:

> ***"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, counsel for the applicants candidly admits that he had misapprehended the provisions of the rules in two respects: Firstly, that upon receipt of the certificate of delay, he was required to apply for leave to file the appeal, thinking that the 60 days for lodging the record of appeal started running from the date of filling of the notice of appeal rather than from the date when the certified proceedings were availed. Secondly, that he could not apply for extension of time *after* lodging the record of appeal; he honestly thought that had first to obtain extension of time before filing the record of appeal.

Reading rule 4 and the proviso to rule 82 with due diligence would have shown that the views held by counsel were erroneous. Nevertheless, when counsel appeared before me he genuinely and honestly appeared to hold firmly to his views. I would in the circumstances excuse him on the basis that his blunder was the kind of mistake that Madan, J.A.(as he then was) found to be excusable in ***BELINDA MURAI & 9 OTHERS V. AMOS WAINAINA, C.A. NO. NAI. 9 OF 1978.*** I note also that in ***KAVUU MURUAMBETI V. JOSIAH KARUGARI, CA NO. NAI 131 OF 1998, Pall, JA*** excused a party who applied for extension of time to file a record of appeal when in fact at the time of filing the application extension of time was not necessary. The learned judge found the party to have been cautious and playing safe with his intended appeal.

I am therefore satisfied that the delay has been candidly and reasonably explained. No reasonable litigant will deliberately and knowingly file an application seeking that which he already has. The delay, which was occasioned by the misconception is also not inordinate. This application unnecessary as it then was, was filed within 14 days of receipt of the proceedings.

As regards the objections raised by Mr. Kimani, I have intimated that I find them to be technical in nature, not in any way implicating the substance or the merits of this application. In ***NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 6 OTHERS, CA NO. 228 OF 2013, Ouko, JA*** stated as follows regarding technical objections:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law***

which at times create hardship and unfairness."

I would take the same view of this matter.

On the merit of the intended appeal, this Court has advisedly stated that it is *possibly* a matter for consideration, because the definitive determination of the merits of the appeal is an issue for the full court. All that I am required to satisfy myself, which I do, is that the intended appeal is not flimsy or frivolous. It is also noteworthy that the dispute in the intended appeal involves land which the applicants claim to be their ancestral land. In the absence of deliberate delay or overreaching by the applicants, I take the view that they should have the opportunity to indulge fully their constitutional right of appeal.

Regarding the degree of prejudice which the respondent stands to suffer, he has not adverted to any, as he did not file a replying affidavit. Accordingly I do not have any material before me on the basis of which I can conclude the respondent stands to suffer any prejudice that cannot be adequately remedied by award of costs. It is also worth emphasizing that any prejudice that the respondent stands to suffer is obviated or considerably reduced in this Court's station at Malindi because the parties are guaranteed that the appeal will be heard and determined as soon as it is filed.

Taking all the foregoing into account, the overriding objective in ***section 3A of the Judicature Act***, and the duty imposed upon this Court by ***section 3B*** of the same Act to facilitate the just, expeditious, proportionate and affordable resolution of the appeals, I allow this application and direct the applicants to file and served upon the respondent the record of appeal within seven days from the date of this ruling. The applicants' Advocates shall also file and serve the notice of change of advocates within the same period. Costs of this application shall be in the intended appeal.

Dated and delivered at Mombasa this 19th day 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