



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 235 OF 2012 (UR 167 OF 2012)

BETWEEN

JOPPA VILLAS LLC..... APPLICANT

AND

OVERSEAS PRIVATE INVESTMENT CORPORATION..... 1st RESPONDENT

HARVEN GADHOKE..... 2nd RESPONDENT

DANIEL MUTISYA NDONYE..... 3rd RESPONDENT

(Being an application for leave to extend time to file and serve Notice and Record of Appeal; injunction and stay orders made by Justice J. MNgugi on 5th July, 2012 and delivered by Justice George Dulu on 6th July, 2012 pending the intended appeal

in

H.C.C.C No. 215 of 2008)

RULING

Before me is a Notice of Motion brought by the Joppa Villas LLC, the applicants seeking extension of time within which to file the Notice and Record of Appeal against the orders of J.M Ngugi, J. made on the 5th July 2012. This is brought under the provisions of Rule 4 of this Court Rules. The brief facts giving rise to this application is an interlocutory application that was determined within a civil suit which is still pending determination before the High Court at Machakos being Civil Case No. 215 of 2008. The applicant sought for various orders among them, restraining orders against the respondents from foreclosing, selling, or alienating a property described as LR No. 27253/42 pending the hearing and determination of the suit.

By a ruling delivered on the 6th July 2013, that application was dismissed and the Judge inter alia made the following conclusion;

"... The end of this line of litigation has, in this Court's opinion, come. The Court cannot be asked to determine the same issue multiple times in the guise of protean applications which seem to mutate with each adverse ruling. It is time for the 1st respondent to realize its security. It is the least the Court can do

to maintain some semblance of predictability and integrity in our commercial practice after so many years of waiting. The applicant must wait the ventilation of its grievance at the full hearing of the suit".

The applicant is dissatisfied with the aforesaid ruling and intends to appeal. However the time for filing the appeal passed, hence this application which was supported by the affidavits of John Paul Njoroge sworn on the 12th September, 2012. He also appeared before me during the hearing of the instant application in his capacity as the proprietor of the property. He submitted that when the above ruling was delivered in court, nor he or his Advocates m/s Wambugu Muriuki were notified of the date for delivery of the ruling. For that reason they were not able to file a Notice of Appeal in time despite the fact that he was dissatisfied with the outcome of the application.

Mr. John Paul Njoroge admitted that he received a letter written by the Judge to the Advocates over the delay in delivering the aforesaid ruling which was scheduled for delivery on the 30th May 2012. Pursuant to a letter dated 25th May 2012, informing the parties that the ruling was to be delivered on the 29th June, 2012, he attended court on that day but the ruling was not delivered. He was not given the notice for delivery of the ruling which was done on the 6th July 2012 by Dulu J., he only became aware of the ruling on 30th August 2012 after he was informed by Irungu Kang'ata Advocate; by then time within which a Notice of Appeal could be filed had run out. Mr. Njoroge urged the application be allowed as the intended appeal would challenge the intended sale of the suit premises, which if sold by the respondents will occasion the applicant irreparable loss.

This application was opposed by the respondents; Mrs. Opiyo, learned counsel for the respondents, relied on the replying affidavit sworn by Nathan Bayer on the 23rd January, 2013. It is stated in the said affidavit that Mrs. Opiyo attended court on the 29th June 2012 as indicated in the letter by Judge, the court clerk to the Judge informed her that the ruling had further been postponed to the 6th July 2012. An advocate by the name Oscar Litoro attended court on the 6th July 2012, as directed and the ruling was read by Dulu, J., on behalf of Judge Ngugi. Thus according to the respondents, the applicant was not diligent as they failed to make reasonable steps to follow up and make inquiries from the registry as did the respondents. The applicant was blamed for the prolonged delay of about 72 days. On the appeal being arguable, it is contended that the debt secured by the charged property is currently at USD 5,000,000.00, which was also noted by the trial Judge and there has been a multiplicity of litigation over the same issue which is subject to four court rulings by the High Court and one by the Court of Appeal. Counsel urged me to dismiss this application.

I have considered all the submissions, the matters stated in the application and the cited authorities. It is settled that an application such as the instant one call for the exercise of the court's discretion which is generally unfettered. However, where the court has to exercise its discretion, there must be some reasonable basis of fact or law to warrant the orders being made in favor of the applicant. In other words, judicial discretion cannot be exercised whimsically or capriciously. The parameters that guide the court are well set out in a long line of authorities. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, C. A. Appl. No. Nai. 251/97 (ur):

"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 in deciding whether to grant an extension of time are: first the length of the 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 above list is of course not exhaustive as held in the case of *Mokira & Another v Mukaria & Another*, 2005 2 KLR 103 at page 106-107, where the Court again cited *Leo Sila Mutiso* (supra), and went on to state:

"These, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion and so long as the discretion is

exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way."

With the above principles in mind, I now approach the application before me. The applicant is late in filing the appeal from the original order of Ngugi J., dated 6th July, 2012 by about 72 days. The applicant has explained that the delay was caused by the failure by the High Court to issue a notice of delivery of the said ruling to the Advocates. It is not in dispute that after the Judge wrote to the parties and gave the 29th June, 2012, as the date for the delivery of ruling; there is no other formal communication from the court that the ruling was further postponed to the 6th of July, 2012. Nonetheless, the respondents were able to make an inquiry from the Judge's court clerk and were informed of 6th July, 2012, when the ruling was delivered. That is they exercised diligence and took reasonable steps to proactively seek directions and clarification from the Judge's court clerk, which I think is a matter of common routine. The applicant cannot entirely be blamed for failing to take these reasonable steps, because also the registry should have issued a formal notice indicating the postponed date, or they should have formally furnished the applicant with the copy of the ruling that was delivered in his absence.

If the above was the only reason for the delay, the applicant could have been excused. There is a second delay, because the applicant states that he became aware of the ruling on the 30th August 2012, but this application was not filed until the 12th September 2012. This second delay is not explained. This application has further problems as the applicant has a duty to demonstrate that the intended appeal is arguable. I also have to look at the merit of the appeal and that is not to say an arguable appeal will of necessity be successful. From the submissions by counsel for the respondent which was not at all contested by the applicant, the applicant has filed a multiplicity of applications on the same issue and several rulings have been rendered. In addition to the ruling being challenged in the intended appeal there are others rulings that dwelt with the same subject matter as follows; - Ruling by Lenaola, J. dated 20th May, 2009. That ruling was unsuccessfully appealed against in Civil Application No. NAI 147 2009 (UR. 99/2009) before the Court of Appeal. There were other suits filed by other parties seeking for interlocutory orders to restrain the respondents from disposing the same properties as per the rulings by

Njagi J., dated 14th December 2011 and Odunga J., dated 27th day of April 2012. This is critical information that the applicant did not bring to the attention of this Court. This information was included in the respondents' replying affidavit; it therefore lends credence to the respondent's counsel's submission that the applicant was guilty of material non-disclosure. When a party is invoking the exercise of the courts discretion, they have a duty to make all the material disclosures.

Finally all these efforts made by the applicant in an attempt to appeal against an interlocutory order, basically both the High Court and Court of Appeal have expressed themselves regarding the respondent's rights to recover the debts secured by the suit property. Also the main suit is still pending determination before the Machakos High Court. Whatever the outcome of the suits, if the applicant is still aggrieved, he will have a chance to appeal on final orders.

In view of the foregoing, I am not satisfied that this is a proper case in which to grant leave to appeal. This application is dismissed, with costs to the respondents.

Dated and delivered at Nairobi this 14th day of November, 2014.

MARTHA .K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR