



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE –JA IN CHAMBERS)

CIVIL APPLICATION NO. 250 OF 2010

BETWEEN

SOLOMON MUATHE MITAU & 787 OTHERS.....APPLICANTS

AND

NGUNI GROUP RANCH.....RESPONDENT

(An application for extension of time to file a Memorandum and Record of Appeal out of time in respect of the Notice of Appeal dated 8th June, 2009 and filed with the Deputy Registrar of the High Court of Kenya in Machakos on the same date with intention to appeal against the whole of the Judgment (Lenaola J) Dated 27th May, 2009

in

Machakos High Court Civil Case No. 109 of 2001)

RULING

Before me is an amended Notice of motion dated the 7th day of October, 2013 and lodged on the 9th day of October, 2013. It is premised on Section 3A and 3B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law. The following reliefs are sought:-

- 1. This Honourable Court be pleased to grant leave to the Applicants to file a Notice of Appeal within seven (7) days or as the Court shall deem fit.***
- 2. In the alternative to prayer (1) herein, the Notice of appeal filed on 8th June, 2009 be validated or deemed properly filed.***
- 3. This honourable Court be pleased to extend time for the Applicants to file their memorandum of appeal and the record of appeal and the memorandum of appeal and record of appeal filed herewith be deemed as duly filed and served upon payment of the requisite Court fees.***
- 4. The costs of this application be provided for.***

The application is grounded on the grounds in the body of the application and the content of the supporting affidavit deponed by **Solomon Muathe Mitau** on the same 7th day of October, 2013 and filed simultaneously with the amended application.

In summary, the deponent depones that he has deponed the affidavit on his own behalf and on behalf of the other 787 others; that the applicants filed Machakos HCCC.82 of 1996 (OS) against the respondent; the suit was duly heard resulting in a Judgment delivered by **Lenaola J** on the 27th May, 2009, by which time the applicants were represented by the firm of **Kinyua Musyoki & Company Advocates**. The applicants desired to change representation to the firm of **M/S Kisongoa** and Company advocates who upon acceptance of the brief presented an application for change of advocate on 3rd June, 2009 which was duly granted.

Upon placing themselves on the record, **Mr. Kisongoa** filed a notice of appointment of advocates and then lodged a notice of appeal on 8th June, 2009. He then applied for a typed copy of the proceedings on the same date of 8th June, 2009. He also wrote to the previous firm of advocates for the applicant vide their letter of 22nd June, 2009 seeking the release of the client file to them.

It was not until the 12th August, 2009 when the incoming lawyer received notification that a copy of the proceedings was ready for collection. Arrangements were made to collect these together with the certificate of delay issued on 24th August, 2009. Upon receipt of the voluminous proceedings, the applicants' counsel embarked on preparation of the record of appeal which took a bit of time and by the time these were readied and filed on 2nd November, 2010 time for lodging the record of appeal had become spent hence the application to regularize the position.

M/S Songole who was holding brief for **Mbaluka** for the applicants urged me to allow their application because the delay was not deliberate; that they now have the record ready and are ready and willing to lodge the record of appeal as soon as allowed to do so.

The respondent opposed the application on the basis of a replying affidavit deponed by one **Daniel Mwengea Mukolo** on the 13th day of February, 2014 and filed on the 20th day of February, 2014, the content of submissions also filed on the same 20th day of February, 2014 as well as oral highlights in Court. In summary learned counsel **Mr. Mutua** holding brief for **Mwalimu** urged me to dismiss the application on the grounds that the applicants have not sufficiently explained a delay of fourteen (14) months from the date of receipt of the certificate of delay and as such, they have not brought themselves within the principles governing the granting of a relief under rule 4 of the Court of Appeal Rules.

Mr. Mutua also contended that there is no need to grant the applicants an indulgence because their intended appeal is hopeless and cannot succeed; that the respondent is already in possession; that it is not true that the mentioned number of applicants are still participating in these proceedings as some were struck out from the plaint at the High Court level; and lastly that the respondent is being hindered from enjoying the fruits of the Judgment by the applicants frivolous application.

Mr. Mutua relied on the decision in Civil Application No. Nai 290 of 2007 (Nak.31/2007) **Joshua Korir and 2 others versus John K. Koskei** for the proposition that where the applicant or his advocate has occasioned the delay, they will be penalized in the payment of costs for the application; the decision in **Dr. Wilson Mwonga Ngoka versus Anne Ndinda Ngoka Civil Application No. Nai.296 of 2005 (182/2005 UR)** for the proposition that where the intended appeal is frivolous, there is no need to grant leave for extension of time to file the same. Lastly the decision in **Margaret Njeri Njoroge versus Hanna Wambui Kibe Njoroge Civil Application No. Nai 266 of 2007 (UR 164/2007)** for the proposition that leave to extend time will be refused where it is proven that the respondent will be prejudiced if the application were to be allowed.

My jurisdiction to grant the relief sought has been invoked under Section 3A and 3B of the Appellate jurisdiction Act Cap 9 Laws of Kenya and Rule 4 of this Courts' Rules. Section 3A and 3B enshrines the

overriding objective principle which enjoins me to make a just determination of the proceedings and where possible to observe the rule on timely disposal of proceedings.

Rule 4 on the other hand is a discretionary rule. It reads:-

The Court may on such terms as it thinks just, by order extend 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.

As submitted by **Mr. Mutua**, case law has crystallized parameters for the exercise of my jurisdiction under that rule. This was explicitly set out in the case of **Mutiso versus Mwangi [1999] 2EA (SCU) 231** wherein, this Court held inter alia that:-

“The decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters. First, the length of the delay; second the reason for the delay; thirdly possibly, the chances of the appeal succeeding if the application is granted, and fourth the degree of prejudice to the respondent if the application is granted”

I have applied the above guiding parameters to both the rival arguments and the facts as laid before me. It is my considered view that there is no dispute that the notice of appeal was filed in time. That notice is still alive as the respondent has not procedurally moved the Court under Rule 84 of this court’s Rules to strike it out.

The Notice of Appeal is the means by which this Court becomes seized of this matter. In the absence of an order striking out that Notice of appeal, this Court is still seized of that appeal save that such an appeal is in an irregular form for the reason that the record of appeal was not lodged within the time line prescribed by Rule 82(1) of this Courts Rule, namely sixty (60) days from the date of the lodging of the notice of appeal. Rule 82(1) is not cast in stone. There are instances where genuine reasons may abound as to why the record was not lodged in time. That is why Rule 4 becomes handy, while the case law principles guide the Court in the exercise of its discretionary jurisdiction.

In the circumstances of the application before me, there is an undisputed delay of fourteen (14) months from the date of delivery of the certificate of delay. The explanation given by the applicant was that the mistake lay with the applicants’ advocates then on record for them. The respondent has argued that the negligent performance of duty by the applicants’ advocates should not be visited on him. This may be so but the respondent has himself cited case law of **Joshua Korir and 2 others versus John Koskel (Supra)** where the delay was occasioned by the applicants advocate, the exercise of the Courts discretion was not withheld but the applicant was penalized with an order to pay the respondents cost. Herein there is proof that applicant had counsel on record. They changed to a new counsel who managed to come on record well in time to lodge a Notice of appeal in time. The incoming counsel was deemed to be conversant with the time lines set by Rule 82(1). It was the advocates’ fault that he did not move with speed to comply with the rules. I see no reason as to why the applicant should be penalized save for an award of costs in the event the application is allowed.

As for prejudice to the respondent, I find none demonstrated as the respondent claims to be in possession of both the land and the title. The status quo subsisting can be observed pending the disposal of the intended appeal to give the applicant an opportunity to get a second opinion on his grievances.

As for the likely success of the appeal, it is evident from the framing of this ingredient that, it is not a mandatory consideration. That is why there is use of the words “**possibly**”. On my part, I find it unprudent to asses this in the absence of an entire record of appeal being placed before me. This aside, I am enjoined not to loose sight of the presence of Article 159 (2) (d) of the constitution which enjoins me to lean towards allowing issues in controversy as between the parties being decided substantively on their merits as opposed to shutting out intending litigants on grounds of technicality. Shutting out the applicant from a

process which the relevant rules permit a reprieve will be highly punitive and uncalled for.

For the reasons given above, I am inclined to grant prayer 2, 3 and 4 of the Notice of motion application lodged on the 9th day of October, 2013 and I proceed to make the following orders:-

1. The Notice of Appeal filed on 8th June, 2009 be and is hereby validated and or deemed as properly filed.
2. The applicant who says he has the record of appeal ready for filing will have thirty (30) days from the date hereof to lodge the said record of appeal.
3. The respondent will have costs of the application.

Dated and Delivered at Nairobi this 7th day of April, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR