IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civil Application 274 of 2009

JOHN TERER
RICHARD ROTICH
KIPKORIR KIRUI (Suing as officials for and on behalf of ST MARK'S COMMUNITY GROUP) …… APPLICANTS
AND

FR. JOHN MBARAKA
NELSON KIPRUTO TUITOEK
JOSEPH TONUI ..... RESPONDENTS

(Application to extend time to serve the notice of Appeal lodged o 12th May, 2009 in Kericho High Court Civil suit No. 40 of 2009 against the decision of Lady Justice M.A. Ang'awa delivered on the 6th May, 2009 and served out of time on the 12th June, 2009)

RULING

By their motion dated 24th August, 2009 and filed on 26th August, 2009, the applicants seek an order under ***Rule 4*** of the rules of this Court for extension of time within which to serve a notice of appeal against the decision of the superior court made on 6th May, 2009. The notice of appeal was indeed filed timeously on 12th May, 2009 but it was served on 12th June, 2009 which was out of time. Learned counsel for the applicants, Mr. Cheruiyot Richard referred to the supporting affidavit in which the advocate seized of the matter in the superior court, one Sonister Khalwale, swore that after the filing of the notice of appeal, the Deputy Registrar was in session and could not therefore sign the notice of appeal. It was left with the Registry awaiting his signature and collection for serving. It was not signed until 20th May, 2009 but due to inadvertent oversight by counsel it was not collected from the Court until 9th June, 2009 and subsequently served on 12th June, 2009. The resultant delay occasioned, according to Mr. Cheruiyot, was 8 days. He further stated that there was further delay in making the application for extension of time as it was made on 28th July, 2009, which was more than two months. For all these infractions, Mr. Cheruiyot pleaded mistakes of counsel and sought absolution and grant of the order sought. As for the chances of the intended appeal succeeding, Mr. Cheruiyot submitted that this was a land matter involving ownership of a school and the respondents would suffer no prejudice if the order was granted since they were in possession of the disputed property. The

intended appeal itself cannot be filed yet since copies of proceedings and judgment have not been supplied to the applicant, though applied for timeously.

The application was strenuously opposed by learned counsel for the respondents, Ms. Muchungi Selina, who submitted that the delay in serving the notice of appeal was 24 days and there was a further delay of 77 days before the application herein was filed. All this was unexplained delay, since forgetfulness is not excusable, the delay was inordinate. As for chances of success of the intended appeal, Ms. Muchungi saw no chances since in law a self-help group is incapable of owning any property and it matters not that there would be no prejudice caused to the respondents. The applicants' Advocates' sloppiness and flouting of rules of procedure, she urged, should not avail the applicants and the application should therefore fail.

The principles upon which I ought to consider the application are well settled and I need not belabor them. Indeed Ms. Muchungi enumerated the various factors that have to be considered in an application under ***Rule 4*** if the unfettered discretion donated to the court is to be seen to have been exercised judicially. Those factors have been identified in numerous decisions of this court including ***Leo Sila Mutiso v Rose Hellen Wangari,*** Civil Application No. Nai. 251 of 1997 (UR). One thing, however, which has been made clear in those decisions is that the factors available for consideration are not exhaustive and the Court's concern is to do justice between the parties. More recently, in view of enactment by Parliament of ***Sections 3A*** and ***3B*** of the Appellate Jurisdiction Act to provide for an overriding objective of civil litigation, the Court now has considerable latitude in the interpretation of the law and the rules made thereunder. The two sections provide as follows:-

> **"3A. (1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.**
>
> **(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
>
> **(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the process of the Court and orders of the court.**
>
> **(3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-**
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> **(a)The just determination of the proceedings;**
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> **(b)The efficient use of the available judicial and administrative resources;**
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> **(c)The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
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> **(d)The use of suitable technology."**

In construing those provisions, this Court in ***City Chemist (NB) & 2 Others vs Oriental Commercial Bank Limited***, Civil Application No. Nai.302 of 2008 (UR***)*** referred to the parentage of the section in England and stated thus:-

> *"It was tailored to enabling the court to deal with cases justly which includes as far as practicable:*
>
> **"(**a*) ensuring that the parties are on an equal footing;*
> *(b) Saving expenses;*
> *(c) dealing with the case in ways which are proportionate*
>
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
>
> *(e)ensuring that it is dealt with expeditiously and fairly;*
>
> *and*
>
> *(f) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*
>
> *Those are not pious aspirations and the Court has a duty to give them operational effect. That, however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the Court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower courts and maintains stability in the law and its application."*

With those principles in mind, I now turn to the application before me. It was, firstly, erroneous for the applicants' counsel to believe, as he did, that the notice of appeal had to be signed by the Deputy Registrar before it was served. ***Rule 76(1)*** is clear that the notice of appeal can be served "*before or within seven days after lodging*" it. I had occasion to deal with the same issue when it arose in ***Shital Bimal Shah & 2 Others vs Akiba Bank Limited & 4 Others***, Civil Appeal No. 159 of 2005(UR***)*** where I stated as follows:

> *"In **Gulamhusen Cassam & Anor. V. Shashikant Sachania & Anor. [1982 – 88] 1 KAR 24**, the advocate for the intending appellant in that case, Mr. Nowrojee filed a notice of appeal timeously but failed to serve it on the respondent contending that he could not collect the notice of appeal filed in Court because the Registrar had not signed the second portion of it . He served it nearly two weeks out of time. In dealing with the subsequent application for extension of time, Madan, J.A (as he then was) stated*:
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> *"Rule 75 clearly shows that notice of appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, either before or within seven days after lodging it. There is no prohibition in the Rules against serving notice of appeal even before it is lodged in the superior court. Form D shows that notice of appeal has to be sent to the Registrar of the High Court which can only be done without his signature or first, signed either by the appellant himself or his advocates. Therefore, on the face of it, there was no excuse for not serving notice of appeal within time.*

> *The applicant's legal adviser Mr. Nowrojee freely admitted that it was an error of judgment on his part to think that notice of appeal had to be singed by the Registrar before service. An error of judgment on the part of a legal adviser may help to built up sufficient reason under* Rule 4 *to induce this Court to exercise its discretion to extend time for the doing of any act under the Rules of Court."*

That decision was made when ***"sufficient reason"*** was a requirement in ***Rule 4*** applications. Now the Court's discretion is unfettered.

In seeking extension of time to serve the notice of appeal, the applicants here attribute that delay and the delay in filing the motion before me on their counsel. They plead that the mistakes of counsel ought not to be visited on them. Once again I considered the same plea in the ***Shital Shah Case (Supra)*** and I stated:

> "*That leaves the consideration whether the mistake of counsel in this matter is excusable. Such mistakes come in all shapes and sizes, as it were, but some have been rejected by this Court, such as total inaction by counsel disguised as a mistake. The most memorable discourse on the subject was again from Madan, J.A (as he then was) in* ***Murai v. Wainaina*** *(No. 4) 1982 KLR 38:*

> "*a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."*

> *The delay in serving the three respondents with the notice of appeal was 6, 7 and 11 days respectively. The respondents were certainly not misled that the applicant was not intent on pursuing the appeal and if they were, they did not challenge the record of appeal soon after that ground or at any rate, before the applicant filed the application now before me on 12.07.05. The delay in all the circumstances is not inordinate and the prejudice, if any, caused on the respondents may be recompensed in payment of costs."*

Should the delay occasioned in this matter be excused? I think the blunder on the issue of law relating to the signature of the notice of appeal before service may readily be excused. In different circumstances, however, the delay in filing this application for extension of time would have been difficult to excuse but I am inclined to consider some special circumstances of the matter before me. It is relevant that the subject matter of the dispute between the parties is a piece of land upon which is a development of a school. The respondents were the successful party and are in possession of the school land and thus the only prejudice caused to them is the delay in realizing the fruits of their judgment. It is also relevant that copies of proceedings and judgment which were applied for have not been supplied by the court and the respondents have been aware all along that the applicants were intent on pursuing the intended appeal. Ms. Muchungi, made me aware that the respondents had filed an application to have the notice of appeal struck out for want of service within time. It is that application which jogged the applicants into action. In either case, however, appropriate orders for costs would atone the transgressions of the applicants and I would be inclined to give

them an opportunity to urge their intended appeal if they complied with such an order.

Being of that frame of mind, I allow the application and extend the time within which the notice of appeal lodged in the High Court of Kenya at Kericho on 12th May, 2009 may be served. I further order that the notice of appeal which was served on the respondents on 12th June, 2009 be and is hereby deemed to have been served within time and is a valid notice. The applicants shall bear all costs thrown away, assessed at Kshs.20,000/=, which shall be paid to the respondents within 14 days of this ruling, failing which execution for that sum with interest at court rates shall ensue. Those shall be my orders.

Dated and delivered at NAKURU this 26th day of February, 2010.

P. N. WAKI
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.