



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM:G.B.M. KARIUKI JA) (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 120 OF 2013**

**THE MINISTRY OF EDUCATION .....1<sup>ST</sup> APPLICANT**

**THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE ARYA PRATINIDHI SABHA EAST AFRICAN .....RESPONDENT**

***(An application for extension of time to file and serve Notice of Appeal out of time in an intended Appeal from the ruling of the High Court (Musinga J) dated 4<sup>th</sup> March, 2011***

**In**

**Constitutional Petition No.120 of 2013**

**\*\*\*\*\***

**RULING**

1. By a Notice of Motion dated 3<sup>rd</sup> June 2013, **the Applicants**, the ministry of Education and the Attorney General, lodged in this court on 10<sup>th</sup> June 2013 an application seeking orders that-

1. ***The time limited by Rule 75(2) of the Court of appeal Rules 2010 be enlarged to enable the applicants to serve the Notice of appeal filed on 29<sup>th</sup> May 2013 against the Ruling of the Honourable Justice D. Musinga JA dated 4<sup>th</sup> March 2011 delivered in favour of the Petitioner in Constitutional Petition No.225 of 2008.***

2. ***That the Notice of appeal dated 28<sup>th</sup> May 2013 be deemed as duly filed and properly on record.***

2. The application was supported by an affidavit sworn by **Mr. Anthony Opondo**, an advocate of the High Court of Kenya working as a litigation counsel in the Attorney General's Office and having the conduct of the application. The application was made on the grounds, inter alia, that the mistake and/or the inadvertent misplacement of the documents relating to the litigation on the subject matter of the

Constitutional Petition No.225 of 2008, (Arya Girls High School, formerly known as Arya girls Senior School, located on land parcel bearing No.G/A/336/84), should not be visited on the innocent Ministry Officials and that parties have since the delivery of the said ruling consulted on the issue of the running of the school *“bearing in mind that in the best interest of the students who are in the school, their education should not be disrupted.”*

3. In his affidavit in support of the application, **Mr. Anthony Opondo** averred that upon perusal of the ruling, it was apparent that the learned trial judge duly noted that sufficient evidence was not adduced to show that the government has always supported and had a hand in the management of the school.

4. **The respondent**, the Arya Pratinidhi Sobha East Africa, opposed the application and in paragraph 2 of its replying affidavit sworn by **Mr. Suresh Sofat**, the present registered trustee of the respondent, averred that-

*“The delay in lodging the Notice of Appeal and the application for extension of time is so inordinate that the applicants are not entitled to invoke the jurisdiction of the court for extension of time.”*

5. Contrary to the above averment by the respondent, the applicant has a right to access the Court and to make, as it has done, the application which is the subject of this ruling. However, whether the relief sought is granted or not is a matter for this Court’s decision.

6. The copies of correspondence attached to the replying affidavit show that after the ruling was delivered on 4<sup>th</sup> March 2013 parties embarked on an attempt to discuss the matter pertaining to the running of the school although the Notice of Appeal (in respect of which extension of time to serve it is sought) was lodged on 29<sup>th</sup> May 2013. The correspondence referred to by the Respondent commenced on 17<sup>th</sup> March 2011 (one day before the expiry of the 14 days period for giving of notice of appeal as stipulated in Rule 75 of this court’s Rules) and rested with the letter dated 28.4.2011. In effect, the notice of appeal filed on 29<sup>th</sup> May 2011 was filed out of time without leave of the court.

7. When the application came up for hearing before me in chambers on 5<sup>th</sup> June 2014, learned counsel **Mr. Anthony Opondo**, appeared for the applicants while learned counsel **Mr. A. B. Shah** assisted by learned counsel **Mr. Ataka** appeared for the respondent.

**8. Mr. Opondo** started his submissions by pointing out that the learned trial judge of the High Court was not furnished with documents which were material to the Petition before him due to inadvertence and that counsel discovered their existence later. It was because the documents were material to the fair determination of the dispute, said counsel, that the applicants had filed the Notice of appeal and sought enlargement of time to serve the same. **Mr. Opondo** pleaded with the court to grant the applicants an opportunity to urge the intended appeal.

9. On his part, **Mr. A. B. Shah** opposed the application and pointed out that the attendant delay was of 5 months. But that was an exaggeration because the period of delay was from the end of the period given by the Rules for filing the notice of appeal to the time the notice was filed. In this case, the last day for lodging the notice of appeal was 18<sup>th</sup> March 2013. The application for extension of time to file and serve it was filed on 29.5.2013, after period of 2 months and 11 days since time ran out

10. It was **Mr. Shah’s** submission that the intended appeal had no merit and that in any case while the Ministry of Education had accepted the ruling of the court and did not appear intent on appealing, the Attorney General had advised that the appeal was not merited. However, perusal of the Minister’s letter attached to the replying affidavit and marked as annexure SS4 does not show that the Minister of Education accepted the court verdict. He merely acceded to the request for a meeting.

11. It was further Mr. Shah’s submission that the court did not overlook anything in its ruling as the documents alluded to were not before the court which was enjoined to determine the matter on the basis

of the evidence before it. He drew this court's attention to the decision in the case of **Githere v Kimungu [1984] KLR 387** in which this court (differently constituted) addressed the issue of delay and the exercise of this court's discretion under rule 4 of this Court's Rules. In that case, the applicant filed an application for extension of time ten and half months after a decision of the High court with which he was dissatisfied. While the application was pending in that case, rule 4 of the Court of Appeal Rules was amended and the provision then existing to the effect that one needed to show "*sufficient reason*" for the extension of time to be granted was replaced with one expanding the jurisdiction of the Court by giving the court power to extend the time limited by the rules or by any decision of the Court or of a superior court "*on such terms as the Court thinks just.*" The respondent's advocate in that case submitted that the previous rule should be applied as all the events that related to the application had occurred before the coming into force of the amended rule. The court held that-

1. ***Rule 4 of the Court of appeal Rules was to be applied as amended as it was intended henceforth that the court should have unfettered discretion in dealing with applications for extension of time which came before it and not to be too rigidly bound by previous decisions.***
2. ***The court had free discretion in granting extension of time which it was to exercise judicially considering that it should not be so far bound by rules of procedure as to do that which may cause injustice.***
3. ***It is incumbent upon a party who is out of time to make an application for an extension of the prescribed time within a reasonable time.***
4. ***In the circumstances of the case and particularly due to the applicant's delay, the court would not exercise its discretion in his favour. (underlining is mine)***

12. The applicants in the instant application took 2 months and 11 days to apply for extension of time. The issue for determination is whether this period was inordinate and whether it has been satisfactorily explained. In addition, if the court is disposed to enlarge the time to serve the Notice of appeal, whether in practical terms this will help the applicants to lodge appeal or whether it will be futile as the latter do not appear to have complied with the proviso to rule 82(1) of this court's Rules. In short, if the court allows the application and enlarges the time for serving the Notice of appeal, the appeal, by dint of Rule 82(1) will have to be lodged within 60 days from the date when the notice of appeal was lodged or is deemed to have been lodged (that is 29<sup>th</sup> May 2011) unless the proviso to Rule 82 is invoked by dint of the fact that an application for a copy of the proceedings was made within 30 days of the date of delivery of the impugned ruling which does not appear to be the case here.

13. The explanation given for the inadvertence in filing late the notice of appeal is that there were ongoing discussions between the parties or their representatives and further that after the delivery of the ruling the applicants discovered new documentation pertaining to government grants to the school dating back to 1953, bursaries, TSC staffing, parents contribution, etc, which if the trial Judge had had regard to before delivery of the ruling the court decision would probably have been different. With this new evidence in form of documentation, the applicants could have applied for review of the decision and/or for adduction of further evidence. But the applicant did not do so. Instead, the applicant decided to appeal the decision which was predicated on the evidence and material placed before the learned trial judge which did not include the newly discovered documentation. Although it is still open to the applicants to apply for review of the Judge's orders, and/or to be allowed to adduce further evidence in the High Court, and although the reasons advanced for the orders sought in the application before me are not implausible in the circumstances of this case, it is debatable whether the Court can make orders in futility, that is to say, orders that will not facilitate institution of appeal.

14. Because of the ongoing negotiations between the parties, it seems the applicant dithered on the question of lodging appeal to this Court and clearly the notice of appeal would not have been lodged when it was on 29<sup>th</sup> July 2013, had the applicant not received the *impetus* through discovery of the new documentation which, in the applicant's view, would have given the matter in dispute a different

complexion and perhaps resulted in a different decision. In the light of the peculiar circumstances of this case and having regard to the fact that the centre of controversy relates to control and management of a school in which many parents with children in the institution had a stake, it was not unreasonable for the 1<sup>st</sup> applicant after the delivery of the ruling to focus on the possibility of further deliberations and negotiations especially after the discovery of the new documentation. As earlier stated, perhaps on the strength of such documentation review of the decision would have been apt.

15. Secondly, it has not been shown to me by the applicant that within 30 days of the delivery of the Ruling on 4<sup>th</sup> March 2011, the applicant applied for a copy of the proceedings so as to enable the applicant to take advantage of the proviso to Rule 82(1) with a view to have excluded from the period for lodging appeal the time taken by the Court in preparing the proceedings. In the event, it is not now feasible that the applicant can competently lodge the record of appeal within the sixty day period as it expired on 29<sup>th</sup> July 2013. The applicant seems to have focused in the application only on the issue of extension of time to give and serve the notice of appeal by seeking an order to have “the notice of appeal dated 29<sup>th</sup> May 2013 deemed duly filed and property on record” but did not focus on the need to seek extension of time to lodge the record of appeal out of time.

16. Thirdly, even if the applicant were to get extension of time to give and serve notice of appeal, the applicant would still have to surmount the handle of complying with Rule 82 (1) which requires the appeal to be filed within 60 days of the filing of the notice of appeal to the impugned ruling. The applicant has not shown how it can surmount this handle bearing in mind (1) that the 60 day period would run from 28<sup>th</sup> May 2013 when the notice of appeal was filed, if prayer 2 of the application is granted as prayed and (2) that the applicant has not prayed for extension of time to lodge the record of appeal out of time.

17. The unfettered power of the Court under Rule 4 of this Court’s Rules is discretionary. The rule has enhanced the amplitude of the Court’s power to extend time limited by the rules or the orders of this Court with the object of facilitating filing of appeals and ultimately determining the litigation on merit. In effect, Rule 4 mitigates on the harshness resulting from the strictness of the timelines in the rules or orders of the Court. Rule 4 is geared to achieve justice. The existence of the rule is a recognition of human frailties and fallibility. As long as people remain human, mistakes will continue to be made. But mistakes that are plainly reckless or are a result of intolerable indolence may not be excused. However, each case must be decided on its own merit. But mistakes that arise due to inadvertence or unavoidable circumstances can be excused. A litigant has to be vigilant. And in cases where a litigant seeks to be excused for lapses on timelines set in the rules or Court orders, it must be demonstrably shown that the extension of time sought will not be an exercise in futility. Judicial discretion is defined by **Black’s Law Dictionary** (Ninth Edition) as

***“the exercise of judgment by a Judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”*** Also termed “legal discretion.”

18. It cannot be gainsaid that the Court will be disinclined to exercise its discretionary power to issue orders for extension of time where no appeal lies or is a non-starter.

19. The whole object of extending time under Rule 4 is to facilitate parties to pursue litigation and thus access justice. After all, Article 48 of the Constitution (2010) which was preceded by Rule 4 also does mandatorily enjoin the State to ensure access to justice by all persons and therefore it behooves Courts to be flexible, objective and practical when considering applications for extension of time by those wishing to pursue their appeals.

20. In this application, it has not been shown that if I exercise my discretion to extend time to have the notice of appeal deemed duly filed on 29<sup>th</sup> May 2013 and served as prayed, the applicant will be able to regurgitate on time and proceed to lodge the appeal. In my view the order will be in futility.

21. As I cannot make orders in vain, I have no alternative but to dismiss the application. I grant the costs of the application to the respondent.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of November 2014.**

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**

