IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 7 OF 2013

BETWEEN

KOBIL PETROLEUM LIMITED ……..……..APPLICANT

AND

WALTER EDWIN OMINDE

T/A SHELTER CONSULT ……..……..……RESPONDENT

(An application for extension of time to lodge notice and record of

appeal from a judgment and decree of the High Court at Kisumu

(J.P Karanja, J.) dated 31st December, 2010

in

H.C.C.C NO. 300 OF 2001)

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RULING

This application by Notice of Motion dated 11th April, 2013 and lodged on 16th April, 2013 seeks the following main orders of the court: -

1. *That the applicant be granted extension of time to lodge a fresh Notice of appeal and Record of Appeal against the judgment and decree of Mr. Justice J.P. Karanja delivered on 31st December, 2010 following the lapse or expiry of the applicant's previous Notice of Appeal.*

2. *That the applicant be granted leave to file an appeal out of time against the said judgment and decree of Mr. Justice J.P. Karanja delivered on 31st December, 2010.*

The application is based on various grounds set on the face of the Notice of Motion and in the affidavit of the applicant's General Manager***, David Ohana***. The substance of the grounds is that the applicant's former advocates, M/s. Wasuna & Co. failed to inform the applicant of the status of the matter until the

respondent applied for release of the decretal amount held in a joint account of the parties' advocates.

The application is opposed and in this regard the respondent has filed a 21-paragraph replying affidavit in which a detailed background of the dispute between the parties is given. The gist of the opposition is that the applicant in reality is not interested in mounting an appeal against the decision of the High Court but is instead using the court process to deny the respondent access to the decretal amount. No further or supplementary affidavit was filed in response to the respondent's replying affidavit.

The application was debated before me by Mr. Mathi, learned counsel for the applicant and Mr. Otieno learned counsel for the respondent. Both counsel placed reliance upon a number of authorities in support of their clients' respective positions which authorities, I have considered.

From the material placed before me, there is no dispute that soon after the judgment of the High Court was delivered on 31st December, 2010, the applicant filed a Notice of Appeal on 11th January, 2011 through its former advocates M/s. Wasuna & Company. However, no record of appeal and the appeal itself were filed thus prompting the respondent to apply for an order that the said Notice of Appeal be deemed to have been withdrawn which application was allowed on 1st March, 2013. The parties therefore reverted to the position obtaining before the said Notice of Appeal was filed and thus triggered the filing of this Notice of Motion.

The filing of this Notice of Motion has elicited two objections which must be resolved from the outset. The first objection is that the Notice of Motion is incompetent on the ground that the applicant should have instead sought restoration of the Notice of Appeal which was deemed to have been withdrawn. A brief answer to that objection is that there is no provision under this Court's Rules for such restoration. In any event the Notice of Appeal having been deemed to have been withdrawn left the applicant in the position of a party who had not intimated a desire to challenge the decision of the High Court. If the applicant still intended to exercise its right of appeal, it could only do so under ***Rule 4*** of this Court's Rules which option it has exercised. In the premises, the objection on the competence of this application is without merit and is dismissed.

The second objection is with regard to the *locus standi* of the new firm of advocates, M/s. Shapley Barret & Company, who lodged this application. Counsel for the respondent contended that the said advocates had not obtained leave to represent the applicant as M/s. Wasuna & Co. advocates were still the advocates on record for the applicant. In my view, there was no basis for Shapley Barret and Company advocates seeking leave to come on record in place of M/s. Wasuna & Co. Advocates. I say so, because the firm of M/s. Wasuna & Co. Advocates could not be said to be the advocates for the applicant in the intended appeal after the Notice of Appeal lodged by them was deemed to have been withdrawn. In the premises, for purposes of the present application, the applicant is perfectly entitled to be represented by counsel of its choice. ***Order III Rule 9*** of the Civil Procedure Rules, and ***Rule 23*** of this Court's Rules do not apply to this application. The respondent's second objection is therefore also without merit and is dismissed.

I turn now to the substantive issues argued before me. It is well settled that the court has unlimited discretion under ***Rule 4*** of this Court's Rules to extend the time for the doing of any act authorized under the said rules. However, like any other judicial discretion, that discretion must be exercised on the basis of evidence and of course sound legal principles. The matters which are to be considered whether to grant an extension of time are, *inter alia*, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is allowed and the degree of prejudice to the respondent in the event the application is allowed. Those are not the only factors to be considered as each application will be considered on its own peculiar facts.

In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [Civil Application No. 251 of 1997] (UR**), this Court in dealing with an application for extension of time within which to file and serve a Notice of Appeal and record of appeal stated as follows: -

> **"It is now well 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."**

And in **Muchugi Kiragu vs. James Muchugi Kiragu and Another, [Civil Application No. NAI. 356 of 1996] (UR)** this Court expressed itself as follows:-

> **"Lastly we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is as is well known, unfettered and is only subject to it being granted on terms as the court may think just."**

The evidence before me is clear that the applicant's previous advocates apart from lodging a Notice of appeal timously on 11th January, 2011 did not take any other step towards lodging an appeal even after being furnished with copies of proceedings and judgment on 14th August, 2012. The applicant contends that the said advocates deliberately failed to lodge an appeal against the said judgment. The respondent does not agree. In his view, the applicant is unfairly accusing its former advocates. Having considered the rival positions taken by the parties on the issue, I am not at all persuaded that the former advocates of the applicant are entirely to blame. I say so, because the respondent has demonstrated in his replying affidavit that the parties attempted a settlement of the dispute even as the proceedings before the High Court progressed. The applicant has further not demonstrated that it took any step to show that it indeed intended to appeal. It did not exhibit any correspondence with its former advocates, not even one letter making an enquiry about the intended appeal. It did not demonstrate that it made any payment to the former advocates for the purposes of processing the appeal. Indeed it is the former advocates who paid for the proceedings and judgment intended to be challenged.

The applicant knew that a judgment had been entered against it on 31st December, 2010. Yet it made no follow-up until 19th March, 2013 a period of over two years.

Even assuming that the applicant only became aware that its Notice of Appeal had been deemed as withdrawn on 19th March, 2013, it did not lodge this application until 16th April, 2013. That is a period of nearly one month. The applicant has not devoted any single paragraph of the supporting affidavit to explaining that period of delay.

In the end I find and hold that the delay between the time proceedings were received by the applicant's erstwhile advocates on 14th August, 2012 and the date the previous Notice of Appeal was deemed as withdrawn on 1st March, 2013 is inordinate and the explanation proferred is implausible. The applicant alleges that the inactivity of its former advocates was deliberate. Even if that position is taken to be true, would that kind of inaction be excusable? In my view, a deliberate omission or commission on the part of counsel would not properly be the subject of the exercise of the court's discretion in the applicant's favour. The applicant's position is further compounded by the fact that the delay between the 19th March, 2013 and 16th April, 2013 is not explained and is therefore also inexcusable.

As this Court stated in **Muchugo Kiragu vs. James Muchiri Kiragu and Another** (supra), it has:

> **"on several occasions, granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it."**

So, the chances of the appeal succeeding if the application is granted should be taken into account. That is the position which was also taken in **Leo Sila Mutiso vs. Rose Hellen Wangai Mwangi** (supra) and many other decisions of this Court. But what did the applicant say about that aspect of the intended appeal? Absolutely nothing. The applicant did not find it necessary to exhibit a draft of the proposed memorandum of appeal. It did not also give any indication of the chances of the proposed appeal in its

affidavit in support of this application. As if that was not enough, during his oral submissions before me at the hearing of this application, counsel for the applicant did not allude to the chances of the appeal succeeding if this application is allowed. So, whether the intended appeal is frivolous or not must be determined against the applicant as it has not identified a single bona fide triable issue which should be ventilated in the intended appeal.

Whereas a party intending to appeal has an undoubted constitutional foundation to exercise that right, that right is not absolute and should be exercised within an appointed framework and where action sought to be performed is outside that framework, the party seeking to do so must place adequate material before the court to enable it exercise its discretion in his favour. The applicant has not demonstrated that the respondent will not be unduly prejudiced if the application is granted. The respondent has, on his part, shown that he will be prejudiced if the application is allowed. He has expressed that he has been kept out of his money since 1998 when the dispute between him and the applicant ensued. Judgment was entered in his favour on 31st December, 2010 nearly 2 ½ year ago. He should be kept out of his money for good reason; yet the applicant's grievance with the judgment intended to be challenged has not been disclosed. In the event, to allow the application would be to speculate on the chances of the intended appeal succeeding.

In the result, I am not satisfied that the applicant has shown that he should have the indulgence of the court. I accordingly dismiss this application with costs to the respondent.

Dated and delivered at Kisumu this 10th day May, 2013.

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR