



IN THE COURT OF APPEAL

NAIROBI

(CORAM: NAMBUYE JA. IN CHAMBERS)

CIVIL APPLICATION NO. NAI 169 OF 2010

BETWEEN

JAMES NDUNGU MUCHUGI.....APPLICANT

AND

- JOYCE NDUTA MUCHUGI.....1ST RESPONDENT**
- STEPHEN KAMAU MUCHUGI.....2ND RESPONDENT**
- JOHN MBUGUA MUCHUGI.....3RD RESPONDENT**
- MICHAEL MUTHUMU MUCHUGI.....4TH RESPONDENT**
- PATRICK KINYANJUI MUCHUGI.....5TH RESPONDENT**
- JAMES WAMAGATA MUCHUGI.....6TH RESPONDENT**
- PETER MBUGUA MUCHUGI.....7TH RESPONDENT**
- CHRISTOPHER MIRI MUCHUGI.....8TH RESPONDENT**
- PAUL KINYANJUI MUCHUGI.....9TH RESPONDENT**
- FRANCIS KAMAU MUCHUGI.....10TH RESPONDENT**

(An application for extension of time to file a Notice of Appeal and record of Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Mugo J.) dated 28th June, 2005

in

H.C.C.C NO. 1972 of 2000)

RULING OF THE COURT

Before me is an application by way of notice of motion filed on the 13th day of July, 2010. It is expressed as having been brought under Rule 4 of the Court of Appeal Rules and all enabling provisions of the Law. Three reliefs are sought namely: -

1. ***That this Honourable Court do extend time within which the notice of appeal and the record of appeal out of time may be filed.***
2. ***That this Honourable Court be pleased to allow this application of notice of appeal out of time.***
3. ***That costs and incidental to this application abide the result of the intended appeal.***

The application is anchored on the grounds in the body of the application, contents of the supporting affidavit as well as the annexures exhibited. On the hearing date, the applicant Mr. James Ndungu Muchugi appeared in person while learned Counsel Mr. Ndurumo appeared for the 1st, 2nd, 3rd, 4th, 6th, 8th, 9th and 10th respondents. The Court was then informed that the matter was part-heard. It had earlier been placed before the Honourable Mr. Justice S.E.O. Bosire JA when it was brought to the learned Judges notice that the 5th and the 7th respondents had passed on. The matter was then adjourned to enable the applicant substitute the deceased respondents or decide otherwise.

When the hearing next resumed before Nambuye JA, the applicant informed the Court that he did not wish to substitute the deceased 5th and 7th respondents as they were not married and as such they had died leaving no one behind who could be substituted in their place. Thereafter both sides agreed to have the application heard denovo.

In his address to Court, the applicant urged this Court to allow the application because it is properly laid under Rule 4 of the Court of Appeal Rules. The applicant concedes the Judgment sought to be appealed against arises from a decision of Mugo J. delivered on the 28th day of June, 2005 in Nairobi, HCCC No.1972 of 2000. Feeling aggrieved by the said Ruling, the applicant desired to appeal against the said Judgment and lodged a notice of appeal on the 14th day of July 2005 and served the same on the respondents. Simultaneously with the lodging of the notice of appeal the applicant also filed a letter seeking typed proceedings to enable him prepare and lodge the record of appeal.

Thereafter the respondent moved this Court by filing ***Civil Application No. Nai 193 of 2008 between Joyce Nduta Muchungi and 9 others versus James Ndungu Muchungi*** seeking to strike out the applicant's notice of appeal filed on the 14th day of July, 2005. The said application was heard on merit and allowed by this Court on the 24th day of June, 2010. The allowing of the application for striking out the notice of appeal prompted the applicant to present the application subject of this ruling seeking leave to file notice of appeal and record of appeal out of time.

The applicant contends that he is entitled to the relief sought because the intended appeal is arguable as he intends to raise serious issues of facts and law touching on failure on the part of the trial Court to observe the rules of natural justice, on matters of procedure which were breached, on misdirections and errors of law committed by the Court as the learned trial Judge exercised a jurisdiction not vested in her resulting in the shielding of fraudulent irregularities committed in the cause of the proceedings.

In response, learned Counsel Mr. Ndurumo on behalf of the remaining named respondents urged the Court not to allow the application because it is almost seven years since the judgment sought to be appealed against was made. No orders of stay of execution were granted both in the High Court and in this Court resulting in the decree being fully executed by subdividing the subject matter of the proceedings in the High Court and allocating it to persons some of whom were not parties to the High Court proceedings and who will be prejudiced and inconvenienced if the matter, is to be reopened.

Further, that no prejudice has been suffered by the applicant as the applicant also benefited from the said

Judgment. The Court is invited to uphold the principle that litigation has to come to an end and exercise its discretion judiciously to bring this protracted litigation to an end.

The undisputed background information leading to the presentation of the application is that indeed the alleged grieving judgment was delivered by Mugo J. on the 28th day of June, 2005. The applicant expressed his desire to exercise his undoubted right to appeal against the said decision by lodging the requisite notice of appeal on the 14th day of July, 2005 simultaneously with the filing of a letter seeking typed copies of the proceedings for purposes of preparation of the record of appeal. Thereafter the respondents as they were then (before the demise of the 5th and 7th respondents), filed civil Application No. Nai 193 of 2008 by way of a notice of motion on 23rd July, 2008 seeking to strike out the applicant's notice of appeal which had been filed on 14th day of July, 2005 on the sole ground that the said notice of appeal had been filed out of time in contravention of Rule 74(2) of the Court Rules.

A reading of the content of the resulting ruling reveals that the applicant is indicated to have conceded the contention of the respondents hence the striking out of the said notice of appeal on the 24th day of June, 2010 prompting the applicant to present an application subject of this ruling on the 13th July, 2010. The Court has been informed that the resulting decree has been fully executed as there were no stay orders. This resulted in the subject matter of the proceeding in the High Court being subdivided and distributed to adjudged beneficiaries of the High Court proceedings as well as 3rd parties. Learned Counsel for the respondents has used this resulting state of affairs to urge this Court not to reopen the matter as the appeal will not serve any useful purposes considering that the applicant has also benefited from the same execution.

Rule 4 on which the application is anchored provides: -

“The Court may on such terms as it thinks just by order extend the time limited by these rules or by any decision of the Court for the doing of any Act authorized or required by these Rules, whether before or after the doing of the Act and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The overriding consideration by the Court in this Rule is that the Court has a discretion in deciding whether to grant or withhold leave to extend time. The applicable principles have been crystallized by this Court in the case of ***Mutiso versus Mwangi [1999] 2EA 23*** first and foremost that the decision to grant or withhold the relief is an exercise of discretion which exercise of discretion has to take into account the following matters:

“First, the length of the delay, second, 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”

This Court went further in the case of ***Small Enterprises Finance Company Ltd Versus Thomas Adongo Oniko T/A Kisumu Export Tailoring House Kisumu Civil Application No. Nai 166 of 2008 (KSM 9/08) (UR)***;

“That the afore set out list is not exhaustive. From the use of the words “general” meaning that Rule 4 gives the Court an unfettered discretion so long as the discretion is exercised judicially. The Court is perfectly entitled to consider any other factors besides those enumerated in the Mutiso Case (supra), with the only caveat being that it is relevant to the issue being considered”.

Bearing in mind the afore set out principles and considering the facts of this application, the Court is of the opinion that it is not in doubt that the applicant was aggrieved with the High Court decision and decided to exercise his undoubted right to appeal and filed a notice of appeal on the 14th day of July, 2005, a period of 17 days from the date of the decision. Rule 75(2) makes it mandatory that such a notice be lodged within 14 days from the date the decision sought to be appealed against was made. It provides:

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“Every such (Rule 75(2) notice shall subject to Rule 84 and 976 be so lodged within fourteen days of the decision against which it is desired to appeal.”

The applicants’ notice of appeal was therefore filed three days late which cannot be said to be inordinate. As for the reasons for the delay the applicant has explained that it is a question of miscalculation of days. The explanation is plausible.

The chances of the success of the appeal is not a primary consideration and that is why in the *Mutiso case* (supra) this Court stated specifically that ***“possibly”*** the chances of the success of the appeal. It is therefore sufficient to demonstrate that there are real issues to be interrogated on appeal. Herein the applicant intends to raise issues of breach of rules of natural justice, flouting of rules of procedure and whether the Court had jurisdiction to impute the existence of a Trust when none had been expressly registered against the title in the first instance and when none had been demonstrated to exist by the facts before the Court in the second instance. In this Court’s opinion these are arguable. It is now trite and this Court has judicial notice of the same that by ***“arguable”*** it does not mean ***“those which must succeed”***. It simply means issues capable of being interrogated by a Court of Law to determine whether there is a genuine grievance or not. Numbers also do not matter. Demonstration of existence of one arguable point suffices.

As for prejudice to the respondent, it is evidently clear that as observed, the notice of appeal struck out was filed only 3 days late and when it was subsequently struck out on 24th day of June, 2010, the applicant moved to file the current application subject of this Ruling on 13th July, 2010 a period of 20 days which in this Court’s opinion cannot be said to be an inordinate delay which can operate to stifle the applicant’s right to exercise his undoubted right to appeal.

With regard to issues of non-existence of the subject matter of the High Court decision sought to be appealed against, this is a matter for merit argument on the appeal when eventually filed.

For the reasons given in the assessment the Court is inclined to exercise its discretion in favour of the applicant. Accordingly this application is allowed and the applicant is allowed to file the notice of appeal within 14 days from the date hereof. In view of the length of time which has lapsed since the decision sought to be appealed against was made, the applicant will have 21 days from the date of the lodging of the appeal to lodge the record of appeal. In default, the leave of extension of time to lodge the said documents granted herein shall stand lapsed. Costs of the application to the respondents, the same to be agreed and or taxed and paid in the usual manner.

Dated and Delivered at Nairobi this 20th day of April 2012.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR