



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO 212 OF 2014

BETWEEN

JOHN KASIMU KILATYA.....APPLICANT

AND

THE CHAIRMAN MACHAKOS LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

MAINGI WAMBUA.....3RD RESPONDENT

(an application for extension of time to file and serve the notice of appeal, memorandum of appeal and the record of appeal against the ruling and order of the High Court of Kenya (Makhandia, J.) made on the 29th November 2012

in

JR Misc. Application No 158 of 2002)

RULING

The applicant, John Kasimu Kilatya. The applicant bought a parcel of land known as Kalama/Kiitini/420 from Kimeu Muli and Makau Nzioka, and a title deed in his favour was issued on 18th September 2002. In February 2002, Maingi Wambua, the 3rd respondent filed a claim before the 1st respondent, the Machakos Land Dispute Tribunal. The 3rd respondent contended that the property was jointly owned by him and others. The dispute was heard and determined in favour of the 3rd respondent. The applicant was ordered to refund the purchase price, and an order was made that the register in respect of the land be amended to remove his name and replace it with that of the 3rd respondent. This finding of the tribunal was adopted as an order by the Principal Magistrate's Court at Machakos on the 23rd August 2002.

Begin aggrieved with that decision, the applicant filed a judicial review application before the High Court. The said application was dismissed for failure to comply with the mandatory requirements of judicial review procedure, since the applicant had failed to join the Principal Magistrate's Court at Machakos as a party to the proceedings. That decision was delivered on 30th November 2012.

The applicant was again aggrieved but nonetheless did not file an appeal or notice of appeal within the mandatory period. As a result of his omission, he now intends to remedy the delay by the present application which seeks enlargement of time for filing a notice of appeal.

It is clear that the judgment of the High Court was delivered on the 30th November 2012. Thus, the applicant was required to lodge the notice of appeal within fourteen days of the decision, which is by the 14th December 2012. The notice of appeal was eventually filed two days later on the 17th December 2012. The applicant's advocate thereafter requested the Deputy Registrar, to provide him with typed proceedings on the 8th January 2013. These typed proceedings were issued on 6th September 2013, and the certificate of delay subsequently was issued on the 8th August 2014.

Ms Grace Gichuki, advocate for the applicant contends that the delay in filing of the notice of appeal is not inordinate, and that it was caused as a result of an oversight on her part. The applicant also submits that the intended appeal is arguable and that a grant of an extension time within which the appeal can be filed will not prejudice the 3rd respondent. The applicant therefore requests this court not to punish him for the error of counsel, and grant the orders as sought.

The application is opposed by the 3rd respondent. His position is that the delay in this case is over two years, and is therefore inordinate, and that the delay has not been explained by the applicant. The 3rd respondent submits that there is nothing to be appealed against as the order of the tribunal was adopted by the Principal Magistrate's Court has since been executed since the register was amended to include his name in 2008. Furthermore, the 3rd respondent states that the applicant has not demonstrated in what way the appeal is arguable and therefore asks that the application be dismissed.

The discretion of the Court is wide and unfettered, but it must be exercised judiciously. To benefit from the discretion of the Court, the applicant must place sufficient material to persuade the court to exercise its discretion in his favour. The factors upon which the Court will exercise that discretion follow a well beaten path, as the Court stated in ***Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR (Civil Application No. Nai 332 of 2004)***:

***“The exercise of this Court’s discretion under Rule 4 has [follows] a well-beaten path ... 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 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.*”**

The Court can also consider any other relevant factor(s) in order to meet the ends of justice. As stated by this Court in ***Mongira & Another v Makori & Another [2005] 2 KLR 103***:

***“Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general,” Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.*”**

As stated above, the delay in filing the notice of appeal was of three days. This is not an inordinate delay that would operate to shut the doors of justice to the applicant. However, the delay in filing the record of appeal is well over two years. This is because while the applicant took steps to secure a certificate of delay, his advocate did not comply with the requirements of the proviso to rule 82 (1) as read with sub

rule (2) of the Courts rules, which states that:

“... Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

The letter requesting typed proceedings was not served upon the respondents. The appeal is therefore out of time. However, as soon as the applicant procured the certificate of delay, he moved to regularise his position by filing this motion. The delay is therefore explained and is excusable.

From the documents before me, I have no hesitation in finding that the applicant’s present predicament is caused by the omissions of his counsel. Nonetheless, as was stated by the Court in *Bamanya v Zaver [2002] 2 EA 329 (CAU)* the ***“mistakes, faults or dilatory conduct of counsel should not be visited on the litigant.”***

I hasten to add that it is not every mistake or error of an advocate that would be excused; only those acts and omissions which meet the threshold of a proper and reasonable explanation would benefit from the discretion of the Court. This case squarely falls within such parameters. In the circumstances, I am satisfied with the explanation given. I find it reasonable and plausible, thus I am inclined to exercise my discretion in favour of the applicant.

In the premises, I grant the orders sought in the notice of motion dated 14th August 2014. The respondents shall have the costs of this application to be borne by the applicant.

Dated and Delivered at Nairobi this 10th day of July, 2015

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR