



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: M’INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 51 OF 2015

BETWEEN

RICCARDO FANELLI.....1ST APPLICANT

CARLO NERI.....2ND APPLICANT

LINESTAFF LIMITED.....3RD APPLICANT

AND

FRIGRIERI GRAZIANO.....RESPONDENT

(An application for extension of time to file notice of appeal in an intended appeal against the Judgment and Decree of the High Court of Kenya at Malindi, (Meoli, J.) dated 3rd September 2015

in

HCCC. No. 54 of 2011)

RULING

Before me is yet another ominous motion on notice in which the applicants are seeking in the same application, reliefs which can only be granted by a single judge, as well as other reliefs which must be sought before the full court. This undesirable practice that is fast taking root in Malindi and Mombasa has no basis in the rules of procedure, encourages wastage of time in the form of unnecessary objections and is otherwise a devise for avoiding payment of the prescribed court fees for applications before a single judge, and those before the full court. We have previously decried the practice in **CHRISTOPHER IDDI MOTO & 15 OTHERS V. CHIRIBA NYAMBU BARUA & ANOTHER, CA NO. 43 OF 2014 (UR 38/14)** and **FEISAL MOHAMED ALI V. REPUBLIC, CR AP.NO. 2 OF 2015 (UR1/15)** and hope that it shall cease forthwith.

For the record applications for extension of time under **Rule 4** of the **Court of Appeal Rules** are, by virtual of the provisions of **rule 53 (1)** to be heard and determined in the first instance by a single judge.

Such an application comes to the full court under **rule 55** only by way of reference from the decision of the single judge. On the other hand, an application for stay of execution, injunction or stay of proceedings under **rule 5 (2) (b)** must be made to the full court. These are two separate and distinct applications that should be filed and prosecuted as such.

In the application before me, **Ms. Otieno**, learned counsel for the respondent, has rightly taken objection to the omnibus nature of the application. While I agree with Ms. Otieno that the applicants ought to have separated the two applications, the default is technical in nature and curable under **Article 159 of the Constitution** and the overriding objective in section 3A and 3B of the Appellate Jurisdiction Act. I will accordingly treat the application before me as a single judge application. Should the applicant's desire any relief from the full court, they must file a separate application in that regard, for it is not the practice of the Court to hear and determine applications piecemeal and in bits and pieces.

The background to the application for extension of time is a dispute between the 1st and 2nd applicants on the one hand, and the respondent on the other, regarding their respective shareholding in the 3rd applicant. Also in contestation is the lawful managing director of the 3rd applicant. By a judgment delivered on 3rd September 2015, **Meoli, J.** found for the respondent and prohibited the applicants, pending the amicable resolution of the dispute between the shareholders, from disposing of the assets of the 3rd applicant. It is against that judgment that the applicants intend to appeal and for that purpose craves extension of time to lodge a notice of appeal.

Before the High Court **Messrs. Chepkwony & Company Advocates** represented the applicants. They contend that when the judgment was delivered, the 1st and 2nd applicants were out of the country and their advocates were not in court. The advocates also did not advise them of the outcome of the suit. When they learnt of the delivery of the judgment, their attempts to contact their advocates proved futile, their messages and telephone calls went unacknowledged and unanswered, and they were ultimately forced to seek the services of **Messrs. B. J. Sawe & Company Advocates** in Nairobi. They obtained a copy of the judgment on 19th September 2015, which they couriered to the new advocates, and the same was received in Nairobi on 21st September 2015. By that time, the period prescribed by the Court of Appeal Rules for lodging the notice of appeal had expired. The applicants filed this application for extension of time on 1st October 2015, barely ten days after receipt of the judgment.

Other grounds advanced in support of the application for extension of time are that the intended appeal is arguable and that the delay is not inordinate. The applicants further plead that from the nature of the High Court decree, the respondent is not likely to suffer any irremediable prejudice and that the failings of their former advocates should not be visited upon them. They lastly carve an opportunity to exercise their right of appeal, which is recognised by the Constitution and statutes.

The respondent vigorously opposed the application contending that the firm of Chepkwony & Company Advocates was still operational in Malindi; that the appellant's delay in filing the application was inordinate and unexplained; and that the intended appeal had no chances of success. The other grounds upon which the application was opposed were of a rather technical nature, it being contended that the 3rd applicant had not sanctioned the filing of the application or the appointment of the new firm of advocates; that the affidavit in support of the application was not sworn in Nairobi on 29th September 2015 as it purported; that the applicants had not followed the procedure in changing their advocates and that the application was fatally defective on account of its omnibus nature, which I have already disposed off.

I have duly considered this application and the submissions by learned counsel. It cannot be gainsaid that under rule 4 of the Court of Appeal Rules, the discretion of the Court to extend time is wide and unfettered. The only qualification is that the discretion shall be exercised judicially. Hence in **FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS C.A. No. NAI 332 of 2004**, the Court stated 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 ...”

(See also MUCHUGI KIRAGU V. JAMES MUCHUGI KIRAGU & ANOTHER CA NO. NAI. 36 OF 1996 and JOSEPH MWETERI IGWETA V. MUKIRA M’ETHARE & ANOTHER, CA NO. NAI. 270 OF 2001 (149/2001 UR)).

It looks fairly obvious that all has not been well between the applicants’ and their former advocates. A copy of the 1st applicant’s passport annexed to one of his affidavits in support of the application does support his statement that he was out of the country at the material time. The delay between the date the applicants state they obtained the judgment and the date of filing the current application for extension of time is barely 10 days, which I would not classify as inordinate or unreasonable delay.

On the face of it, the intended appeal cannot be dismissed as hopeless and bereft of any chances of success. Nor is there any obvious or readily apparent prejudice to the respondent, granted the nature of the decree of the High Court.

The respondent has raised several objections, which from their disputed nature cannot be determined conclusively in an application of this nature and ought not to be the grounds upon which this application is determined. The disputed shareholding in the 3rd applicant is a live issue in the intended appeal and is what will determine what the majority shareholders in the 3rd applicant can or cannot do. That issue should not be pre-empted in an application before a single judge.

The extract from the 1st applicant’s passport sufficiently puts to rest the claim that he could not have sworn the supporting affidavit in Nairobi. There is also a letter of authority from the 2nd applicant that on the face of it is valid and authorizes the 1st applicant to act on his behalf. The complaints regarding change of advocates are the kind of procedural hitches that this Court held in NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 6 OTHERS, CA NO. 228 OF 2013, ought not to be elevated to the level of criminal offences attracting heavy sanction but should as much as possible cede way to determination of matters on merit.

I also take into account the terms of the overriding objective in **section 3A of the Appellate Jurisdiction Act**, and the obligation of this Court under **section 3B** of the same Act to facilitate the just, expeditious, proportionate and affordable resolution of the appeals, I am satisfied that this is a suitable application for extension of time. Accordingly I allow the application and direct the applicants to file and serve the notice of appeal within seven days from today. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 4th day of December, 2015

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR