



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KANTAI, J. A (IN CHAMBERS))**

**CIVIL APPLICATION NO. 60 OF 2012**

**BETWEEN**

**ALRED NYANGWESO AKUNGA .....APPLICANT**

**AND**

**REV. JOSHUA HAMISI ONDIMU .....RESPONDENT**

*(An application for extension of time to file Record of Appeal out of time*

*from a judgment of the High Court of Kenya at Kisii (Hon. Mr. Justice*

*D. MUSINGA) dated the 16<sup>th</sup> day of September 2011)*

**in**

**KISII HCCC No. 81 OF 2007)**

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**RULING**

What is before me is a Motion by Notice under Rule 4 of this Court's Rules, 2010, where the Applicant, Alfred Nyangweso Akunga prays in the main that I extend the time within which the applicant may file and serve a Record of Appeal out of time. The Motion is supported by grounds set out to the effect that a judgment was delivered in the High Court on 30<sup>th</sup> September 2011 in favour of the respondent Rev. Joshua Hamisi Ondimu; a Notice of Appeal was lodged on 13<sup>th</sup> October, 2011 and was duly served on time; that an application for proceedings was made to the High Court on 13<sup>th</sup> October, 2011; by letter of 5<sup>th</sup> January, 2012 the High Court notified the applicant that proceedings were ready; proceedings were paid for on 5<sup>th</sup> January, 2012 and collected on 9<sup>th</sup> January, 2012; that the time necessary for preparation and supply of proceedings was from 13<sup>th</sup> October, 2011 to 9<sup>th</sup> January, 2012 as was shown in Certificate of Delay produced before me through affidavit; that delay in filing Record of Appeal was occasioned by the stated facts; the subject of the intended appeal was land and that the intended appeal has merit.

The applicant annexed an affidavit sworn by him on 28<sup>th</sup> February, 2012 where there are various

annextures.

In the replying affidavit sworn on 11<sup>th</sup> April, 2012 the respondent opposed the application on the following main grounds: that the applicant has lied by stating that he applied for proceedings and judgement on the alleged date; the applicant did not pay a deposit to the High Court for proceedings to be prepared; that the Certificate of Delay annexed to the applicants affidavit is in effect a forgery; that Rule 81 of this courts Rules was breached because the letter applying for proceedings was not copied to the respondent; that the subject matter is not land but an access road and that therefore the applicant cannot suffer any loss.

The applicant with leave of the court filed a further affidavit sworn on 22<sup>nd</sup> May, 2012. This affidavit attempts to answer the matters raised by the respondent in the replying affidavit.

The rather uncomplicated facts of the case can be seen from the opening paragraph of the judgement of Musinga, J (as he then was) delivered on his behalf on 30<sup>th</sup> September, 2011:

**“The plaintiff is the registered proprietor of a parcel of land known as Kisii/Nyaribari Chache/B/B/Boburia/6498. The defendant is the registered absolute proprietor of a parcel of land known as Kisii / Nyaribari Chache /B/B/Boburia/4086. The plaintiff alleged that on or about the month of December, 2003 the defendant fenced round his parcel of land as well as the access road to the plaintiff's land...”**

The learned judge found for the plaintiff in the case which did not find favour with the defendant thus the intended appeal.

I have perused the various affidavits, the annexures thereto and considered the able submissions made before me by learned counsel for the applicant Mr. Solomon Wamwayi and learned counsel for the respondent Mr. Ibrahim Onyinkwa. I have also considered the authorities the counsel have cited in support of the opposite positions they have posited in this matter.

The principles upon which an application is to be considered under Rule 4 of this Courts Rules appear to be well settled. History will show that the hands of a judge were tied by the principle of **“sufficient reason”** under the said Rule until the amendment introduced through Legal Notice No. 14 of 1984 where that stricture was cast away. Waki, JA stated the position quite well in **Fakir Mohamed v Joseph Mugambi & 2 others Civil Application Nai 332/04 (Nyeri 32/04 (ur)** as follows:

**“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance -are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI 8/2000 (ur) and Murai v. Wainana (No. 4) [1982] KLR 38.”**

Mr. Wamwayi, learned counsel for the applicant has asked me to exercise discretion in favour of the applicant and extend time for filing and serving Record of Appeal. Counsel informed me at the hearing of the Motion on 30<sup>th</sup> May, 2013 that Record of Appeal was ready and could be filed immediately if leave was granted.

As has been shown judgement of the High Court was delivered on 30<sup>th</sup> September, 2011. A Notice of

Appeal was lodged on 13<sup>th</sup> October, 2012 which was within time. I was informed by learned counsel for the applicant, and this was not denied by the respondent, that Notice of Appeal was served upon the respondent within the time envisaged by the Rules.

Certificate of Delay issued by the High Court of Kenya at Kisii shows that an application for copies of proceedings and “**ruling**” was made on 13<sup>th</sup> October, 2011. Proceedings and judgement were supplied to the applicant on 9<sup>th</sup> January, 2012. The application before me was filed on 5<sup>th</sup> March, 2012.

Mr. Onyinkwa, learned Counsel for the respondent attacked the said Certificate of Delay and letters attached thereto terming them a forgery. This followed the line taken by the respondent in the replying affidavit. I was not impressed by this position taken by counsel at all. If, indeed, as alleged by counsel, the Certificate of Delay which, on the face of it, is issued by the Deputy Registrar of the High Court, is a forgery, why was report not made to the appropriate authorities equipped with investigative facilities so that criminal sanctions could follow? It will indeed be noted that forgery, if it was committed at all, is a matter of fact which the party alleging has responsibility to prove. I am, on my part, satisfied that Certificate of Delay produced before me was issued by the Deputy Registrar of the High Court of Kenya, Kisii.

The applicant was supplied with proceedings and judgement on 9<sup>th</sup> January, 2012.

The Notice of Motion was filed on 5<sup>th</sup> March, 2013. This is a period of about 55 days. No reasonable explanation was offered for this delay.

I have perused draft Memorandum of Appeal annexed to the application. There are various issues raised including whether the judge had jurisdiction to entertain the suit, what was the effect of the judgement in respect of whether it would lead to cancellation of title to land and whether the dispute was on land or access to land. I cannot say that these are frivolous matters.

I agree with Mr. Onyinkwa that the applicant breached Rule 82 of this courts Rules by not copying the letter requesting proceedings to the respondent. But it was submitted to me by Mr. Wamwayi which was not denied that the High Court file was very active because the respondent was taxing for costs. I am entitled to take the view that the respondent was therefore aware of such a letter and an appeal was intended. The respondent had in any event been served in October, 2011 with Notice of Appeal. This is a situation calling for my application of the principles in Article 159 of the Constitution of Kenya, 2010, and to hold, as I do, that the omission by the applicant was technical.

Although the applicant has not satisfactorily explained the nearly 2 months delay in filing the application after being supplied with necessary records by the High Court I have considered the whole matter and have taken the view that this is an appropriate application where I should exercise my discretion in favour of the applicant. I therefore do so and extend the time for filing Record of Appeal.

Record of Appeal shall be filed within 14 days of today and be served in accordance with the Rules. I award costs of the application to the respondent to be paid by the applicant and I assess such costs at Kshs. 10,000/= which I order to be paid within 14 days of this Ruling in default of payment execution to issue.

**Dated and delivered at Kisumu this 13<sup>th</sup> day of June 2013**

**S. ole Kantai**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**