



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI.122 OF 2013 (UR.84/2013)

BETWEEN

JOYCE AKINYI OCHIENG.....APPLICANT

AND

ANTONY CHINEDU IFEDIGBO.....1ST RESPONDENT

JOSEPH KAMAU MUCHINA.....2ND RESPONDENT

KENYA INSTITUTE FOR THE BLIND.....3RD RESPONDENT

(Being an application for Extension of time to file the Record of Appeal and Serve the Notice of Appeal from the Ruling and Orders of the High Court of Kenya (Msagha Mbogoli, J.) dated 21st September, 2010

in

ELC CIVIL CASE NO.304 OF 2009)

RULING OF THE COURT

In her notice of motion dated 10th June, 2013 the applicant **Joyce Akinyi Ochieng** invoked the powers donated by Section 3A, 3B of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules and prayed that:

1. *this Court do grant extension of time to file and/or serve the notice of appeal dated 5th October, 2010 against the ruling (Msagha, J.) of 21st September, 2010 and that notice filed be deemed properly filed and served on time.*

2. *the Court grant extension of time within which to file and serve the record of appeal against the said ruling of 21st September, 2010.*

Twenty three (23) grounds, some split in sub-grounds, were stated in the body of the motion supported by an affidavit sworn by the applicant covering twenty-six paragraphs, some divided in sub-paragraphs.

The 1st respondent **Anthony Chinedu Ifedigbo** filed two grounds in opposition to the motion. Learned counsel Mr. Oluoch for the applicant and Mr. Osundwa for the respondents, argued the motion.

Mr. Oluoch said that on 21st September, 2010 Mbogholi-Msagha, J. delivered a ruling by which the suit, HC ELC No.304/2009 was struck out. A notice of appeal against that decision was filed on 5th October, 2010 – five days after the statutory time under rule 77(1) of the Rules had expired. It was stated from the Bar, and not in any affidavit, that the delay in serving the notice of appeal was due to the mistaken belief that the notice had to be endorsed by the Registrar of the High Court before serving it. The record has it that that notice was served on the advocates of the respondents M/S Njagi Wanjeri and M/S Havi Company on 29th October, 2010 and 2nd November, 2010 respectively.

Turning to the record of appeal Mr. Oluoch told me that it was not filed on time because of the financial constraints that the applicant experienced at the time and the wrangling between her and the 1st respondent over the suit properties. The 1st respondent obtained injunction orders in 2008 restraining the applicant from in any way dealing with these properties, particularly one known as the “**Deep West**” – a going concern that generated income, which income the applicant could not access. Further that once upon a time the 1st respondent was ordered to pay maintenance sums Shs.210,000/= in Children’s Court Case No.815/2009. He did not comply and that left the applicant destitute as regards money to maintain herself and the children and also avail for the preparation of the record of appeal. Without evidence of the fees owed, Mr. Oluoch submitted that the applicant owed his firm Sh.5 million which she could not settle because of the financial constraints affecting her. All the circumstances seen together, the orders sought ought to be granted in the wide discretion of this court in such matters. The record of appeal was ready for filing.

Asked where a draft memorandum of appeal was, for reference in this proceeding, the court was told that none was available. But the court would refer to ground 6 in the application to glean from it what grounds the memorandum would contain. In any case the applicant’s stay application dated 10th June, 2013 contained such a draft. Such an application did not form part of the present record. Mr. Oluoch proposed that he would seek leave to introduce that draft memorandum by way of a supplementary affidavit to demonstrate that the intended appeal had chances of success.

Mindful of what this court’s duty is in addressing such an application for extension of time, counsel narrated that the length of delay is one factor; whether the appeal was arguable or had chances of success; reasons for the delay; prejudice to be borne by the respondent and any other prevailing circumstances. In support of those aspects the cases including ***Gacau & Another vs Pioneer Holdings Ltd & Others [2005] KLR 315***, were cited.

In response Mr. Osundwa posited that no material had been placed before me to exercise the discretion to enlarge time as prayed. Orders restraining the applicant had not been placed before court; there was no evidence exhibited by way of demand letter or fee note that the applicant owed her lawyers Sh.5 million. There has been no satisfactory or any explanation given as to why for 2 years and 9 months the applicant had not done what she is now asking for time to do. It was a long delay. It was added that the applicant did not demonstrate the loss she stood to suffer if leave was refused. There was no draft of the memorandum of appeal placed before court to assess the likelihood of the appeal succeeding. This application was brought in bad faith since it was provoked by service of notice to execute. The leave sought should not issue. Litigation must come to an end. The application to be dismissed with costs being paid by the applicant’s lawyer personally. To support his position, Mr. Osundwa cited several cases including ***Patel vs Waweru & Others [2003] KLR 361***, ***George Chege Kamau vs Esther Wanjiru [2005] eKLR***, ***Peter Kihumbi vs Gladys Migwi & Another [2006] eKLR*** and ***Joyce Muthoni Njagi vs***

Elizabeth Nyaga & Another Civ. App.No.168/1997. There was a reply from Mr. Oluoch.

In the ***George Chege Kamau case*** (Supra), Deverell JA, as he then was, stated:

“In general the matters to be taken into account in deciding whether to grant an extension of time are:

‘First, the length of delay; secondly, the reason for the delay; thirdly (possibly), the chances of success of the appeal if the application is granted; fourthly, the degree of prejudice to the respondent if the application is granted.’

Both sides are alive to the contents quoted above and they referred to them. It is trite law that to seek extension of time under Rule 4, the court moves to do justice to parties who being anxious at every moment to move a matter forward but for some reason explainable or excusable, it is unable to move. This provision of law is not meant to assist an indolent litigant.

Beginning with the length of delay to serve the notice of appeal 5 days late has not been explained. To serve a notice of appeal does not require that it be endorsed by the Registrar first. Whoever acted under that so-called mistaken view has not even stated so in an affidavit.

As for the delay to prepare the record of appeal, a long time of 2 years and 9 months is said to have passed. The applicant has not given reason satisfactory enough to explain it. Yes, lack of financial resources can hamper such a step being taken. But there is even no evidence for instance that she owed her lawyer Sh.5 million as stated from the Bar. Or the applicant should have applied to appeal as a pauper. Rather an undignified course but it works. She did not take that course.

Regarding the chances of the intended appeal succeeding, the court was not favoured with a draft memorandum to gauge that. Instead, it was referred to other proceedings, not forming part of these ones. Not much can be done in this state of things. I was simply left with no way to assess the chances of the appeal succeeding.

Moving to prejudice to the respondent, it is constituted by stopping him from executing the orders in his favor to enjoy the fruits of his litigation. Litigation must come to an end and the applicant should not be seen to unnecessarily extend it at the last moment when a notice to execute has been served after a long time.

In sum this application is dismissed with costs to the 1st respondent. There has been no good reason advanced or compelling reason to cause me to order that those costs to be paid personally by the applicant’s advocate.

Dated and delivered at Nairobi this 20th day of September, 2013

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/jkc