



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 52 OF 2010**

**BETWEEN**

**BARCLAYS BANK OF KENYA LTD.....APPLICANT**

**AND**

**MARTHA KARWIRWA ANTONY .....RESPONDENT**

*(Application for extension of time for filing an appeal from the ruling of the High Court of Kenya at Nairobi (Okwengu, J.) dated 29<sup>th</sup> February, 2008*

**in**

**MILIMANI CIVIL CASE NO. 446 OF 2007)**

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**R U L I N G**

I have before me a notice of motion brought under **rule 4** of this Court's Rules seeking orders that:-

- “1. *The time for lodging the appeal be extended***
- 2. *The costs of this application be provided for.*”**

No grounds in support of the application were availed in the notice of motion as the applicant preferred to refer the Court to the grounds set out in the supporting affidavit. That is not proper but I will treat that omission as curable irregularity nonetheless. In the supporting affidavit, sworn by the applicant's learned counsel Mr. Paul Ogunde, it is reposed that the ruling, the appellant intends to appeal from was delivered on 29<sup>th</sup> February 2008 in the High Court at Milimani Civil Case No. 446 of 2007. The applicant, through its advocates filed notice of appeal timeously on 3<sup>rd</sup> March 2008. On 4<sup>th</sup> March 2008, its advocates wrote a letter to the Deputy Registrar, superior court bespeaking certified copies of proceedings. That letter was copied to Machira and Company, the advocates for the respondents in this application. Thereafter, the applicant sought, in the superior court, temporary injunction pending the filing of its intended appeal. That was granted. Nothing happened immediately thereafter as apparently, the appellant took no

further action on the matter for sometimes. On 26<sup>th</sup> February 2010, the respondent herein served the applicant with an application lodged in the superior court seeking to discharge the temporary injunction granted to the applicant, the which injunction was granted partly on grounds that the applicant intended to lodge an appeal in this Court, and was to extend till the date that appeal would be heard. The applicant's advocates swear that when they were served with that application, it alerted them and woke them up into calling up the file to see if indeed the superior court had responded to their request for copies of ruling and proceedings. On checking their file, the applicant's advocates discovered that indeed the Court Registry had long written to them in response to their request for copies of proceedings and ruling and had in a letter dated 28<sup>th</sup> September 2009, which was received by them on 2<sup>nd</sup> October 2009, informed them that the required proceedings were ready for collection upon payment of amounts specified in that letter. That letter was in the applicants' advocates file. Mr. Ogunde, states that as the receipt of that letter was not acknowledged by any of the advocates in the firm by signing against the receipt stamp, the letter must have been received by a member of their firm's staff who filed it away without bringing it to the attention of any advocates in the firm. That is the explanation for the delay in taking action between the date the ruling was delivered, which was 29<sup>th</sup> February, 2008 upto 26<sup>th</sup> February, 2010. The events thereafter are explained by Mr. Ogunde at paragraph 19 as follows:-

***“I was only able to file this affidavit (sic) after I received the duly extracted order of 17<sup>th</sup> of July 2009 which was only issued by the Court 8<sup>th</sup> March, 2010 (sic) and only received by me on 12<sup>th</sup> of March, 2010.”***

This application was filed on 17<sup>th</sup> March 2010.

In reply to applicant's supporting affidavits, the respondent Martha Karwirwa Anthony states in salient parts of her affidavit that the letter from the Deputy Registrar informing the applicant that the copies of ruling and proceedings were ready was duly received by the applicant's advocates, but the same advocates did nothing about the matter and excuses advanced by the applicants could not attract court's discretionary powers in the applicant's favour as despite the admitted receipt of the copies of ruling and proceedings in time, the applicant dilly dallied till the time for filing the appeal had expired. She stated further that the intended appeal has no merit and is only a move to delay the finalization of the dispute so as to enable the applicant reap advantages consequent upon the same delay and lastly, the respondent maintained that she would be severely prejudiced by granting of this application as order of the court to register the suit premises in her favour has been frustrated and are likely to be frustrated by the several injunction orders sought by the applicant. During the hearing before me, it transpired that the order the applicant's counsel stated they were waiting for even after knowing that the copies of proceedings were ready, was not the order arising from the ruling in respect of which the appeal was intended i.e. ruling delivered by Lady Justice Okwengu on 29<sup>th</sup> February, 2008 but was an order of Lady Justice Khaminwa against which no appeal was intended and which was not the subject of the notice of appeal. Indeed it transpired that the order in respect of Okwengu J's ruling was not even annexed in the record before me.

The principles to be applied by this Court when considering a matter brought under **rule 4** of this Court's Rules are well settled. In the case of ***Fakir Mohamed vs. Joseph Mugambi and two others, Civil Application No. 332 of 2004***, this Court had the following to say:-

***“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 delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the 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 Application No. Nai. 255 of 1997, (ur), Mwangi vs. Kenya Airways Ltd (2003) KLR 486, Major Joseph Mwereri Igwete vs. Murika M'Ethare & Attorney General Civil Application No. Nai. 8 of 2000 (ur) and Murai vs. Wainaina (No. 4) (1982) KLR 38.”***

The above is clear. For the applicant to succeed in an application brought under **rule 4** of this Court's Rules, he needs to demonstrate the period of delay; the explanation or reasons for that delay, that the intended appeal as is the case here, is arguable but without going into the merits of the appeal or of the intended appeal; that the respondent will suffer no prejudice if the application is granted and other matters stated in the above ruling. It will be noted however, that the above decision emphasizes the need to comply with the time limits. One cannot also forget that when considering such an application the court also needs to and indeed does consider the overriding objectives which in a case of this nature cuts both ways as inordinate delay by the applicant to take action may defeat the requirement to have cases finalized expeditiously whereas at the same time minor hiccups may have to be ignored lest injustice results from undue regard to technicalities.

It is with the above in mind that I do consider the application, the affidavits, the record, the able submissions by both counsel and the law. Ruling appealed from was delivered on 29<sup>th</sup> February 2008. Notice of appeal was filed timeously on 3<sup>rd</sup> March 2008. Thereafter the appellant had sixty (60) days to file record of appeal. That should have been filed by about 4<sup>th</sup> May 2008. It was not filed. This application was filed on 17<sup>th</sup> March 2010 as I have stated above. Thus the delay period is from 4<sup>th</sup> May 2008 to 17<sup>th</sup> March 2010. The explanations given for that delay are two. First is that the delay between 4<sup>th</sup> May 2008 and 26<sup>th</sup> February 2010 was caused by lack of knowledge of the applicant's advocates that the copies of proceedings and ruling they applied for had been ready and were awaiting collection as the letter saying so, though received in their offices, had not been brought to their attention by their support staff. Second is that when they eventually came to know that the same proceedings were ready for collection on 26<sup>th</sup> February 2010 through respondent's application to discharge the order of injunction granted to them by Khaminwa J, they still needed to have orders to include in their application for leave to file appeal out of time as that order was not ready for collection from the Court Registry. That explanation was offered for the delay between 26<sup>th</sup> February 2010 and 17<sup>th</sup> March 2010.

On the first explanation as regards the delay upto 26<sup>th</sup> February 2010, the respondent's response is that the letter from the Registry was duly received by the applicant's advocates in time and the allegation of ignorance of the existence of that letter in their chambers is no more than a crafty story built to hoodwink the court into allowing the application. That may very well be so, but I have no evidence before me to confirm the same and it remains the respondent's sentiments. Courts do not act on whims, imaginations, sentiments, or even on suspicions. Courts act on hard evidence. In so far as there are no such facts to lead me into accepting that what the applicant says is not true, I have no alternative but to give the benefit of doubt to the applicant much as it may in itself be clear evidence of break down of communication in that office. I would add that such instances cannot be ruled out in advocates firms and I would on my side see it as a possibility. Thus if that explanation was the sole explanation covering the entire period of delay, I would have exercised my discretion in favour of the applicant.

But as I have stated above that explanation only covers delay upto 26<sup>th</sup> February 2010. From 26<sup>th</sup> 2010, there was another delay of about 19 days or so i.e. upto 17<sup>th</sup> March 2010 when this application was filed. That part of delay is explained by the allegations at paragraph 19 of Mr. Ogunde's affidavit, I have reproduced above. In my view that explanation is not by any standard, valid. The order in respect of ruling of the court delivered on 17<sup>th</sup> July 2009, was an order made by Khaminwa J. whereas the intended appeal is to be against the ruling by Okwengu J. delivered on 29<sup>th</sup> February 2008. That order of Khaminwa J. was therefore not relevant to the matter that was being appealed from and needed not be waited for if one had to wait for any order at all. Indeed the order from the ruling of Okwengu J. which was relevant, was not included in the records before me. Mr. Ogunde, in his submissions in reply to Mr. Machira, conceded these facts. Further and in any event the procedure for extracting, and approval of the decrees and orders are matters that are left to the parties and the applicants cannot be heard to say the delay in filing the record of appeal was a result of their waiting for a duly extracted order which in this case was an irrelevant order. I do not consider the delay between 26<sup>th</sup> February 2010 and 17<sup>th</sup> March 2010 explained.

As to whether the intended appeal has any chances of success, Mr. Machira says there was no draft

memorandum of appeal annexed to enable me make any informed decision as what Mr. Ogunde refers to is no more than allegations that were before the superior court. I have seen the alleged grounds. On technicalities, Mr. Machira is right that there is no draft memorandum of appeal. That however, is not a requirement in law and I think the court is entitled to get the gist of what would be the merits of appeal from the record availed and what was before the court, though not draft memorandum of appeal filed in this Court, is enough for purposes of gauging whether the intended appeal is arguable. I do, without going into the merits think the matters raised in that document whereas they cannot be wished away, are not matters that would make me gloss over the importance of compliance with time limits.

On the question of prejudice, the respondent has put forward clear instances that do show that the respondent would suffer prejudice if this application is allowed. These are spelt out in the replying affidavit. The entire case was instituted on 29<sup>th</sup> August 2007 and has not been heard. Only injunction matters have been heard. In fact reading the affidavits before me, it would appear that another relevant matter was filed way back in 2006, i.e, HCCC No. 114 of 2006 and a consent order was entered in that suit. The consequence of all these is that the registration of the suit premises hangs in the air all because of these injunctions. These allegations by the respondent have not been rebutted by the applicant. Whereas I cannot find either way on the allegations, I do feel the respondent has put on the table the prejudice it would suffer if the application is allowed.

In conclusion, doing the best in the circumstances, and noting that no explanation has been advanced for the full period of delay, and that possibilities of the respondent suffering prejudice have been demonstrated, I find it difficult to exercise my discretion in favour of the applicant. The application cannot succeed. It is dismissed with costs to the respondent. Orders accordingly.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of September, 2010.***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**