IN THE COURT OF APPEAL
AT NAKURU
Civil Application 155 of 2009

SAMUEL THUITA WANJAMA ……APPLICANT

AND

CELESTINE MWANIKI MUNA & LILIAN MWERU ……..RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nakuru (L. Kimaru, J.) dated 13th June, 2006

in

H.C.C.C. NO. 144 OF 2003)
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R U L I N G

The applicant in this notice of motion dated and filed on 13th May 2009, ***Samuel Thuita Wanjama*** and ***Lilian Mweru*** (now deceased) had a dispute in the superior court commenced by way of Originating Summons dated and filed on 27th August 2003 in which Lilian sought three declarations to be made by that court in respect of property known as L.R. No. 12250/142 situate in Free Area in Nakuru Municipality. After full hearing of that matter but before judgment was delivered, Lilian passed on on 16th March 2006. The applicant says he was not aware of this until sometimes in the year 2009 when his present advocate was served with an application for substitution of the deceased Lilian. In the meantime, on 13th June 2006, the superior court (Kimaru, J.) delivered judgment in the originating summons. The applicant felt aggrieved by that judgment and instructed his then advocates Mungai Mbugua & Co., to appeal against it. His then advocates, on the applicant's instructions, filed notice of appeal on 16th June, 2006. That notice of appeal was timeously served upon the advocates for the administrator of the estate of the deceased Lilian. His advocates also sent a letter bespeaking the copies of proceedings and judgment to the Deputy Registrar of the superior court. On 28th June 2006, his lawyer was served with a notice of address of service by M/s Wamaasa Mungai & Co., Advocates for the administrators of the estate of Lilian. The administrator is Celestine Mwaniki Muna who is now a party on behalf of Lilian's estate. Thereafter everything went silent. The applicant says that the last time he communicated with his then lawyer was in September 2007 when he was told that the proceedings were not yet ready and he was asked to wait for the same to be availed before the appeal could be filed. In June 2008, he visited his lawyer's chambers and he found the offices closed. On enquiry, he was told that the lawyer had passed away in September 2007. He then sought to retrieve his file as the deceased advocate was running a single man firm. He retrieved his file in December 2008, but does not state the exact date. In February 2009, he instructed his present advocates to proceed with the appeal. On the present advocates taking over his matter, they were served with an application for substitution of the deceased Lilian. The advocates, noting that Lilian had passed on even before the judgment sought to be appealed from was delivered, felt the appeal had abated and decided to bring this application.

The application is seeking four orders which are as follows:-

> ***"1. That this Court does enlarge time within which the applicant herein can file and serve a notice of appeal.***
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> ***2. That the notice of appeal filed and lodged herein be deemed as timeously filed.***
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> ***3. That this Court does enlarge time within which the applicant can file and serve the record of appeal herein.***
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> ***4. That the costs of this application to abide the outcome of the intended appeal."***

The application is premised on grounds that whereas the applicant timeously instructed his erstwhile advocates to file appeal and the same advocates filed notice of appeal in time and sent out letter bespeaking the proceedings in time, the advocate passed on and that fact was not known to the applicant till December 2008; that having known that, he instructed his present advocates in February 2009; that his present advocates, on being served with the application for substitution of the deceased Lilian, formed the opinion that the appeal earlier on commenced by the former advocate had abated and had to file this application seeking to file fresh notice of appeal and serve the same out of time and further to file and serve record of appeal out of time.

The application is brought under ***rule 4*** of the Court of Appeal Rules. Mr. Githui, the learned counsel for the applicant addressed me at length on the application and referred me to several authorities on the applicable principles guiding the Court when considering such an application. He emphasized the time - hallowed principle that the Court in considering such an application, exercises unfettered discretion. According to Mr. Githui, although delay in filing the notice of appeal, serving the same and in filing the record of appeal and serving it was lengthy, it was not unreasonable and in his view only unreasonable delay needs explanation. The matter concerns land, and is therefore a sensitive matter. He referred me to paragraph 18 (ii) and (iii) of the supporting affidavit in support of his submission that the intended appeal is not frivolous. He ended by submitting that the respondent, being administrator of the estate of the deceased who was a party in the matter, does not stand to suffer prejudice by the grant of extensions sought. Mr. Wamaasa, the learned counsel for the respondent on the other hand was of the contrary view; first that it was not necessary to file and serve another notice of appeal as under ***rule 74 (1)*** of this Court's Rules, the notice filed earlier was proper and was duly served. It is still in existence even if it was filed after the demise of Lilian. He also referred me to ***rule 77*** and contended that as at the time that notice of appeal was filed the matter had not abated, it was still a valid notice of appeal even though it was filed and served after the demise of Lilian. In any case, as a copy of that notice of appeal was not in the record, there was nothing to be extended. He urged me to dismiss the first and second prayers on that score. On the prayer seeking extension of time to file and serve record of appeal, Mr. Wamaasa's argument was that there was inordinate delay which the applicant had not explained; that the subject matter of the intended appeal is land was the more reason why the applicant should have ensured diligence in pursuing it; that the applicant had not been candid as he had not stated when his former advocate died and when he instructed the present advocate. He ended his submission by stating that the appeal in this case had long abated and as the notice of appeal was filed and served upon a party who was already dead, there would be no valid appeal and thus the Court would be acting in vain in extending time to file the intended appeal. He also referred me to several authorities in support of his submissions.

The notice of motion is brought pursuant to ***rule 4*** of this Court's Rules. The principles that guide the Court in deciding such an application are now well settled. The Court in deciding such a matter is exercising unfettered discretion and for an applicant under that rule to benefit, he has to state generally the delay period, and give explanation for that delay. Further he has to demonstrate whether the intended appeal or the appeal for which time is sought to be extended is arguable, and whether the respondent would not suffer any prejudice by the

extension sought and any other matters that would persuade the Court to exercise the same discretion in his favour. The exercise of the discretionary powers though unfettered, must be carried out judicially and not upon the whims of the Court nor capriciously. The grounds to avail the applicant the exercise of such a discretion are not limited to the above as to do so would militate against the concept of the exercise of unfettered discretion. Lakha JA (as he then was) brought out those principles admirably in the case of ***Major Joseph Mweteri Igweta vs. Mukira M'Ethare & Another***, Civil Application No. Nai. 8 of 2000 where he stated:-

> ***"The subject matter of this litigation relates to twelve acres of land situated in Meru District. The application made under rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."***

And O'Kubasu JA, considering a similar application in the case of ***Pan African Paper Mills (EA) Ltd vs. Olaka***, **[2001] KLR 8**, and having considered the well known case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi,*** Civil Application No. Nai. 255 of 1997 held as follows:-

> ***"1. In an application for leave to file and serve a notice and record of appeal out of time, the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but its not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.***
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> ***2. The decision whether or not to extend the time for appealing is essentially discretionary. In general, the matters which the Court takes into account in deciding whether to grant an extension of time are:-***
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> ***(a) The length of delay.***
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> ***(b) The reason for the delay***
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> ***(c) The chances of the appeal succeeding if the application is granted; and***
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> ***(d) The degree of prejudice to the respondent if the application is granted.***
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> ***3. The discretion under rule 4 of the Court of Appeal rules should be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiment or sympathy."***

As the jurisdiction is discretionary, it goes without saying that Court cannot be bound by the other decisions but the Court will be guided by the same decisions. In deciding this matter, I am guided by those decisions of this Court which have provided the guidelines for quite sometime now and in any case, I have no reason to depart from them much as I may add other issues depending on the circumstances of a particular case and its peculiarity.

The applicant in his affidavit in support of the application stated that there was a notice of appeal timeously filed and served in this matter. That notice was filed and served sometime after Lilian was dead. It was thus filed against a dead person but under ***rule 77*** of this Court's Rules, that could be done and nothing turns on that. When the present advocates took over the matter in February 2009, they felt that that appeal had abated as Lilian died on 16th March 2006. I note that the notice of appeal was served in June 2006 before one year elapsed after Lilian's death. Indeed, even the judgment sought to be appealed from was delivered about three months after Lilian's demise and when no substitution had been made. That notice of appeal is however still on record and has not been declared as having abated although common sense would say it had long abated. Whether in that scenario, the appeal could be revived by filing fresh notice of appeal is a moot

point. Fortunately, mine is not to decide on the validity or otherwise of that notices of appeal for that must remain the domain of a full Court. What I do feel however, is that in so far as the application is seeking that I allow another notice of appeal to be filed afresh, it is not proper and to that extent, I agree with Mr. Wamaasa. That will mean having two notices of appeal in support of one appeal. It would not be proper. In the case of ***Dolphin Palms Limited vs. Al-Nasibh Trading Co. Ltd and two others*** – Civil Application No. Nai. 112 of 1999, Omolo JA stated as follows:-

> ***"Mrs. Gudka for the applicant sought to persuade me that I have jurisdiction to allow the applicant to file a notice of appeal out of time: of course I have jurisdiction to extend time within which a notice of appeal is to be filed. But as Mr. Khatib for the first respondent correctly pointed out, there is in fact a valid notice of appeal which was lodged on time against the decision in so far as that decision affects the first respondent. As at now, there is really no notice of appeal at all as regards the third respondent and prayer one in the notice of motion is not that I should enlarge time within which the applicant can file and serve a notice of appeal against the decision as it affects the third respondent. The prayer is that I should extend time to enable the applicant to file a notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is valid one cannot be a decision to be made by a single Judge. That is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 52 (b) an application to strike out a notice of appeal can only be heard and determined by the Court not by a singly Judge."***

That only concerns the application for leave to file notice of appeal and to serve it out of time. I am still to consider the other limb of the application which is seeking leave to file and serve the record of appeal out of time. Just in case I am wrong in my observations on the notice of appeal limb, I will deal with it also herein and treat both limbs together.

The first notice of appeal was timeously filed and served. The former lawyer for the applicant died in September 2007 but the applicant did not know about his death till sometimes in June 2008. He says he then started the process of retrieving his file and that took him upto December 2008. Although that time looks long, I will however accept it for what it is as it is not challenged and thus I will excuse the delay upto December 2008 and accept that it was explained i.e. the period between 16th June 2006 when first notice of appeal was filed and served upon the advocates of Lilian and the date the applicant retrieved his file from his former advocates in December 2008. Thereafter, having retrieved the file on a date not stated in December 2008, the applicant says he instructed the present advocates in February 2009, again on a date not stated. That is about two month's delay. Any explanation for that delay? None at all. It is in my view an inordinate delay. Not even an attempt to explain that delay. Further, in February 2009, his present advocates were instructed according to the applicant. When did they take action? On 13th May 2009 when this application was filed. That is another delay of three months. Again, in my view an inordinate delay. Any reason for that delay? None and again no attempt was made to explain it.

No draft memorandum of appeal was annexed to the application but in my mind that omission is cured by the allegations at paragraph 18 of the supporting affidavit where the applicant says the intended appeal is arguable as it raises issues as to whether the applicant was married to the respondent; whether the proceedings could be taken out in the absence of divorce or judicial separation and whether there was any proof of contribution. I have also perused and considered the judgment of the learned Judge of the superior court. Whereas, I cannot say the points raised will not carry the day if the appeal is heard, I would not, on the basis of the judgment say for certain that prima facie those points are meritorious. I was told by Mr. Githui that the applicant stands to suffer prejudice if the application is not allowed more than the respondent stands to suffer prejudice if the application is allowed. That is a rather novel point, as the prejudice that the law talks about is normally that which the respondent would suffer if time is extended. Mr. Wamaasa's take on that is that the respondent would suffer

prejudice if the application is allowed for that would to him mean revisiting an appeal which had already abated. On my part, I do feel that to extend in respect of a matter which commenced in 2003 and in respect of an appeal of which at one time the applicant had also considered as abated would be to the prejudice of the respondent. Lastly, it was stated that this was a land matter and that being so, there was need to have it heard and finalized once and for all at the highest Court in the land. That is an attractive argument. First, this was in reality a matter on the building developed on a piece of land. It is odd that the applicant, anxious to ensure his rights over the subject property, took two months to instruct a lawyer, having retrieved his file from a former lawyer and that even after that they i.e. he together with his lawyer took another three months to file a short application for extension of time. Surely he knew all along that this was a land matter. I think there are occasions when the argument that a land matter deserves to be heard in this Court is abused and this is one of such occasions. One who has a sensitive matter needs to be always sensitive and have it finalized as early as possible and not sleep over it and hold it as a reason for seeking extension later. If for some reason there is delay, then he surely needs to explain the delay or make an attempt to explain it, but not like in this case where no explanation of the delay is given and the matter being a land case is the only reason advanced. In any case, land matter would be a sensitive issue to all parties and not only to the applicant and so all interested parties need to play their part in ensuring expeditious disposal of the same.

Considering all the above, I do not find that the applicant has demonstrated a case upon which I can exercise my discretion on his behalf. The result is that this application must be dismissed in its entirety. It is so dismissed. The respondent will have the costs of the application.

Dated and delivered at Nakuru this 6th day of November, 2009.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR