



THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M KARIUKI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 138 OF 2013

BETWEEN

P N N.....APPLICANT

AND

Z W N.....RESPONDENT

(Being an application for extension of time within which to file and serve a notice of appeal of the High Court of Kenya at Nairobi (Nambuye, J.) dated 28th September, 2014

in

H.C.C.C. NO.10 OF 2004)

R U L I N G

This ruling relates to the application (by notice of motion) dated 27th June, 2013 made by **P M N** seeking extension of time to file and serve a notice of appeal against the judgment and decree delivered by the High Court (Nambuye J, as she then was,) on 28th September, 2013.

The application came up for hearing before me sitting as a single Judge on 17th March, 2014 pursuant to rule 53 of the rules of this Court.

Learned counsel Mr. D. K. Musyoka appeared for the applicant, while learned counsel Mrs. Judy Thongori appeared for the respondent. Mrs. Thongori opposed the application. Mr. Musyoka relied on the affidavit sworn by him on 26th June, 2013 in support of the application in which he has averred that he did not get notice that delivery of the judgment would be on 28th January, 2011 and that he learnt of the delivery on 1st November, 2012 when, Mrs. Thongori, counsel for the respondent, called him to enquire about implementation of the judgment and that after he got instructions from the applicant on a date that is not disclosed, he filed a notice of appeal on 9th June, 2012 and served it on 22nd November, 2012. A notice of appeal is supposed to be filed within 14 days of delivery of judgment/ruling and to be served within 7 days of filing. In this case, the applicant avers that he was disabled from filing the notice of appeal within 14 days of delivery of the judgment as required by rule 75 of the rules of this court as he had no notice of the date of delivery of the ruling. Why did he serve it after 13 days on 22nd November,

2012 instead of 7 days after filing it on 9th November, 2012? Mr. Musyoka also submitted that he did not apply for proceedings in time because he did not have notice of delivery of the judgment. But he applied for proceedings on 6th November, 2012 which shows that as at that date he was alive to the fact that judgment had been delivered. He places the blame on his clerk in serving the notice of appeal late and says that his clerk was under the impression that the notice needed to be signed by the Registrar first. He avers that delay was not inordinate and pleads that it be excused.

Mr. Musyoka referred in his supplementary affidavit to a ruling of this Court in Civil Application No. Nai 91 of 2013 (UR 61/2013) involving same parties in which **P N N**, the applicant herein applied for and obtained stay of execution of the judgment and decree of the High Court (Nambuye, J. as she then was) in H.C.C.C. No.10 of 2004 (OS) on terms that he, **P N N**, “**shall not hamper or part with possession of the properties, the subject of the intended appeal**” and “**in addition, Z W N shall continue to occupy and utilize parts of the suit properties that she is presently occupying and using without interference from the applicant, P N N**”. This order for stay was made in the context that there was pending for determination an intended appeal following a notice of appeal filed by **P N N** against the judgment of Nambuye, J. as she then was, which raised several arguable points. The present respondent, **Z W N** opposed the application for stay and challenged the competence of the notice of appeal given by **P N N**, the applicant herein contending that the application for stay was “**a mere stratagem to delay enjoyment of the fruits of her judgment.**” The order for stay seems to be in place.

Mrs. Thongori in opposing the notice of motion contended that the explanation given by the applicant for late filing and service of the notice of appeal was wanting. There was no reasonable excuse why the notice of appeal, which was filed late, was not served within 7 days. At any rate, she said the delivery of the judgment was reflected in the cause list and could have been discerned from it. Moreover, once the applicant realized that the notice of appeal was filed late on 9th November, 2012 and served late on 22nd November, 2012, the applicant did not move to court soon enough to seek extension of time and it was not until after 7 months that the present application for extension of time was filed on 27th June, 2012. It was Mrs. Thongori’s submission that the lateness in seeking extension of time, reflects lack of seriousness on the part of the applicant, **P N N** who, she contended, was using the order for stay as a shield against execution.

As correctly pointed out by Mrs. Thongori, the application relates to a judgment in a matrimonial property dispute in which the parties are septuagenarians. The judgment of the High Court (in HCCC No.10 of 2004 (OS) divided the properties equally. It is also discernible that the life of the order for stay in Civil Application No. Nai 91 of 2013 (UR 61/2013) is dependent on this ruling. Mrs. Thongori urged the Court to decline to exercise its discretion in favour of the applicant under rule 4 of the Court of Appeal Rules and to dismiss the application.

I have perused the application and the applicant’s two affidavits and the respondent’s replying affidavit together with the annexures attached to the affidavits. This Court has unfettered power under rule 4 of the rules of this Court to extend time. Rule 4 stipulates:

“r.4. 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.”

The discretionary power of the Court under rule 4 is required to be exercised judicially with the object of serving justice to the parties. The policy of the Court is to sustain an appeal. As long ago as 1986, Apaloo JA, as he then was, stated in *GATU V. MURIUKI [1986] KLR 211* that:

“the Court ought to be inclined to exercise its discretion to enlarge the time to appeal where the applicant has shown prima facie that he has an arguable case for consideration.”

More recently, Githinji, JA in *WASIKE V. KHISA [2004] KLR 197* re-echoed this when he held that the

discretion of the Court under rule 4 is unfettered and must be exercised judicially and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable, he stated, that would disentitle an applicant to an order for extension of time and whether or not delay is unreasonable depends on the circumstances of each case.

The jurisprudence that has emerged from decisions of this Court on interpretation of rule 4 shows that the factors to be considered in deciding whether to exercise the discretionary power in favour of an applicant include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 f the Constitution and also the need to ensure under Section 3A(1) of the Appellate Jurisdiction Act, Cap 9, that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals. For the purpose of furthering the overriding objectives the Court is enjoined to handle all matters for the purpose of attaining the aims set out in Section 3B(1) of the Act which include the just determination of the proceedings.

In ***Gulam Hussein N. Cassamand and Another v. Shashikant Ramji (Civil Application No. Nai 1 of 1981)*** the Court acknowledged that human errors or mistakes including errors by legal advisors can constitute acceptable excuse for not acting within the timelines set in the rules or the orders of the Court. In that case, C.B. Madan, JA, as he then was, held that errors by a legal advisor can be pardoned. In ***Belinda Murai and 9 Others vs Amos Wainaina (Civil Application No. Nai (of 1978)*** unreported by C. B. Madan state in relation to mistakes and the Court's unfettered discretionary power to extend time under rule 4.

“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 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. 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 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.”

Applying these principles to the instant application, has the applicant made out a case for the order he seeks? He has offered a plausible explanation for filing the notice of appeal late. He ought to have served the notice of appeal within 7 days of filing but he took 13 days to do so. Having failed to file the notice in time, he ought to have been twice shy and ensured that service was done in time. The applicant's counsel attributes the delay in serving the notice to the misconception by his law clerk who thought it had to be signed by the Deputy Registrar before service. While I am prepared to accept the explanation for late service, I must hasten to state that it behooves advocates to continually teach their law clerks basic principles on matters of pleadings and service of documents. I observe that having filed late and served late, the applicant did not apply for extension of time until after 7 months when he filed the notice of motion on 27th June, 2013. He seems to have been preoccupied with obtaining an order for stay of the High Court orders and in that regard he applied in April, 2013 in this Court in Civil Application No. Nai 91 of 2013 (UR 61/2013) and got a ruling on 15th November, 2013. I also observe that the High Court file had gone missing and Mrs. Thongori's client obviously on counsel's advice took the sensible step of applying for its reconstruction in July 2012 and that orders for reconstruction of the court file were made on 31st July, 2012 and the reconstructed file was required to be stored in the court's strong room. These circumstances, coupled with the fact that the litigation involves matrimonial properties and the appeal seems in my view to be arguable and hence the need to have the dispute resolved and determined on merit, have persuaded me to exercise my discretion so as to sustain the appeal seeing that no undue prejudice will be caused to the respondent and that costs will adequately compensate the latter.

Accordingly, I allow the notice of motion dated 27th June, 2013 and grant orders in terms of prayers 1 and 2 of the motion providing that the applicant shall lodge and serve the record of appeal within 21 days from the date hereof if he has not done so already. The applicant shall pay the respondent the costs of this application in any event.

In view of the nature of the litigation and the fact that the parties are septuagenarians, the record of appeal, if not filed, shall be filed and served as directed and the appeal shall be fast tracked.

Dated and delivered at Nairobi this 2nd day of May, 2014.

G.B.M. KARIUKI SC

JUDGE OF APPEAL

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

DEPUTY REGISTRAR