



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 292 OF 2013 (UR 212/2013)

BETWEEN

SYOMBUA MULI MUTUVA.....APPLICANT

AND

CHARLES A.K. MULELA.....RESPONDENT

(An application for injunction pending the filing, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (A. Makhandia, J.) dated 20th September, 2013

in

H.C.C.C. NO. 58 OF 2009)

RULING OF THE COURT.

This is an application mainly brought under **Rule 1(2)** and **(4)** of the Court of Appeal Rules for extension of the 90 days period fixed by the Court for filing of the record of appeal.

By a **Rule 5(2) (b)** application dated 25th October, 2013, and lodged in Court on 30th October 2013, the applicant herein sought orders of injunction to restrain the respondent from blocking the applicant's access to, and from transferring, **plots No. 3444 and 3445 in Katelembo Athian Mavuti Farmers and Ranching Co-operative Society Limited**; an injunction restraining the respondent from transferring Plot No. 653 in the same Co-operative Society and pending the hearing of the application.

The applicant also sought a stay of execution of the decree of the High Court issued on 9th October 2013 pending the hearing and determination of an intended appeal from the said decree of the High Court.

By a Ruling dated 14th March 2014 this Court granted the orders of injunction as prayed pending the hearing and determination of the intended appeal. However, this Court added the following order:

“The applicant shall within 90 days from the date of delivery of this ruling lodge the record of appeal failing which this order shall automatically lapse.”

The extension of the 90 days period (in the words of the applicant) is sought on the ground that:

“The proceedings in Machakos H.C.C.C. No. 52 of 2009 are still pending for typing and the applicant cannot lodge the record of appeal without the typed proceedings and as such the applicant is not in a position to comply with the order within the 90 days fixed by the Court”.

The application is opposed essentially on two grounds namely: that there is no order capable of extension as the order sought to be extended lapsed more than one month prior to the filing of the application, and secondly, that no justifiable reasons have been given for the inordinate delay. Further, **Mr. Abass Esmail**, learned counsel for the respondent was of the view that the application for extension of time should have been prosecuted before a single Judge of this Court.

It is true that pursuant to **Rule 53 (1)** of the Rules, an application for extension of time should normally be heard by a single Judge. However, the proviso to that rule provides that such an application may be adjourned by the Judge for determination by the Court. Further, **Rule 53(2)** specifies the type of applications which the single Judge has no power to hear, including an application for stay of execution, injunction or stay of further proceedings, or an application made as **ancillary** to such an application (*emphasis added*).

Rule 4 under which the application is made provides:

“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 doing any act authorised 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.” (*Emphasis added*).

The 90 days period was fixed by the Court and not by a single Judge. It would be a procedural anomaly if a single Judge were to review such an order. Furthermore, the present application is ancillary to the previous application for injunction and for stay of execution which, under **Rule 53(2)**, can only be entertained by the Court. We are therefore satisfied that the application was properly made before the Court.

The application for extension of time was lodged on 17th July 2014, a period of 32 days after the expiry of the stipulated 90 days. The fact that the period fixed by the Court has lapsed is not an impediment to the exercise of discretion to extend time. **Rule 4** itself authorises extension of time either before or after the doing of an act authorized or required by the Rules. Moreover, **section 59** of the

Interpretation and General Provisions Act provides:

“Where in a written law time is prescribed for doing an act or taking proceedings, and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”

(*Emphasis added*).

Thus, the Court has jurisdiction to extend time even when the application for extension of time is made after the time prescribed by the Rules or by the order of the Court has expired.

The jurisdiction of the Court to extend time fixed by the Court where there is a default clause was considered by this Court in **Caltex Oil (K) Limited v Rono Limited - Civil Appeal/Application No. 97 of 2008 (unreported)** where the

Court said in part:

“However the fact that a default clause has been imposed by a court does not necessarily deprive

a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the Court still retains control of the order, notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause.”

The orders of injunction pending appeal granted by the Court on 14th March 2014 automatically lapsed when the applicant failed to lodge the record of appeal within the stipulated 90 days. The orders of injunction were interlocutory in nature. The intended appeal has not been lodged. The notice of appeal on the basis of which the orders of injunction were granted is still valid as it has not been struck out or withdrawn. The default clause was not intended to limit the time within which the appeal should be lodged. Rather, it was intended to limit the duration of the orders of injunction by making the duration of the orders dependent on the fact of filing the appeal. The time for filing the appeal is prescribed by **Rule 82(1)** and its proviso. It has not been contended in this application that the time for lodging the appeal has expired by effluxion of time prescribed by the Rule. It follows that the Court still retains control of the dispute until the appeal is finally determined. Thus the Court is not *functus officio* as regards the default clause and therefore, has power to extend time notwithstanding the wording of the default clause.

The reason for delay in filing the record of appeal within 90 days has been reasonably explained. There are letters dated 31st October 2013 and 19th March 2014 respectively applying for a copy of typing proceedings. There is also a copy of a court receipt showing that the applicant paid for the proceedings on 18th August 2014. The applicant has demonstrated that the reason for non compliance was due to failure by the High Court to deliver a copy of the proceedings – a fact which is not within her control.

For those reasons, we allow the application and extend the time limited by the order dated 14th March 2014, by a further 90 days from the date of this Ruling. For avoidance of doubt, the extension of time automatically extends the orders of injunction for 90 days from the date hereof, and we so order.

The costs of this application shall be costs in the appeal.

DATED and delivered at Nairobi this 17th day of October, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR