IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, JA. IN CHAMBERS)

CIVIL APPLICATION NO. 1 OF 2015

BETWEEN

DIRIE & SONS COMPANY LIMITED …….....…APPELLANT

AND

TAITA RANCHING COMPANY LIMITED ……RESPONDENT

(Being an application for extension of time to file and serve a Notice & Record of Appeal against the Decree of the High Court of Kenya at Mombasa (Mukunya,J.) dated 6th November, 2010 In H.C.C.C. No.281 of 2010)

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RULING

Under **Rule 4** of the Court of Appeal Rules, this Court, on its terms may extend time limited either by the Rules or by its own decision or a decision of any superior court below for doing any act.

The applicant relying on that rule seeks in a motion filed on 28th January, 2015, that time fixed by the rules for the filing and serving a notice and record of appeal be extended so that it can challenge in this court, the decision of the **High Court** (**Mukunya, J.**) made on 6th November, 2010 in which judgment was entered against it in the sum of Kshs.3,300,000/- being rent for grazing and eco-tourism fees. The applicant contends that after the suit was heard judgment was reserved for 1st September, 2014 but was not delivered. No notice of the delivery date after the 1st September, 2014 was issued; that it was on 6th December, 2014, by a letter from the respondent's advocates that the applicant's attention was drawn to the fact that the judgment had in fact been delivered on 6th December, 2014. The letter was demanding the payment of the decretal sum of Kshs.3,300,000/-, interest and costs amounting in total to Kshs.5,488,115/=. Upon receipt of the letter the applicant's erstwhile advocate proceeded to the court registry but was unable to peruse the court file as it was misplaced. It was not traced until 20th January, 2015.

Although the court record shows that learned counsel then representing the applicant was present in court when the judgment was delivered, it has been clarified that that was not the case; that as a matter of fact the applicant was not represented.

It is the applicant's conviction that the intended appeal is arguable. The respondent in reply maintains that its advocate, being diligent made followups and finally personally collected the notice of the

judgment from the court; that the applicant and its advocate failed to exercise similar diligence. The respondent has also averred that the instant application and any subsequent proceedings are a nullity for the reason that the applicant's advocates are not regularly before the Court.

Starting with the substance of this application, in exercising its discretion under **Rule 4**, it is long settled that although the discretion is unfettered, it must be exercised judicially along the well-known principles. Those principles were reiterated in **Fakir Mohamed** v **Joseph Mugambi & 2 others**, Civil Application No.Nrb.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 actors 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 the limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustively factors….."

It is common factor that the judgment was not delivered on the due date. There is no evidence that the applicant was notified of the next date when it was finally delivered. It is the applicant's unchallenged position that it was alerted by a letter from the respondent's advocates that the judgment had been delivered. That letter was received on 14th January, 2015, over 2 ½ months from the date of the judgment. This application was filed on 28th January, 2015 – some two weeks from the date the applicant had notice of the delivery of the judgment.

In terms of **Rule 82** aforesaid an appeal from the decision of the **High Court** exercising a civil jurisdiction must be instituted within sixty days of the date when the notice of appeal was lodged. The notice of appeal under **Rule 75,** on the other hand must be lodged within fourteen days of the date of the decision against which it is desired to appeal. Because I am satisfied that the applicant had no notice of 6th November, 2014 when the judgment was delivered, time began to run from the 14th January, 2015 when it received the aforesaid letter from the respondent's advocates. In strict computation of time, as directed in **Rule 3,** excluding the 6th November, 2014; the applicant had up to 27th January, 2015 to file a notice of appeal. Having brought this application on 28th January, 2015, the delay is for a mere one day.

Bearing in mind that the delay was substantially caused by the court when it failed to notify the applicant of the new date for the delivery of judgment and when the file was misplaced in the registry the applicant, I hold has given a plausible explanation why the notice and record of appeal were not filed within the prescribed period. I have looked at the draft memorandum of appeal and without expressing any view, it suffices to state that the intended appeal will not be frivolous. The respondent has not claimed that they would be prejudiced if the application is allowed.

On the question whether the application is incompetent on account of having been brought in breach of **Order 9 rule 9** of the Civil Procedure Rules which requires that any change of advocate after judgment can only be with leave of the court and notice to all the parties or upon consent between the outgoing and incoming advocate. **Order 9** relied on in making this argument does not apply to proceeding before this Court, which is governed by different rules regarding representation and appearances before the court. Specifically our **rule 22** simply provides that a party before the Court may appear either in person or by advocate. It is only when a person previously represented by an advocate in the court or having acted in person but now wishes to change advocates or engage an advocate having acted in person, a notice of such change or appointment must be filed and served. I find no merit in this ground.

Accordingly, I am persuaded that the applicant was prevented from commencing the appeal process due to factors it had no control over.

The application is allowed, costs being in the appeal, and the applicant has leave to file and serve the notice and the record of appeal within twenty one days from the date of this ruling.

Dated and delivered at Malindi this 31st day of July,2015

W. OUKO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR