



**IN THE COURT OF APPEAL
AT NAKURU**

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

CIVIL APPLICATION NO. NAI. 235 OF 2010

BETWEEN

JOHAM MUIRURI KIBARU.....APPLICANT

AND

SIMON TOWETT MARITIM.....RESPONDENT

(An application for extension of time within which to serve the notice of appeal arising from the decision of the High Court of Kenya at Nakuru (Ouko, J) dated 15th January, 2010 in

H.C.C.C. NO. 188 OF 2007)

RULING

This is a motion under **rule 4** of the Court of Appeal Rules for an order extending the time within which to serve a notice of appeal. The applicant **Jotham Muiruri Kibaruf** filed a notice of appeal declaring his intention of appealing against the decision of the High Court given on 15th January, 2010, in High Court Civil Case No. 188 of 2007, but he did not serve the said notice within the stipulated time under the Court of Appeal Rules. He has explained through his advocate, *Mr. Lawrence Macharia Karanja* that the delay in serving the said notice was due to inadvertence. *Mr. Karanja* swore the affidavit in support of the motion, and in it he has deponed, inter alia, that he instructed his court clerk to serve the aforesaid notice and *Mr. Karanja* believed his instructions were complied with. But alas, the clerk did not serve the notice on the respondent, **Simon Towett Maritim**, and this fact came to light when *Messrs Odhiambo & Odhiambo, Advocates*, who are on record for the respondent, through their letter to *Mr. Karanja* dated 17th August, 2010, complained that they had not been served with the notice.

Nancy Wanjiku Njiri, was the clerk who failed to serve the notice of appeal, and by her affidavit sworn on 25th February, 2011, she had explained that by oversight she did not serve the notice of appeal as she had been instructed by *Mr. Karanja*.

The Ruling against which the appeal is intended was given by *Ouko, J* on 15 January, 2010, pursuant to an application under section 27 and 28 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, for leave to file suit after the time within which the suit was supposed to be filed had expired. The applicant in that application was the respondent herein. He was the judgment debtor in High Court Civil Case No. 253 of 1996. Through execution proceedings in that suit at the instance of the

applicant herein, several of the respondent's properties were attached, and later sold. It happened that at the time execution proceedings were conducted and the sale eventually held, there was an order in place staying execution. The respondent contends herein that he did not become aware of the stay order until 15th January, 2007, and soon thereafter, on 20th August, 2007, he filed Nakuru High Court Civil Case No. 188 of 2007, claiming damages for wrongful attachment and sale of his property. The suit was based on an alleged tort. In view of that the cause of action having arisen way back on or about 27th July, 2004, the suit should have been but was not filed within 3 years, but after a period exceeding 3 years. The suit was filed without leave.

The court's power under **rule 4** above is discretionary, but like all discretions the discretion has to be exercised judicially and on the basis of evidence and sound legal principles. The power of the court is free and original in nature. The respondent pleaded with me to decline to exercise my discretion in favour of the applicant for two main reasons, firstly, that the applicant's intended appeal is not meritorious. Secondly, that the delay in bringing this application has not been explained.

There is something curious about this matter. The applicant herein was the unsuccessful party in the application before the High Court for extension of the time to sue. When orders were made on or about 15th January, 2010 the applicant was quick to file a notice of appeal, but thereafter he did not treat the matter with the urgency it deserved. Besides when it was drawn to the applicant's attention that he had not served the notice of appeal on the persons likely to be affected by the appeal, the applicant did nothing until after 41 days when he filed the present application. As rightly pointed out by *Mr. Kipkoech* for the respondent, that delay has not been explained. A failure to serve the notice of appeal in the first instance may have genuinely been an oversight. However, when evidence emerges indicating that even after the applicant's advocates were reminded of the omission to serve the said notice, they did not act with quick dispatch. That in a way tends to suggest that the failure to serve the notice of appeal was due to factors other than oversight.

Besides, since the notice of appeal was filed, a period in excess of 60 days has elapsed. I have no evidence whether or not the applicant has filed a record of appeal. There is no prayer in the motion before me for extension of time within which to lodge a record of appeal. It may be that the applicant may be intending to rely on the proviso to rule 82 of the Court of Appeal Rules, if he requested for copies of proceedings and ruling within the stipulated period under that proviso. I have not lost sight of the fact that neither party raised this issue. However, looking at the prayers in this application it would not fail to strike you that unless time for lodging a record of appeal is extended, *prima facie*, an extension of time within which to serve a notice of appeal may turn out to be an act in futility and the maxim that courts never act in vain holds.

In the above circumstances, I am not persuaded that I should exercise my unfettered discretion in favour of the applicant and accordingly dismiss this application with costs to the respondent.

DATED and DELIVERED at NAKURU this 28th day of SEPTEMBER, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR