IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. NAI. 170 OF 2010

BETWEEN

BANDARI ENTERPRISES (K) LTD .....APPLICANT

AND

MR. D.K. MUSINGA T/A MUSINGA & ADVOCATES .....RESPONDENT

(An application for extension of time to file and serve a notice of appeal, memorandum of appeal and record of appeal

out of time and the extension of time to apply for a copy of proceedings from the ruling and order of the

High Court of Kenya at Mombasa (Ojwang, J.) dated 11th December, 2009

in

Misc. Civil Suit No. 72 of 2005 (O.S))
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R U L I N G

It is exciting that the hearing of this application and the ruling thereon have been conducted through video conferencing; a modern technology that will hopefully expedite the administration of justice, improve access to justice and reduce costs. I pay tribute to the parties for giving their consent for adoption of this novel procedure in their matter.

The application is made under ***rule 4*** of the rules of this Court seeking an order for extension of time to file and serve a fresh notice of appeal and a further order for filing and serving a memorandum and record of appeal. The decision of the superior court (Ojwang, J.) which is intended to be challenged was delivered on 11th December, 2009. According to the rules, the notice of appeal ought to have been filed within 14 days, that is on or before 25th December, 2009, and served within seven days thereafter. No notice of appeal was filed or served as provided by the rules, although both parties were represented by counsel in the superior court.

According to the affidavit in support of the motion, the applicant terminated the services of his advocates on 10th May, 2010 when he filed a notice of intention to act in person. He swears that he did not know about the ruling of the superior court until his advocates informed him on 3rd May, 2010 and one week later on 10th May, 2010 he filed a notice of appeal. That filing was done more than four months out of time. The only reason given in the supporting affidavit for the delay is the inaction of the advocate who was on record for the applicant. The applicant himself says nothing in the affidavit about the efforts he made to instruct his advocates and to pursue the matter. He also says the intended appeal has high chances of success without putting forward any proposed grounds in support of such assertion. In oral submissions, the applicant blamed his advocate for simply telling him to wait at home for the ruling when the coram shows that the advocate was present when the ruling was delivered on 11th December, 2009. He further stated that he found it difficult to process the application as a layman, after receiving the advocate's letter dated 3rd May, 2010. He disclosed that he had financial difficulties, hence the further delay of two months before filing the motion now under consideration.

For his part, Mr. Mabeya, learned counsel for the respondent, referred to the principles which guide a single judge in considering a motion under ***rule 4*** and submitted that there was totally no explanation for the lengthy delay in filing the notice of appeal in May, 2010 and the further delay in filing this motion in July, 2010. The total period of delay was about 7 months. The allegation by the applicant that his advocate was to blame ought to be ignored since there was no affidavit from the advocate to explain the delay. Mr. Mabeya further submitted that the intended appeal had no chances of success and was merely meant to vex the respondent now that he is in public service and therefore the revival of the matter in all the circumstances would be prejudicial to the respondent.

Iam conscious in this matter that the applicant appeared and conducted this matter in person and that is why I readily allowed his application for adjournment to enable him to engage an advocate. At the resumed hearing however, the applicant recanted his desire to have an advocate and said he would proceed on his own. He then made an application for my disqualification but that application was rejected as it was devoid of merit. I subsequently fully heard the applicant and learned counsel for the respondent.

The discretion exercisable under ***rule 4*** is unfettered but it cannot be exercised on whim or caprice. This Court has stated before that several relevant factors guide the court in the exercise of that discretion among them, the length of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, or whether the matter raises issues of public importance - see **Fakir Mohammed v Joseph Mugambi & 2 others Civil App. Nai. 332/04**. Those factors are not exhaustive and have more recently been enriched by the enactment of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act and the new Constitution.

As correctly stated by Mr. Mabeya, the delay in filing the notice of appeal after the delivery of the ruling

by the superior court was more than four months. There was a further delay of two months before this application was filed making in all a period of about seven months. Any delay in compliance with the rules or orders of the court ought to go in tandem with an explanation for it. Without any explanation, there would be no basis for the exercise of the court's discretion. Both in his affidavit in support and in oral submissions, the applicant simply blames his erstwhile advocate for failure to take action in the matter until the 3rd of May, 2010. As this Court has said before, times without number, inaction by counsel is not an excusable mistake that may enure to the benefit of the client. If the advocate refuses or fails to carry out the instructions of the client, the client has a remedy elsewhere. I do not know whether in this matter, there were instructions given to counsel to lodge any appeal within time or at all, since the applicant was dilatory and made no disclosure. He could have easily obtained an affidavit from the advocate explaining the delay but he confessed he did not seek any such affidavit. A notice of appeal is a formal document which any layman can lodge, with advice, if necessary from the registry. In this case it would appear that the applicant was least concerned about the fate of his matter and made no attempt to obtain information through the court registry if, as he seems to portray, his advocate on record was unapproachable. The blame, in my view, does not simply lie with the advocate, but also with the applicant himself. That is so if the further delay of two months after receiving information from his advocate is considered. The only excuse advanced is that the applicant found difficulties in launching the application as a layman and that he had financial problems. On both counts, I would say this: a conscientious litigant would seek advice when he encounters difficulties since the law makes no distinction between represented and unrepresented litigants. As for impecuniosity, this Court's rules provide for relief in ***rule 112*** and therefore such excuse would not avail the applicant. In all the circumstances I am not satisfied that the applicant has offered explanation for the delay, both in filing the notice of appeal out of time, and in filing this motion. I have no basis therefore for exercise of my discretion in the matter and that finding would be sufficient to dispose of the application.

I am however asked to consider other factors relating to the merits of the intended appeals and the degree of prejudice to the respondent. It is not within the province of the single judge to adjudicate with finality on the merits of an appeal or an intended one. But as stated above, this is a factor the single judge may possibly consider because it would serve no purpose to admit to hearing frivolous and vexations matters and thus waste judicial time. A single judge would be acting on behalf of the court in that regard and, in an appropriate matter, the applicant ought to show that there is an issue, whether factual or legal, worth submitting to the court for adjudication. Sadly in this matter no single possible issue has been put forward, whether in affidavit ,draft memorandum of appeal or in oral submissions, and I cannot even begin to consider whether there is any merit in the intended appeal. The issue before the superior court was whether there was a relationship of advocate/client between the respondent and the applicant and the finding of fact was that there was none. In those circumstances I would agree with Mr. Mabeya that further prolongation of this litigation would be prejudicial to the respondent.

For those reasons I decline to exercise my discretion in favour of the applicant and I order that the application be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of October, 2010

P.N. WAKI

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JUDGE OF APPEAL

Icertify that this is a true copy of the original.

DEPUTY REGISTRAR