REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: F. SICHALE (IN CHAMBERS)

CIVIL APPLICATION NO. 16 OF 2013

BETWEEN

1. ERES N. V.

2. ERES ENTERPRISES LIMITED …......................................APPLICANTS

AND

MAINA MURAGE & CO. ADVOCATES …..............................RESPONDENT

(Application for extension of time to file and serve a notice of appeal from the judgment of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 14th August 2012 and delivered in court on 20th September, 2012

in

H.C. Misc. Appl. No. 459 of 2008)

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RULING

The applicants, ***Eres N.V.*** and ***Eres Enterprises Limited*** filed a notice of motion application dated 10th September, 2013 and sought the following orders:

1. THAT this Honourable Court do order that the time limited by the rules of the Court for the filing and service of Notice of Appeal be extended.

2. THAT the Applicants herein be given leave to file and serve Notice of Appeal upon MAINA MURAGE & CO. ADVOCATES.

3. THAT costs of this application be provided for.

The application was premised on the following grounds:

a. THAT the decision was given on 20th September 2012 by the Honourable Justice Mwongo on behalf of M K Ibrahim sitting in the High Court in Mombasa

b. THAT the applicant is aggrieved by the aforesaid decision and wish to appeal to the Court of Appeal against the whole of the decision.

c. THAT prior to the coming into force of the Constitution 2010, leave was required to appeal against such decisions.

d. THAT due to the changes effected by the coming into force of the new Constitution, leave to appeal to the Court of Appeal is now a matter of right and therefore automatic.

e. THAT the appellants and the Respondent filed an application for leave before the High Court and ruling delivered on 29th May 2013.

f. THAT the applicant advocate has now realised that the requirement for leave to appeal is unconstitutional as the jurisdiction of the Court of Appeal has been enhanced.

g. THAT the Respondent herein will not suffer any prejudice if time to lodge in the Notice of Appeal is extended.

h. THAT the applicant has an arguable appeal based on law and has overwhelming changes of success but stands to suffer loss if he is not granted the opportunity to file and prosecute the appeal.

The affidavit in support of the application was sworn by ***Nikola Radulovic*** the General Manager of the 2nd applicant and raised near similar grounds as those stated in the Notice of Motion.

In opposition to the Notice of Motion the respondent swore two affidavits dated 5th June, 2013 and 10th September, 2013 by ***Maina Murage***, the respondent herein and ***Mr. Gikandi Ngibuini*** the respondent's counsel respectively.

Mr. Murage deponed that the delay on the part of the appellant was inordinate and inexcusable for it was brought one year later after the judgment they intend to challenge was delivered; that the appellant failed to file the Notice of Appeal within the stipulated 14 days but instead opted to file an application seeking leave to file an appeal; that the appellants obtained leave to file their Notice of Appeal on 29th May, 2013 subject to payment of Kshs.57,793,600/= in the joint account of the parties counsels within 45 days; that the said sum of Kshs.57.793,600/= has never been deposited; that the appellants filed a Notice of Appeal pursued to Muya's J. Orders on 3rd June, 2013. On his part, Mr. Gikandi deponed that the appellant had failed to disclose the filing of a Notice of Motion on 13th September, 2013 seeking an order for setting aside the ruling of 29th May, 2013.

The application came before me on 6th December, 2013 and the respective counsels made their submissions.

Mr. Mogaka, learned counsel for the applicant urged the Court to grant it leave for extension of time to file a Notice of Appeal against the decision of ***Ibrahim J***. (*as he then was*) delivered on 20th September, 2012. Mr. Mogaka sought to explain the delay thus:-

1. The applicant's counsel sought leave to file an appeal by an application lodged in Court on 1st October, 2012, which was 10 days from the date of the ruling of 20.9.2012

2. The respondent filed an application seeking leave to file an appeal on 4th October, 2013.

The Court rendered its joint decision on 29th May, 2013 and granted the leave sought and ordered that the appeal be filed within the *"prescribed time"*. Mr. Mogaka submitted that as at 29th May, 2013 the 14 days within which to file a notice of appeal had long past and the situation was made worse by the failure of the applicant's counsel to seek orders for enlargement of time in the application filed on 1st October, 2012. Following the ruling of 29th May, 2013 the applicant's counsel proceeded to file a notice of appeal on 5th June, 2012.

It was Mr. Mogaka's contention that both parties were dissatisfied with the judgment of Ibrahim J. as the applicant herein was of the view that the sum of Kshs.21 million (*exclusive of interest*) was excessive whilst the respondent was of the view that it was too low. He relied on the following authorities:

1. ***Murai vs Wainana (No. 4) KLR. 37***
2. ***Gulamhussein Nurmohamed Cassam & Another vs Shashikant Ramji***
3. ***C.A. No. 362 of 1999: Mohamed Yakub & Others vs Robert M. Chege*** (unreported)
4. ***C.A. No. 217 of 1997: Michael Njoroge & Others vs Vincent Kimani Chege*** (unreported).
5. ***C.A. No. 121 of 1985: Wathira Gachino vs Kamau Kaburu***

In response Mr. Gikandi, learned counsel for the respondent vehemently opposed the application. He blamed the applicant for not making a full disclosure and in particular of not disclosing that it had filed an application to review the orders of Muya, J. of 29th September, 2012. He faulted the non-inclusion of the impugned ruling as without it the Court cannot decide whether there is an arguable appeal inspite of the memorandum of appeal dated 10th July, 2013; that instead the applicant annexed the ruling of ***Muya, J***. of 29th May, 2013. Mr. Gikandi pointed out that in the said ruling the Court ordered a deposit of ***Kshs.57,793,600.60*** to be made within 14 days apart from granting leave to file a notice of appeal within the *"prescribed time."* He pointed out that the applicant had actually filed a notice of appeal dated 30th May, 2013 following the order of 29th May, 2013 and are now seeking leave to file a second notice of appeal. Mr. Gikandi drew this Court's attention that on the same day this notice of motion was filed i.e. 13th September, 2013, the applicant proceeded to file an application to review the orders of *Muya J*. in ***H.C.C. Misc. Appl. No. 459 of 2013***, a fact which they failed to disclose. He urged the Court to disallow the application for the non-disclosure. His further grievance was that although the instant Notice of Motion application was filed on 13th September, 2013, it was not until 22nd November, 2013 when the respondent's counsel was served. He urged the Court to dismiss the application with costs. The learned counsel further submitted that if the Court was inclined to allow the application, then the applicant should deposit the sum ordered by *Muya, J*. of Kshs.57,793,600.60 in a joint account of the applicant's and respondent's counsel. He relied on the following authorities:

1. ***Margaret Muthoni Muchiga v Esther Kaori Gichohi,***

   (Nyeri) Civil App. 117/2009

2. ***Peter Luka Ndutu v Daniel Wambua,***

   (Nbi) Civil App. 317/2007 (UR 219/2007)

3. ***Geoffrey Mwangi Wachira v Joseph Mwangi Irungu,***

(Nbi) Civil App. No. 225/2009

4. *Eddy Ndetu Gitetu v KCB [2009] eKLR,*

Nbi Civil Application No. 77 of 2004

5. *Joseph Kariuki Kamau v Pius Nungari & Another,*

(Nbi Civil App 244 of 2009

6. *Kenya Comm. Bank v Kenya Planters Coop Union,*

(Nbi) Civil Application 85/2010

7. *Owners of M. V. Lillian v Caltex Oil Kenya Ltd, [1989] KLR 1*

8. *Mwangi Stephen Mureithi v Daniel Arap Moi,*

   Nbi HC Petition NO. 625 of 2009

9. *Hunker Trading Ltd v Elf Oil Ltd,*

   Court of Appeal Civil Application No. 6 of 2010

10. *Depak Chamanlal Kamani v Kenya Anti-Corruption Authority, Nairobi Civil Appeal (Application) No. 152 of 2009*

11. *Commissioner of Income Tax v Westmont Power (K) Ltd,*

    Nbi Civil Appeal 128/2006

12. *John Gakure v Dawa Pharmaceuticals Ltd,*

    Nbi Civil Appeal (Application) No. 299/2007

13. *Musamarini Limited v ADM Limited,*

    Nbi Civil Appeal (Application) No. 171 of 2010

14. *The Inherent Jurisdiction of the Court, Sir Isaac Jacobs, (1970) Current Legal Problems 23*

I have carefully considered the rival arguments and the authorities cited by each of the respective counsels.

The Notice of Motion application seeks an order for extension of time to file and serve a Notice of Appeal from the decision of ***Ibrahim, J*** (*as he then was*) in Mombasa ***H.C. Misc. Appl. No. 459 of 2008*** rendered on 20th September, 2012. The Notice of Motion is premised *inter alia* on Rule 4 of this Court's Rules providing:

> ***"The Court may, on such terms as it thinks just, by order extent the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the 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."***

Having read all the cited authorities, what is uppermost in my mind is that it is important to do justice to all and at all times. In the dispensation of justice, it is important to always bear in mind that there are two (*if not more*) adversaries. In the particular circumstances of this case the applicant has attributed the non-filing of the Notice of Appeal in time to the appellants counsel's inadvertence or ignorance of the law.

In opposing the application Mr. Gikandi cited several authorities including ***Margaret Muthoni Muchiga vs Esther Kamori Gichuhi*** (supra) wherein *Visram, J.A.* found that the delays of:

> ***"... one for three months, and the second comprising thirteen months were inordinate, and either unexplained, or the explanation was lame and unacceptable to the Court."***

In ***Peter Luka Ndutu vs Daniel Wambua Ndavi***, *P. Tunoi, J.A.* (*as he then was*) refused to grant leave for extension of time to file and serve a notice of appeal on the reasoning:

> ***"... the applicant has not offered any explanation as to why his new advocate took 17 months to file this application. I agree with*** *Mr. Kimuli* ***that the delay herein is inordinate and has not been explained.***
>
> ***The applicant has been guilty of laches at every stage since the decision of*** *Kasango, J.* ***was delivered and all these have not been explained to my satisfaction."***

In ***Geoffrey Mwangi Wachira vs Joseph*** reliance was made on the case of ***Mwangi Stephen Mureithi vs Daniel Arap Moi*** (*supra*) where reference was made to the case of ***Mitchell & Others v Director of Public Prosecutions & Another [1985] LRC (Const.) 127*** where the Court held:

> ***"In a civilised society Legal process is the machinery used in the courts of law to vindicate man's rights or to enforce his duties. It can be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage which the law does not recognise as a legitimate use of that process. But the circumstances in which the abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the steps taken and sometimes on extrinsic evidence only. But when it is shown to have happened, it would be wrong to allow the misuse of the process to continue. Rules of the court may and usually provide for its frustration in some instances. Others attract*** *res judicata* ***rule. But apart from and independent of these there is an inherent jurisdiction of every court of justice to prevent an abuse in its process and its duty to intervene and stop the proceedings or put an end to it.".***

Mr. Gikandi relied on several authorities to the effect that even the oxygen principles cannot aid the applicant. See ***Hunker Trading Co. Ltd vs Elf Oil Kenya Limited, Deepak Chamanlal Kamani & Another vs Kenya Anti-Corruption Commission & Others,*** and ***John Gakure & 148 Others vs Mwangi Irungu***, where *Omolo J.A.* held that:

> ***"Litigation whether conducted by laymen or otherwise must come to an end at some stage. The applicant must accept the fact that he lost the land and could not be allowed to revive the litigation."***

In ***Eddy Ndetu Gitetu vs Kenya Commercial Bank Ltd*** (supra) the Court of Appeal held:

> ***"For an applicant to succeed in an application under*** *Rule 4* ***of the Court of Appeal Rules, he has to satisfy to the Court that***
>
> ***a) The delay was not inordinate and has been sufficiently explained.***
>
> ***b) The intended appeal was arguable.***

c) No prejudice would be caused to the respondent if the application to extend time was allowed.”

On the aspect of non-disclosure, Mr. Gikandi relied on the well known case of ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (supra) where the Court cited the case of The Anoria (Vasso) [1984] QB 477*** where it was held:

> ***“It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant.***
>
> ***Failure to make disclosure may result in the discharge of any order made upon ex-parte application”.***

He also cited “Inherent Jurisdiction of the Court, ***Sir Issac Jacob*** [1970] *“Current Legal Problem 23,”* entitled

Abuse of process:

> ***“From the earliest times, the court exercised the power under its inherent jurisdiction by summary process to terminate proceedings which were frivolous or vexatious or which were an abuse of process.***

and defines abuse as follows:

> ***“It connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused , and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice. It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.***
>
> ***A proceeding may be said to be*** *“frivolous”* ***when a party is trifling with the court, or when to put it forward would be wasting the time of the court or when it is no capable of reasoned argument.”***

Mr. Gikandi's final submission was that the applicant lacked condour .

In support of the application, Mr. Mogaka cited several authorities including ***Trust Bank Limited vs Amolo Company Ltd*** (supra) wherein ***Essanji & Another vs Solanki [1968] E.A.*** at page 224 was cited thus:

> ***“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.”***

In ***Murai v Wainaina*** (No. 4) supra it was held by this Court:

> ***“The mistake of an advocate or legal adviser may amount to sufficient reason as per rule 4 of the Court of Appeal Rules”***

and further that:

"A bona fide mistake does not mean an error without fault. The advocate's belief was a mistake on a point of law, however wrong he might have been in his belief."

By way of ***Obiter Madan, J.A***. said this:

"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

(Obiter Madan JA)

The courts of justice, themselves, make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interest of justice. A static system of justice cannot be efficient. *Benjamin Disraeli* ***said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress."***

Similarly in ***Gulamhusseein Nurmohamed Cassam & Another vs Shashikant Ranji Sachania & Another*** (supra) *Madan, J.A.* held *inter alia*

"Had it not been for the error on the part of the applicants' legal adviser in misinterpreting the plain wording of the relevant rule, the notice of appeal could have been served well within time and the application for an extension of time therefore would have been unnecessary.

An error in the part of a legal adviser may help to build up sufficient reason for an extension of time under Rule 4."

Equally compelling is the holding in ***Mohamed Yakub & Others vs Robert M. Chege*** (*unreported*) wherein ***Owuor, J.*** where counsel made a mistake the Court found that counsel had made a mistake genuinely and that since counsel was labouring under a mistaken belief and that her action was not motivated by any other reason and granted leave to file Notice of Appeal.

Also in the case of ***Michael Njoroge "B" & Others vs Cinvent Kimani Chege*** (supra) *Shah, J.A.* Observed that:

"Professional standard must be maintained at their highest. But when a lawyer errs, and the error is remediable his client ought to be given a chance to be heard."

The historical background points an unfortunate situation. The judgment of Ibrahim, J. was delivered on 20th September, 2012. It is common ground that both the parties herein were aggrieved by the decision. The applicant filed an application seeking leave to file an appeal on 1st October, 2013 whilst the respondent filed his on 28th November, 2013.

These two applications were filed within 11 and 14 days respectively from the date of judgment. Unfortunately, Muya, J. did not deliver his ruling until 29th May, 2013 a period of about 7 months from when the applications were filed. In the ruling, the learned Judge granted leave to have the Notice of Appeal lodged within the *"prescribed time"* and on condition that a sum of Kshs.57,793,600.60 be put in

a fixed account of the parties counsel. The applicant proceeded to lodge the Notice of Appeal on 5th June, 2013 and this Notice of Motion on 13th September, 2013. Clearly the Notice of Appeal was lodged outside the 14 days period and neither had an order for enlargement of time been sought.

The applicant explains that he now realizes that leave to appeal was not necessary but time to lodge a Notice of Appeal is long past and even the one lodged on 5th June, 2013 was clearly outside time.

It would appear that out of desperation and having realized his folly, the appellants' counsel filed an application on 13th September, 2013 to review Judge Muya's orders of 29th September, 2012.

In my view, it is apparent that the applicant did not go to sleep over since the judgment of Ibrahim, J. (*as he then was)* was delivered on 20th September, 2013. He has been '*busy'* engaging the court, although in the process, he made wrong turns at every stage. His problems were compounded by the ruling of Muya, J. delivered on 29th May, 2013 that permitted him to lodge a Notice of Appeal within the "*prescribed time.*" It was unfortunate that the High Court failed to acknowledge that the 14 days period of lodging a Notice of Appeal was long past. The problem was further compounded as submitted by Mr. Mogaka that the applicant had failed to seek for enlargement of time. I find that the delay on the part of the applicant has been sufficiently explained as pointed out By ***Madan, J.A***. in ***Belinda Murai & 9 Others vs Amos Wainaina*** (supra)

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to revers itself when wisdom accumulated over the course of years since the decision w s delivered so requires. It is is all done in the interest of justice."***

Mr. Gikandi further faulted the applicant for lacking condour. He pointed out that the applicant had failed to disclose that on 13th September, 2013, he had lodged an application seeking orders to set aside Muya, J.'s orders of 29th May, 2013. In my view, nothing much turns on this. The filing of the application does not in any way affect this application but is a parallel process that is not in conflict with this application. Again I do not find that this omission was motivated by ill design. As for possible prejudice I do not see any and none was urged before me save to state that the respondent argued that the appellant is a Belgian Company with no known assets in Kenya. And to counter this an order to a deposit of one half of the sum of Kshs.57,793,600/= shall be made.

The upshot of this is that I allow the application filed on 13th September, 2013 and order that the applicant do file their Notice of Appeal within 7 days from today's date and thereafter file the record of appeal within 14 days from the date of filing the Notice of Appeal.

This leave is on condition that the applicant deposits one-half of the sum of Kshs.57,793,600/= in an interest earning account in joint names of the respondent's counsel within 30 days from today. The costs of this application shall however be borne by the applicants as the delays herein have been occasioned by them.

Dated and delivered at Mombasa this 13th day of February, 2014

F. SICHALE

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JUDGE OF APEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/dw