IN THE COURT OF APPEAL
AT KISUMU

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

CIVIL APPLICATION NO. NAI. 221 OF 2010

BETWEEN

KENYA BANKERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY .....APPLICANT

AND

GEORGE ARUNGA SINO ..... RESPONDENT

(An application for extension of time to serve notice of appeal from the judgment and of the High Court of Kenya at Kisumu (Lady Justice Abida Ali-Aroni) dated 18th June, 2010
in
KISUMU H.C.C.A. NO. 36 OF 2009)
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RULING

George Arunga Sino was the plaintiff in a suit he filed before a subordinate court claiming Kshs.300,000/=, being the balance of the purchase price for two parcels of land he allegedly sold to ***Kenya Bankers Co-operative Savings and Credit Society***, the applicant herein. Following the dismissal of his suit he filed an appeal to the superior court which at the conclusion of the hearing thereof reversed the decision of the subordinate court, and ordered not only that the Kshs.300,000/= was due and owing to it, but also that an additional Kshs.450,000/= was due and owing to him being penalty charges in breach of the contract of sale of the two parcels of land. The applicant was aggrieved, and on 28th June, 2010 filed a notice of appeal declaring its intention of appealing against that decision. That notice was, however, not served upon the respondent herein within the 7 days stipulated under ***rule 76*** of this Court's Rules. It was common ground at the hearing of the applicant's application for extension of time within which to serve the said notice, that the delay in servicing the notice was only for one day.

Albert Kai, a clerk in the firm of advocates representing the applicant, swore the affidavit in support of the application, and in his said affidavit he has given two reasons for the applicant's failure to serve the notice of appeal on the respondent within time. First, he has deponed that there was delay in signing the copies of the notice by the Deputy Registrar. As a general rule a Deputy Registrar endorses a filed notice of appeal to signify the date of its lodgment. This is the signature Mr. Kai is talking about. The second reason he gives for the delay, which in fact is related to the first one, is that he was not aware such a signature was not necessary before a copy of the notice could be served upon all the persons likely to be affected by the intended appeal.

In the application before me expressed to be brought under ***rule 4*** of the Court of Appeal Rules, the applicant would want me to exercise my judicial discretion under the aforesaid rule and enlarge the time within which to serve the aforesaid notice for such period as would include the date it was served upon the respondent. The power of the court under the aforesaid rule is discretionary and the principles to guide the court in exercising that power are well settled. The court is obliged to consider the length of the delay, the reason for the delay, the chances of the intended appeal succeeding and the degree of prejudice to the respondent if the application is granted. See **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application No. NAI. 255 of 1997**. It is, however, in clear cases in which the court may consider the chances of the intended appeal succeeding, as at the time the court is dealing with an application under ***rule 4***, it is not in possession of the full facts of the case. Besides that is an issue especially within the power of the bench which will eventually hear the appeal.

Mr. Odunga, who prosecuted the application on behalf of the applicant, submitted that the mistake in this case was committed by an advocate's clerk. He was under the mistaken belief that he could only serve a notice of appeal already signed by the Deputy Registrar. He urged the view that the clerk's mistake was not deliberate and requested me to excuse it. He added that the delay was for a short time and no prejudice would be suffered by the respondent, more so because the record of appeal has already been filed.

Mr. Ragot for the respondent while conceding that the delay in serving the notice of appeal was very short submitted that the delay has not been satisfactorily explained; that whether the delay is short or long it is imperative to satisfactorily explain the same. In his view the reasons given for the delay are both flimsy and of no relevance as it is being given by an advocate's clerk and not the advocate himself being the person on whom the responsibility for the proper conduct of the case lay. Mr. Ragot submitted further that it was essential for the Deputy Registrar who is alleged to have delayed the signing to swear an affidavit to that fact, and having not done so the reason is of no consequence in this matter. Learned counsel also raised the issue of the competency of the appeal arising from procedural omissions, among them, a defective extracted order, defective decree and the record of appeal having allegedly been filed 2 days out of time. Learned counsel submitted further, that the defects were fundamental and although the respondent has not brought the necessary application to strike out the record of appeal, it was his view that there is nothing to stop the court acting *suo motu*, to strike out the appeal on those grounds. In my view the respondent had the right to move the court to strike out both the record of appeal and the notice of appeal. Having not done so it should not be heard to complain about them here.

I will start by considering the period of delay. The applicant filed the notice of appeal only one day out of time. As pointed out by Mr. Ragot it would have been more prudent for the advocate who prepared the notice of appeal to file an affidavit to explain the delay even if it would have meant repeating what the clerk deponed to. The advocate is the one who had instructions to file a notice of appeal and he needed to own the mistake. The clerk was his employee and he could not act on his own. If the advocate had been involved in the matter he would perhaps have realized that the notice of appeal did not need to be signed before being served upon the advocate. An advocate should not take a lay back position and front his clerk to explain omissions which in law are attributable to him.

Having said that I wish to state that the delay here is very short and in the interests of justice and considering the circumstances of this case is excusable. This is a case in which the respondent may be compensated by an award of costs against the applicant. But there are important issues Mr. Ragot raised which I now turn to. They relate to the competence of the appeal. As a single Judge I do not have the power to strike out an appeal for whatever reason. If it is obviously incompetent I may only decline to grant an extension. However, do the facts as disclosed in the record clearly show that the applicant's intended appeal or appeal is incompetent? I do not have the record of appeal before me as to be able to comment on its competence or otherwise. Mr. Ragot himself conceded that it is difficult to assess the merits or otherwise of an appeal without essential documents like the copy of the judgment of the superior court, among other documents. He seemed to imply that a copy of the decision against which an appeal is intended without more would be sufficient for that purpose if it is made available. To some degree that is so. However the evidence and other factors also count. Those are not before me.

Regarding the filing of this application, the decision against which an appeal is intended was given on 18th June, 2010. The notice of appeal was filed 10 days later and the said notice, according to the rules, was supposed to be served within 7 days thereafter. It was not served. It should have been served latest by 5th or 6th July, 2010. This application was not filed until 6th September, 2010. Clearly the delay in bringing this motion is long and has not been explained. Mr. Ragot urged me to hold that the respondent has been indolent all along and is undeserving of this Court's discretion in its favour. It is quite unfortunate that the applicant's counsel's conduct in this matter appears to be callous and that fact alone would have constrained me to exercise my discretion against the applicant. However, the policy of the law as enunciated in the new Constitution (See ***Article 159***) and the overriding principle in civil litigation under ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act ***Cap 9*** Laws of Kenya, guide the Court to look at the wider picture and dispense justice without undue regard to technicalities of procedure. Yes, the applicant was indolent in bringing this application. Its advocate seems to have left the management of the case to the clerks. However, it is important that the applicant be given an opportunity to ventilate its case in the highest court in the land provided that the rights of the other party are not overlooked; and this can only be possible if it is granted an extension of time.

I appreciate the delay which will be entailed but the respondent will be appropriately compensated with an appropriate order on costs.

In the above circumstances I am constrained to grant the application and accordingly extend the time for serving the notice of appeal lodged in the High court on 28th June, 2010, for such period as will include the date it was served on the respondent. The respondent is awarded the costs of this motion to be agreed failing agreement, to be taxed. It is ordered.

Dated and delivered at Kisumu this 1st day of December, 2010.

S.E.O. BOSIRE
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR