IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 93A OF 2014 (UR 76/14)

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED.....1ST RESPONDENT

NTULELE ESTATE LIMITED.....2ND RESPONDENT

(Application for extension of time to file and serve Record of Appeal out of time

from the judgment of the High Court (Ogolla, J) dated 13th December 2011,

in

H.C.C.C. No. 196 of 2006)

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R U L I N G

This application relates to a Notice of Motion dated 25th April 2014 seeking orders for extension of time to be granted under ***Rule 4*** of the ***Court of Appeal Rules 2010*** within which to lodge a memorandum and record of appeal against a ruling of Ogolla J, delivered on 13th December 2011 which ruling dismissed the applicant's application dated 9th September 2011.

The applicant has advanced seven grounds supported by the sworn affidavit of ***Brian Otieno*** dated 25th April 2014, and a further affidavit sworn on 17th September 2014 deponed that the applicant filed a Notice of Appeal on 19th December 2011, and at the same time applied for typed copies of the proceedings and ruling on 16th December 2011. On 3rd February 2014, it received notification from the deputy registrar that the proceedings and rulings were ready for collection. The applicant collected the proceedings and ruling from the registry, but subsequently, due to inadvertence on the applicant counsel's part, the preparation and compilation of the memorandum and record of appeal was overlooked, resulting in a failure to file the appeal within the stipulated timeframe, the period of which lapsed on 13th April 2014. The applicant has sought for the enlargement of time in order to file the appeal.

When the application came up for hearing, ***Brian Otieno***, learned counsel for the applicant appeared before me, but there was no appearance for the 1st and 2nd respondents despite their having been served with the hearing notice on 10th October 2014 and 30thSeptember 2014 respectively. Mr. Otieno submitted that the Notice of Motion dated 25th April 2014 was for extension of time to lodge the Memorandum and record of appeal. Counsel's submissions were mainly a repetition of the averments in his affidavit, but he added that once it was noticed that the appeal had not be filed, counsel immediately sought to obtain a certificate of delay which was issued 17th April 2014, and thereafter file this application for extension of time. The application was filed on 25th April 2014, which was 23 days after the period for filing lapsed. Counsel further contended that the delay was not inordinate, and has been adequately explained. He conceded that the error in filing the appeal was squarely on the part of the advocate, which mistake should not be visited upon his client. In so doing, counsel and cited ***Rose Wairuino Muthemba vs Kentazuga Hardware Limited (1998) eKLR.*** Counsel continued that there was an arguable appeal to be found in the draft Memorandum of Appeal where the central issue was that two (2) years after the plaint was served on them, the respondents had failed to file or serve a summons to enter appearance on the applicant, and that despite finding that no summons had been served on the applicant, the learned judge had directed the respondent to file a defence, and participate in the suit, contrary to the provisions of ***Order 5 Rules 2*** of the ***Civil Procedure Rules.*** The provision stipulates that where a summons is not served within one year of filing of the suit, it is considered to be invalid. No application was made to court for service on the applicant out of time by the respondent, and neither did the court of its own motion order the respondent to serve the applicant. This being the case, counsel continued, the suit should have been dismissed. Counsel argued that it was the failure by the court to dismiss the suit contrary to the stipulated provisions that gave rise to an arguable appeal. Counsel concluded that there would be no prejudice to the respondent if the application was to be allowed, as, since the filing of the suit, the respondents had not endeavored to file any documents in opposition, but that, in any event, should there be any prejudice to the respondents, they could always be compensated with costs. Counsel cited ***Keziah Stella Pyman & 2 Others vs Paul Mwololo Mutevu & 8 Others*** ***(2013) eKLR*** where the Court extended time, though the delay was not adequately explained, as no prejudice would have been suffered by the respondent.

I have meticulously considered the application and the record, the applicant's supporting affidavit as well as the submissions. Given the nature of this application I am guided by the numerous decisions of this Court on the matter of extension of time to file appeals.

Under ***Rule 4*** of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the Court should exercise this discretion judiciously, and not capriciously, in accordance with the guiding principles, having regard to the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court granted the extension sought, as outlined in the case of ***Leo Sila Mutiso V. Rose Hellen Wangari Mwangi*** – ***Civil Application No. Nai 251 of 1997*** where the court stated;

> ***"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."***

From the record, the period of delay can be computed as 23 days, comprising the period from the date the judgment, to the date this application was filed, and having regard for the time taken by the deputy registrar to prepare and supply the copies of the proceedings, which according to the certificate of delay was 772 days.

This being the case, the question that arises is whether the reason for delay was adequately explained by the respondent. On this, counsel frankly explained that due to pressure of work, and inadvertence on his part, he had failed to file the appeal during the stipulated period. As a consequence, it was while preparing and compiling the record of appeal that the delay was occasioned. Clearly, this was a mistake or slipup on counsel's part, which mistake I surmise has not been the first of its kind. Bearing this in mind, and taking

into account the intent behind ***Article 159*** of the ***Constitution*** which enjoins, not to pay undue regard to procedural technicalities, at the expense of substantive justice, it is of distinct providence that Madan, J.A (as he then was) when addressing mistakes of counsel in ***Murai v. Wainaina (No. 4) 1982 KLR 38*** stated thus,

> ***"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 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."***

I take the liberty to reiterate the age old adage that it is human to err, and in so doing, concur with the sentiments expressed therein. As a consequence, I find that the applicant has adequately explained the delay herein.

On the possibility of success of the intended appeal, it is evident that the appeal is concerned with the question of compliance with the provisions of the Civil Procedure Rules. The applicant contends that the learned judge fell into error when he declined to dismiss the suit for failure by the respondent to file and serve a memorandum of appearance within the stipulated period. Having regard to the outstanding question of whether or not there was compliance with the provisions of the Civil Procedure Rules, I do not consider the intended appeal to be frivolous. Indeed, I take the view that in the circumstances of the case, the applicant should not be precluded from ventilating its complaint in the intended appeal.

Accordingly, I am inclined to exercise my unfettered discretion to allow the application. In so doing, I consider that, the respondents will not be subjected to any real prejudice, save perhaps for the inconvenience of having to defend the appeal in the course of time.

I order that the time for filing and serving of the memorandum and record of appeal is hereby extended by fourteen (14) days from the date hereof.

Dated and delivered at NAIROBI this 7th day of NOVEMBER, 2014.

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR