IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 155 OF 2004 (80/04 UR)

NGOIMA WA MWAURA ……..…..…….. APPLICANT

AND

JAMES NJUGUNA KIHUNA …....……...…… 1ST RESPONDENT

MARY NJERI KIHUNA ……...……. 2ND RESPONDENT

(Application for extension of time to file and serve notice and record of appeal out of time in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Ransley, J) dated 26th April 2004

in

H.C.C.C No. 4569 of 1990)

****

R U L I N G

The application by way of notice of motion dated 29th June 2003 and filed on 1st July 2004 is brought under rule 4 of the Court of Appeal Rules. In substance, it is seeking one order that the applicant, Ngoima Wa Mwaura, be granted extension of time to file notice of appeal and record of appeal out of time. Nine grounds are set out in the application in support thereof. These are that on 26th April 2004, the superior court (Ransley J.) made an order in H.C.C.C No. 4569 of 1990 for the applicant to vacate suit premises Nairobi/Block 32/137 Golf Course on 31st May 2004; that the applicant felt aggrieved by that order and filed notice of appeal against it on 7th May 2004; that the notice of appeal was technically irregular as according to the applicant it was signed by the applicant in person whereas it should have been signed by the advocate who represented the applicant in the superior court namely P.N. Kiama and not by the applicant in person; that the applicant signed that notice of appeal and filed it in ignorance of the provisions of Order III rule 9 of the High Court Rules (I presume Civil Procedure Rules); that the applicant thereafter, on 19th May 2004, instructed the firm of Kihara Ndiba & Company Advocates to act for him and to apply for stay of execution of the judgment delivered by the superior court; that the applicant applied for copies of proceedings, judgment and order on 11th May 2004 and the same have not been supplied and hence the delay in filing the intended appeal; and that in order to mount a successful appeal it is necessary to file fresh notice of appeal. Those grounds were supported by an affidavit sworn by the applicant on 24th June 2004 in support of the application. The respondents did not file any affidavit in their opposition of the application but Mr. Kivuva, the learned counsel for both respondents,

appeared before me on the hearing day and vehemently opposed the application.

The principles that the court needs to consider when faced with an application such as is before me, brought pursuant to rule 4 of this Court's Rules, are now well settled. Although these principles are not exhaustive and cannot in law be exhaustive, a summary of the main ones is well spelt out in the case of Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997 (unreported) in which this Court in dealing with an application for extension of time within which to file and serve notice of appeal and record of appeal stated:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, the reason for the delay, thirdly (Possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

I need to emphasize however, that although the Court in considering an application for extension of time exercises discretionary powers, and although such powers are unfettered, the same powers cannot be exercised on whims or caprice. Hence the above principles which are meant to guide the courts in the exercise of that discretionary powers. In the case of Fakir Mohamed vs. Joseph Mugambi and two others – Civil Application No. Nai. 332 of 2004 (unreported) more aspects are spelt out, perhaps to demonstrate that the matters to be considered are never exhaustive. In that case, the Court stated as follows:

"The exercise of this Court's discretion under rule 4 has followed a well beaten path since the structure 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 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, whether the matter raises issues of public importance are all relevant but not exhaustive factors. See Mutiso vs. Mwangi – Civil Appl. Nai. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd (2003) KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General – Civil Application No. Nai. 8/2000 (ur) and Murai vs. Wainaina (No 4) (1982) KLR 38."

In the matter before me, the scanty facts I gather from the record is that the applicant in this notice of motion Ngoima Wa Mwaura was the plaintiff in HCCC No. 4569 of 1990 at Nairobi. The respondents, James Njuguna Kihuna and Mary Njeri Kihuna were the defendants. The dispute was over suit premises Nairobi/Block 32/137 Golf Course in Nairobi. The matter was first heard by Hayanga J. (as he then was) but was taken over by Ransley J. who, in dismissing the suit vide a judgment dated and indicated to have been delivered on 22nd April 2004, stated:

"The Defendant will have an order for vacant possession to be given on the 31st May 2004 …….. This case should have been heard some 10 years or so ago. This does not reflect well on either the court nor the parties."

The applicant felt dissatisfied with that decision. He demonstrated his intention to appeal by filing notice of appeal dated 7th May 2004. In that notice of appeal which was signed by the applicant in person, he stated that the judgment was delivered on 26th April 2004 and throughout the whole record, in the relevant documents filed by the applicant, he maintained that the judgment was delivered on 26th April 2004. That became another bone of contention as Mr. Kivuva, for the respondents, referring to that aspect maintained that the notice of appeal was defective as it was based on a judgment that never existed whereas Dr. Khaminwa, for the applicant, in response stated from the bar that the judgment was actually delivered on 26th April 2004 and not on 22nd April 2004 as is stated in the judgment itself. That is one of the reasons why I referred to the record as scanty as it is clear to me that without the copies of the proceedings which were not annexed to the record, that issue cannot be effectively decided as the record before me does not indicate the coram or the date the judgment was delivered. However, nothing turns on

this considering the other aspects of this matter as will soon be clear herebelow.

Back to the summary of facts. In the superior court, the applicant was represented by an advocate P.M. Kiama. After the judgment in that court was delivered, he proceeded to file notice of appeal in person. In the affidavit in support of the application for urgency, the present advocate Mr. Samuel Ndiba Kihara says, he (applicant) was misadvised by his former advocate Mr. P.N. Kiama to personally sign and file the notice of appeal without leave of the High Court pursuant to Order III rule 9 of the Civil Procedure Rules, but in his own affidavit in support of this application, he contradicts that statement and says he signed and filed the notice of appeal in person because he was ignorant of the provisions of Order III rule 9 of the Civil Procedure Rules and because Mr. Kiama was not available and there was urgency in filing the notice of appeal. I will not go into the question as to who is telling the truth as in the end that may not be necessary in this matter although at all times, it is necessary to come to court with clean hands and avoid any temptation to mislead the court. Albeit, after he filed the notice of appeal on 7th May, 2004, he decided to engage the services of an advocate and so instructed Messrs Kahara Ndiba & Company Advocates to represent him in this Court in pursuit of his appeal. He did so on 19th May 2004. During the hearing of the notice of motion, it transpired that the same advocates sought leave to come into record and they were granted the same leave on 21st May 2004. On coming onto the record, the applicant's advocates discovered that the notice of appeal had been signed and filed by the applicant in person. They felt that in law that was not proper, as according to them, the applicant had not complied with the provisions of Order III rule 9 of the Civil Procedure Rules. They thus felt that that notice of appeal was invalid. They however did not take any action till 1st July 2004 when they filed this application seeking extension of time to file fresh notice of appeal as by 1st July 2004, the time to file notice of appeal against the decision of Ransley J. dated and delivered on 26th April 2004 or 22nd April 2004 (whichever is the correct date) had long expired. As I have stated above, the respondent, though opposed the application, did not file any affidavit in reply to the applicant's affidavit. Thus the facts as summarised herein were uncontroverted.

In his submission before me, Dr. Khaminwa, the learned counsel leading Mr. Ndiba, the learned counsel for the applicant, urged me to consider that the notice of appeal signed and filed by the applicant in person was not only defective but was invalid and should not be considered as a notice of appeal at all. That being the case, it was Dr. Khaminwa's stand that there had not existed on record any notice of appeal and so in extending time for the applicant to file a notice of appeal, and in that notice of appeal being filed, there could not be two notices of appeal on record as the alleged notice filed by the applicant in person was not a notice of appeal at all but was a mere paper in the record. If I understood him, the explanation of delay in filing the notice of appeal was that the applicant believed he had filed a notice of appeal and hence did not feel the need to get an advocate to file one for him. He urged me to treat the situation as a mistake by the applicant's former advocate in the superior Court, who failed to file a notice of appeal and not to visit that mistake upon the applicant. Mr. Kivuva, the learned counsel for the respondent, on the other had was of the view that the notice of appeal filed by the applicant in person was valid and in any case was still on record as there was no order of the court either striking it out or marking it as withdrawn. That being the case, there cannot, in law, be two notices of appeal in record for one appeal. He also submitted that there was delay of over 40 days even if one were to compute the period of delay from 21st May 2004 when the applicant's advocates came on to the matter. That delay has not been explained. Further, Mr. Kivuva argued that the court could not decide with certainty whether the intended appeal had merits or not as there was no draft memorandum of appeal annexed to the application and copies of the proceedings were also not available. He also maintained that on prejudice, the respondent had waited for this matter for over seventeen years and so would be prejudiced were the court to grant the application. In support of that argument, he referred me to the judgment part of which I have herein reproduced above. He raised other matters which I have considered as well but which I do not think are of serious consequence to the proper decision of this matter. On the issue of delay, Dr. Khaminwa, accepted that there was a delay of 42 days from the date the present applicant's advocates came into the matter and the date this application was filed but he felt that that delay of 42 days was not unreasonable in the context of this matter.

I have anxiously considered the notice of motion, the grounds for the application, the affidavit in

support of it, the able submissions by the learned counsel on both sides, the authorities to which I was referred, the record and the law.

First, assuming as Dr. Khaminwa urges me to do, that there was no notice of appeal filed indicating the intention of the applicant to appeal against the judgment of Ransley J. delivered on 26th April 2004 as Dr. Khaminwa asserts, there would be a delay of about sixty five days. That delay, according to the principles I have stated above, needed to be explained. The applicant's explanation is that he filed a notice of appeal on 7th May 2004 by mistake and so I am invited to treat that period as a delay caused by mistake due to ignorance of the applicant or due to failure by his former advocates to give him professional help. Although for what I will state later in this ruling, I do not share the same views, I am nonetheless prepared to accept that delay as explained upto the time the applicant instructed his present advocates which was on 19th May 2004, when his advocates allegedly came on record for him. That leaves 40 days from 21st May 2004 when his advocates came on to the record for him to 1st July 2004 when this application was filed. Is there any explanation for that delay of 40 days? None at all. Dr. Khaminwa says that that period of delay is reasonable in the context of this case. With respect, I do not agree. All that was required to be filed was only notice of appeal if the advocates felt for some reason that the one filed by the applicant in person was not a notice of appeal at all. That is the context of the matter that was before the advocates.

The other context of the matter was that the notice of appeal is a document that by law is required to be filed within 14 days of the date of delivery of the judgment or ruling against which the intended appeal is being preferred. Thus in making the rules of the court, it was considered prudent that fourteen days after the ruling or judgment was the longest time needed for filing a notice of appeal. Any delay thereafter cannot be treated reasonable on its own. It is the explanation of such a delay that would qualify as reasonable or otherwise. In my view, a delay of about three times the period that the rules stipulate for taking an action cannot be considered reasonable without reasons. I reject that approach and I find that the delay of 40 days from the date the present advocates for the applicant came into the matter and discovered that the notice on record was according to them not valid has not been explained at all.

The next aspect for me to consider is whether the appeal has merits. I must warn myself that when considering this aspect, I am sitting as a single judge and thus I have no jurisdiction to make any definite decision on the aspect. I have perused only the judgment which was the only main document annexed to the application. I do agree that certain aspects in the judgment sound disturbing but I have not been able to see and peruse the pleadings, the proceedings and any draft memorandum of appeal. Without having seen and considered those documents, I cannot make any informed view as to the merits of the intended appeal. It was the duty of the applicant to supply the same. He has failed in doing so and he cannot benefit from such failure.

The next matter I need to consider is whether or not the respondents would suffer prejudice were I to grant this application. As is clear from the record before me, the case before the superior court was filed sometimes in the year 1990. The judgment that the applicant intends to appeal against was delivered in April 2004. It is close to four years since. The case has taken well over seventeen years. It would be prejudicial to the respondents to be asked to hold on for another period all because the applicant is alleged to have made a mistake which his advocates, once on record also failed to put right.

Dr. Khaminwa has urged me to consider that this is a land matter and to seriously consider the rights of the applicant. To that effect, he has referred me to the book International Law of Human Rights in Africa – Article 7 and he emphasises that his client, the applicant, has a right of appeal. I agree. He has a right of appeal. The constitution recognises that right and our laws are never silent on the rights of any person in Kenya. It is to that extent that laws are enacted to regulate the exercise of those rights so that both parties to a suit may be certain, not only of their rights but also of the extent to which such rights would be exercised. That is done to ensure that human beings live and carry out their activities in an orderly manner. In this application, rule 4 of this Court's Rules confers upon the Court the discretionary powers to regulate the manner in which those who are late in the exercise of their right to appeal (if the right is granted by law or if the court allows it) can approach the Court. Under the doctrine of precedent, courts have interpreted what are required for the exercise of such rights and the guidelines are as I have spelt out

above in the decisions, parts of which I have reproduced. The right applies to all and so in applying the law, the respondent's rights cannot be ignored in pursuit of the applicant's rights. In any case, it is upto the applicant to show that it has taken such actions as would confer such rights upon him. Land matter is a serious matter to both parties and not only to the applicant. I cannot ignore the rights and interests of either party. I must consider the same with law as my guide. I have done so.

I will now consider other matters raised before me. As I have considered the principles to guide the courts in considering an application under rule 4 of this Court's Rules, the second matter I will now consider is whether the notice of appeal in the record and signed by the applicant is indeed not a valid document. I want to make it clear that as a single judge, this is not a matter for me to consider to finality. I only consider it on passing because, Dr. Khaminwa based his arguments entirely on the same and sought to convince me that since that document was not a notice of appeal at all, I should proceed on the basis that no notice of appeal was filed. In my humble opinion, my immediate feeling is that a notice of appeal is not in itself a document that is filed in furtherance of the proceedings in the superior court. It is filed in the superior court only as a conduit to enable a party to access the Court of Appeal. It is indeed not part of the pleadings in the superior court. That being the case, I hesitate to state that Order III rule 9 applies to it. Order III rule 9 deals with proceedings in the superior court. It does not deal with matters in the Kenya Court of Appeal. Rule 23 of the Court of Appeal Rules deals, in my view, with matters already in the Court of Appeal. Notice of appeal is filed by a party not yet in the Court of Appeal and so rule 23 does not apply to the filing of a notice of appeal in the first instance. Rule 74 is, in my view, very clear. It allows any person affected by the decision of the superior court to file a notice of appeal. When it talks of any person, that includes such persons as may not have been parties in the superior court. If that be so, then such persons have had no advocates in the superior court and yet they too can file a notice of appeal. Further, it does not state that such persons must come to the Court of Appeal through an advocate. In my view, a court of law, whether Court of Appeal or District Court is accessible to any person with grievances whether such person has an advocate or not. Again in my view, once the superior court has delivered a final judgment in a matter, any party feeling aggrieved can continue to the Court of Appeal with the help of his advocate in the superior court, or hire another advocate or proceed himself. The decision to proceed to the Court of Appeal is a new decision and even if he continues with his former advocate, he would still have to give such an advocate fresh instructions. That being the case, I am personally in doubt as to whether the notice of appeal that was signed and filed by the applicant could be considered invalid only because the applicant signed it in person. As I have said, that is not mine to decide but one thing is certain, I cannot treat it as any other paper sneaked into the record. It is a notice of appeal. The applicant treated it so, whether through ignorance or through his advocate's mistake or not.

That brings me to the last aspect of this ruling. I am being asked to extend time to file a notice of appeal and record of appeal from the judgment of Ransley J. in Civil Case No. 4569 of 1990 in the superior court. On 7th May 2004, a notice of appeal had been filed against the same judgment. That notice of appeal, whether valid or not, is still in the record. There is no order of the court either striking it out or marking it as withdrawn. It is still extant. The law as regards such a scenario is now well settled. In the case of Paul Kanyi and another vs. George Mbugua Njoroge & another – Civil Application No. Nai. 288 of 2001, Kwach J.A (as he then was) dealing with a similar situation stated, *inter alia*, as follows:

"I must reject that submission as misconceived because this Court has stated in a number of decisions that a notice of appeal cannot be deemed to have been withdrawn under rule 82 of the Rules, except with the order of the Court.

The position in this case therefore is that the notice of appeal filed on 26th July, 2001 is still alive and well and as long as it is still extant, there is no room for making an order for filing a second notice of appeal. For this reason, this application must fail and it is hereby dismissed with costs. ….."

In the case of Ocean Freight Shipping Company Limited vs. Oakdale Commodities Ltd - Civil Application No. Nai. 198 of 1995, Shah J.A (as he then was) made a similar decision. That decision was referred to a full bench of this Court and the full bench confirmed Shah J.A's decision on the point. Lastly on that aspect, Omolo J.A dealing with a similar legal point in the case of Dolphin Palms Limited vs Al-Nasibh Trading Co. Ltd and two others – Civil Application No. 112 of 1999 was more specific on

that aspect. He stated:

"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 ……. 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 a valid one cannot be a decision to be made by a single Judge; that is a provision 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 judgment 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 single Judge. By deeming a notice of appeal to have been withdrawn, the single Judge may well be usurping the powers reserved for the court."

I do accept the same sentiments. Dr. Khaminwa urges me to treat the notice of appeal filed on 7th May 2004 as invalid and no notice at all. Whatever way one looks at it, he is inviting me to declare it invalid and treat it as withdrawn and that it does not form part of the record. That is not my duty. That is for the full Court. As for me, that notice of appeal is extant and I cannot extend time to file another notice of appeal while it is still extant. Incidentally, I note while perusing the file that vide a letter dated 13th August 2004, and filed in court on 18th August 2004, the applicant through his advocates applied to withdraw that notice of appeal dated 7th May 2004 under rule 93 of the Court of Appeal Rules. It sounds to me odd that the applicant now wants that document to be treated as no notice of appeal at all when all along they did treat it as such.

I think I have said enough to demonstrate that, in my view, it is not possible to exercise my discretion in favour of the applicant. This application lacks merit. It cannot stand. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 15th day of February, 2008.

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR