



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE J.A) (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 293 OF 2013 (UR 213/2013)**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED .....APPELLANT**

**AND**

**ALLAN GEORGE NJOGU RESIDENCES LIMITED .....RESPONDENT**

*(Application for leave for extension of time and for the admission of the Notice of Appeal and Record of Appeal out of time in this appeal from the Judgment/Order of the High Court of Kenya at Eldoret (Munyao, J.) dated 16<sup>th</sup> April 2013*

*in*

***ENVIRONMENT AND LAND CASE NO. 384 OF 2012)***

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**RULING**

By its motion dated 22<sup>nd</sup> October 2013 the applicant prays that this Court be pleased to enlarge time for filing of the notice of appeal and record of appeal out of time and that its notice of appeal and record of appeal lodged on 10<sup>th</sup> October 2013 be deemed as properly filed on record.

The notice is supported by the affidavit of the applicant's advocate one **Robert Paul Onyango** expressed as sworn on 22<sup>nd</sup> October 2013. It is founded on the grounds appearing in its face which are essentially that;

- The applicant wrote a letter dated 25<sup>th</sup> April 2013 bespeaking the proceedings and judgment of the "Superior Court" (by which the applicant means the High Court) but inadvertently omitted to copy and serve the same on the respondent though it did reach the respondent as an annexure in an affidavit on 13<sup>th</sup> May 2013.
- The applicant noticed the error, which it calls unintentional and curable, after the record of appeal had been filed and served.
- The respondent will suffer neither prejudice nor inconvenience by the allowing of this application timeously filed.

The supporting affidavit adds factual flesh to the grounds and attaches documentary proofs. The deponent avers that the law firm of Rachuonyo & Rachuonyo Advocates where he practices law came on record for the applicant after its previous advocates had lodged a notice of appeal at the High Court on 25<sup>th</sup> April 2013. His firm then wrote a letter on the same day requesting for proceedings and judgment but failed to copy the same to the respondent's advocate as required by **Rule 82(2)** of the Court of Appeal Rules. He attributes the omission to inadvertence and oversight and craves this Court's discretion to save the appeal which it is averred is meritorious. The deponent also avers that the applicant has already paid to the respondent the sum of Kshs. 5 million as ordered by the High Court and that the respondent will suffer no prejudice by enlargement of time.

The respondent opposed the motion by an affidavit sworn by its director **Allan George Njogu Kamau** on 6<sup>th</sup> November 2013. It took a dim view of the applicant's pleas and explanations. It asserted that the applicant's admitted failure to comply with **Rule 82(2)** of the Court of Appeal Rules is fatal to the application. It also asserts that the application before me has been brought after a lengthy and unexplained delay and avers further that the applicant having paid over some Kshs. 5 million as ordered by the High Court, the decree has been fully satisfied and the appeal will serve no useful purpose and is now merely academic. The respondent finally avers that even though it did receive the letter dated 25<sup>th</sup> April 2013 as an attachment to an affidavit, that did not amount to service and the letter was to no effect anyway as the firm of Rachuonyo & Rachuonyo were not on record for the applicant as at that date.

Mr. Onyango and Mr. Kimani, respective learned counsel for the applicant and the respondent in their submissions before me echoed, expounded and expanded on the positions taken by their clients and also cited authorities in support of those positions.

An application under **Rule 4** of our Rules is a plea to a single Judge of this Court to extend time limited by the Rules or a decision of the Court or the Superior Court for the doing of any act authorized or required by the Rules. The application may be made before or after the said act has been done. It is a calling for the court's discretionary powers and its exercise is now based on principles that are well-settled. In **LEO SILA MUTISO Vs. ROSE C.A. NAI 255 OF 1997** (unreported) the Court pronounced them thus;

***“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well-settled that in general, the matters which this Court takes into account on deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

The application before me was filed at the Court's Eldoret sub-registry on 22<sup>nd</sup> October 2013. That was some ten days after the record of appeal itself was lodged and **Mr. Onyango** avers that it is only after he had filed the record of appeal that he realized the letter bespeaking the proceedings had not been formally copied to and served upon the respondent. As this has not been challenged, it would seem that the applicant moved this Court within ten days of discovering its omission, at most.

I am completely unable to follow the respondent's submission that I should not exercise my discretion in favour of the applicant because he did not explain “why he did not discover the omission earlier.” With respect, I am not prepared to penalize a party for failing to discover errors and omissions earlier than it did. Only for such dilatoriness as occurs after discovery of error may I reasonably hold such party to account.

As to whether there was non-compliance with **Rule 82**, I find that the applicant's approach in bringing this application evinces the appropriate and necessary caution and diligence that the situation demanded. The rule requires a party to apply for a copy of the proceedings of the Superior Court (High Court). If such request is made within **thirty days** of the date of the decision sought to be appealed against, the time taken in preparing the copy, so certified by the registrar of the High Court shall be excluded from computation of the sixty days within which an appeal must be filed. That time benefit is however lost to

any applicant who fails to make the request for proceedings in writing and to copy the request to the respondent.

In the case before me, the request for proceedings was made within time. It was also in writing as required. It was not however formally and specifically served upon the respondent. Strictly speaking then, the Rule was not complied with hence the necessity for this application for enlargement of time to cure the appeal filed, which would otherwise have required only a certificate of delay from the High Court.

It is not lost to me that even though the request for proceedings was not strictly speaking served upon the respondent, it was nonetheless brought to its attention by way of a further affidavit by **Damaris Wanjiku Gitonga**, the applicant's manager in charge of legal services, sworn on 10<sup>th</sup> May 2013, which was within the thirty days provided for by **Rule 82**. Paragraph 9 of the said affidavit stated as follows;

***“9. That I am further informed by the incoming advocates, which information I verily believe to be true that steps have already been taken by them to procure copies of the proceedings from the court file in readiness for preparation of a memorandum and record of appeal. I attach hereto a copy of a letter addressed to the Deputy Registrar of this Court dated 25<sup>th</sup> April 2013 and mark it as ‘DWG-1.’ A duly filed copy of the same is available in the court file.”***

The effect of that averment, to my mind, is to deprive the respondent of any argument that it may have been surprised, ambushed or otherwise prejudiced on the question of whether or not the applicant had bespoken proceedings and within time. Added to the fact that the decretal sum of Kshs. 5 million was also paid over to the respondent as ordered by the High Court against a bank guarantee, and the record of appeal having already been filed, the respondent cannot be heard to say that extending time to regularize the appeal will occasion it any form of prejudice. I note that the respondent had not moved the court under **Rule 84** for the striking out of the record of appeal. Such step should have been taken within thirty days of being served with the record of appeal which had long expired by the time this application was filed.

Bearing all of the foregoing facts and factors in mind, and being cognizant of my role to do substantive justice between parties consistent with the constitutional edict and the oxygen principle untrammelled by technicalities of procedure, I find that the applicant has presented a meritorious application and has paid due regard to the Rules. Where it fell short it has applied in timely fashion for this Court's favourable discretion which I accordingly exercise.

The motion dated 22<sup>nd</sup> October 2013 is allowed and time is enlarged with the result that the notice of appeal lodged on 25<sup>th</sup> April 2013 and the record of appeal filed on 10<sup>th</sup> October 2013 are deemed to be properly on record.

Costs shall be in the appeal.

***Dated and delivered at Nairobi this 14<sup>th</sup> day of March 2014.***

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**REGISTRAR**