IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 209 OF 2007

JOSEPH KIBE MUNGAI

(as Guardian ad litem of RAMESH LILADH SHAH) ….....…APPLICANT

AND

JOHN NJAU NJUGUNA

AMMON MUHOHO JOHANA (as the legal representative of the Estate

of the late REUBEN KANGARA KIRIKA).....RESPONDENTS

(An application for extension of time within which to file record of appeal from the ruling and order of the High Court of Kenya at Nairobi (Mr. Justice Tom Mbaluto) dated 16th January, 2002

in

H.C.C.C. NO. 2456 OF 1994 (O.S)

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R U L I N G

This is an application by Notice of Motion dated *10th August 2007* under *rule 4* of the Court of Appeal Rules *(the Rules)* seeking leave to extend time within which to file the Record of Appeal. The affidavit in support of the application was sworn by the *applicant Joseph Kibe Mungai* who is the guardian *ad litem* of *Ramesh Liladhar Shah* (hereinafter "*Ramesh"*). The *respondents* were *John Njau* and *Ammon Muhoho Johana* as the legal representatives of the Estate of the late *Reuben Kangara Kirika.*

The prayers sought in the Notice of Motion before me dated 10th August 2007 were:-

*"**[a] That this Honourable Court be pleased to extend the time within which the intended appellant shall file the Record of Appeal.***

[b] That this Honourable Court be pleased to grant leave to the Intended Appellant to file the Record of Appeal within a period of twenty–one days and to serve that Record of Appeal within seven days of such filing.

[c] That the costs of this application be costs in the cause."

The grounds upon which the application is based are that the applicant's intended appeal was against the ruling of Mbaluto J delivered on ***16th January 2002***. The applicant asserted that it had complied with all the requirements of an intended appellant as to the filing and serving of the Notice of Appeal, the application for typed proceedings and a certified copy of the ruling, but that "*due to inadvertence on the part of counsel for the applicant", **the applicant lodged the appeal on 4th September 2002***, which was outside the 60 days allowed by ***rule 81(1) of the Rules***. No leave of the Court was sought and obtained by the applicant prior to the filing of the appeal.

This error was not noticed by the applicant until it was pointed out by this Court on the day the appeal came for hearing on ***16th July 2007*** and the application was struck out by this Court.

The applicant claims to have lost little time thereafter in filing the current ***rule 4*** application dated ***10th August 2007*** which was lodged in the Registry at Nairobi on ***13th August 2007*** which is about 25 days after the strike out of the appeal.

The affidavit in support of the application for extension of time was sworn by the applicant ***Joseph Kibe Mungai*** on ***10th August 2007.*** He was at all times material to the present application the ***Guardian ad litem*** of ***Ramesh*** who had been adjudged to be of mental infirmity in May 2002 and who had been the employer of the deponent.

The paragraphs of ***J. K. Mungai's*** affidavit that are most relevant to the application before me are:-

"22. THAT I am advised by my advocates on record, Mr. P.L. Mutuli & Co., Advocates, which advice I verily believe to be true, that the appeal was to have been lodged within 60 days from 24th May, 2002.

NB. *As we have seen above this was the date when copies of the proceedings and ruling were made available by the Registrar of the High Court and was not the date from which the 60 days would run within which the appeal was to be lodged.*

23. THAT I am informed by my advocates aforesaid, which information I verily believe to be true, that they inadvertently filed the appeal, being Civil Appeal 225 of 2002 on 4th September, 2002, which was outside the 60 days allowed by law.

24 THAT I am further informed by my advocates aforesaid, which information I verily believe to be true, that he did not notice that the appeal was filed out of time which would have ordinarily required that he makes an application to this Honourable Court for extension of time.

25. THAT I am informed by the said advocate, and verily believe the same to be true, that he became aware of the defect on 16th July, 2007 when the said appeal came up for hearing before the Hon. Justices of Appeal, Messrs. Tunoi, O'Kubasu and Githinji JJA and the court brought the fact to his attention, hence the application filed herewith."

The decision sought to be appealed was that of Mbaluto J. dated ***16th January 2002*** in which the learned Judge delivered a ruling on an application for **review** of an order made in the High Court on 7th December 2001. The application had been brought under ***Order XXI rule 22*** and ***Order XLIV rule 1*** and ***Order XLIV rule 1 (1)*** of the Civil Procedure Rules and ***section 80*** and ***3A*** of the Civil Procedure Act. The Learned Judge found that:-

"The application is based on 7 Grounds which clearly show that this matter ought to have been the subject of an appeal and not an application for review."

In his submissions before me as the single Judge hearing the application for extension of time within which to file the Record of Appeal, ***Mr. Mutuli*** for the applicant stressed that the applicant filed the Notice of Appeal timeously on ***18th January 2002*** and on the same day applied for copies of the

proceedings and a certified copy of the ruling of Mbaluto J. The letter applying for the said copies is not in the record before me, the reason being—according to ***Mr. Mutuli***—that the only copy of the letter was sent to the respondent's advocate.

In her submission in opposition to the application, the respondent's counsel ***Miss. Ndarangu*** stressed that the letter which was produced by the applicant to show when the request for the proceedings was made, was the letter from Mr. Mutuli requesting photo copies etc for appeal purposes dated ***27th May 2002,*** which is at page 65 of the record of the current application.

The text of this letter dated addressed to the Deputy Registrar of the High Court ***27th May 2002*** after the heading was:-

"We shall be grateful if you would kindly furnish us with photocopies (sic) of pleadings, proceedings and Rulings made in the above suit for the purposes of appeal.

We enclose herewith our cheque in settlement of your charges thereof.

Your prompt response shall be appreciated.

Yours faithfully,

P.L. Mutuli & Company, Advocates"

It is not at all clear to me why this letter was written on 27th May 2002 ***without any reference to the alleged earlier letter dated 18th January 2002*** if the applicant had already written to the Registrar requesting the same copies as early as ***18th January 2002,*** allegedly, with a copy to the respondent.

The ***27th May 2002*** letter made no reference to the alleged earlier letter dated 18th January 2002, and the 27th May 2002 letter was also not copied to the respondents in accordance with ***rules 81 (1)*** and ***(2)*** of the **Rules** which state as follows.:-

Rule 81. (1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

(a) A memorandum of appeal in quadruplicate.....

(b) the record of appeal,

(c) the prescribed fee and .....

(d) security for the costs of the appeal.....

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub rule 2 within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent.

(3) .....

Mr. Mutuli submitted that the proceedings and ruling were ready on ***24th May 2002*** and were collected and paid for on the same day.

Mr. Mutuli admitted that he then made a mistake and computed time for lodging the appeal from ***5th June 2002*** being the date the Certificate of Delay was issued and not from the date when the Notice of Appeal was lodged. As a result he arrived at ***4th September 2002*** as the last day allowed by the Rules. Even this was a miscalculation as 60 days from ***5th June 2002*** would expire on ***4th August 2002*** not ***4th September 2002.***

Mr. Mutuli did not discover this mistake until ***16th July 2007*** when the Court of Appeal hearing the appeal, brought it to his attention and struck out the appeal.

According to my calculations, starting from the lodging of the Notice of Appeal on ***18th January 2002***, the ***60 days*** within which, in accordance with ***rule 81 (1)*** of the ***Rules***, the appeal should have been instituted, expired on ***19th March 2002.*** Instead of instituting the appeal by that date, the applicant's appeal ***(Civil Appeal No. 225 of 2002)*** was not instituted until ***4th September 2002*** which was ***169 days*** after 19th March 2002. The length of delay sought to be excused by the current application is therefore ***169 days*** unless the applicant can rely on the Certificate of Delay issued by the Deputy Registrar of the High Court on 5th June 2002. That Certificate stated in paragraph 4 that:-

"the time taken by this court to prepare and supply certified copies of proceedings and ruling was from 13th December 2001 to 24th May 2002 that is 162 days.

It follows that, if the Certificate of Delay can be relied upon, the delay sought now to be excused would be reduced to only about ***7 days.***

The second letter to the Registrar bespeaking the copies of the record etc. was dated ***27th May 2002*** which was well outside the 30 days from delivery of the judgment on 16th January 2002 stipulated in the proviso to ***rule 81 (1)*** of the Rules. This second bespeaking letter cannot, therefore, be relied upon by the applicant.

There were 2 rulings by Mbaluto J. — the first on 7th December 2001 and the second on 16th January 2002. The 7th December 2001 ruling does not appear to be of any direct relevance to the application now before me except that it was the ruling sought by the present applicant to be reviewed by Mbaluto J. leading to the ruling delivered by Mbaluto J. on 16th January 2002.

The 7th December 2001 ruling was not the subject of the appeal and is clearly irrelevant to the present application.

Bearing in mind the Proviso to ***rule 81(1)*** *supra*, the question arises as to whether or not the application for the copy of the proceedings was made within ***30 days*** of ***16th January 2002*** being the date of the decision against which it is desired to appeal, that is by ***15th February 2002***.

The applicant's application for the copy of the proceedings is dated ***27th May 2002*** and was date stamped received by the High Court at Milimani on ***28th May 2002*** which is about ***3 months after 15th February 2002.*** It is therefore clear that the applicant cannot rely on the proviso to ***sub rule (1) of rule 81*** of the ***Rules***.

If this had not been so, the applicant would have probably been shut out from relying on the proviso to ***sub rule (1)*** of the proviso by ***sub rule 2*** of the proviso which provides as follows:-

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent.

The evidence relating to the alleged sending to the respondent of a copy of the letter to the Registrar bespeaking the copies of the proceedings was not convincing.

In the often cited case of ***Leo Sila Mutiso v. Rose Helen Wangari Mwangi – Civil Application No NAI 251 of 1997*** **(**unreported**)** delivered on 5th November 1999 in a Ruling of the Court (Gicheru, Lakha, and Bosire JJ) this Court reiterated that ***"Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.***"

"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."

In ***African Airlines International Ltd vs Eastern Southern Africa Trade & Development* Bank *(PTA Bank) 2003 KLR 140*** this Court said**:-**

"We wish to emphasise that the discretion that fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal; because it may be wrong, and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to elapse, to enable him to pursue a hopeless appeal."

As to the degree of prejudice to the respondent, if the extension sought by the applicant is granted it is submitted by the applicant that ***Shs.4.4 Million*** was deposited in the joint account for advocates which the respondents can hold onto during the hearing and determination of the appeal.

This money cannot be used in the meantime so that the applicant submits that there is no prejudice to the respondent.

The respondent was not awarded costs in the struck out appeal as the mistake had not come to the notice of the respondent and the respondent had not moved the court to strike out the appeal. ***Mr. Mutuli*** regarded this as significant as he submitted before me that ***"****it is imperative to note that the respondent was not awarded costs in the struck out appeal as it had also not come to the notice of the respondent that it was out of time****."***

However, after due consideration, I do not find this to be a factor of any significance to the decision as to whether or not to grant to the applicant an extension of time to file the intended appeal.

I note that the applicant's Notice of Motion seeking extension of time dated 10th August 2007 was lodged on 13th August 2007 which was ***28*** days after the strike out of the appeal. No explanation was offered by the applicant for this further delay.

Mr. Mutuli submitted that the application for extension was filed less than one month after the discovery of the defect and that:-

"Save for the miscalculation of time the applicant has been diligent and desirous of appealing against the Mbaluto J. decision as evidenced by the Notice of Appeal and application for the proceedings.

The appeal is basically about the exercise of discretion by Mbaluto J. in refusing to review his decision on 7th December 2001 which was itself a decision on review."

I have considered the authorities cited by counsel for the applicant, the first being ***Mariaria & others vs. Matundura [2004] 2 EA 16.*** In this case the single Judge ***O'Kubasu JA*** hearing an application for extension of time cited with approval in his Ruling cited the following passage:-

In ***Omar Transmotors Ltd and another v. Onyango [2002] LLR 3774 (CAK) Omolo JA*** dealing

with a similar application had the following to say:-

"Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their cost that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders".

In "*The Due Process of Law*" 1980 *London Butterworths at 93 Lord Denning said:*

"Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him, as for instance when a solicitor does not issue a writ in time, or serve it in time or does not renew it properly. We have seen I regret to say several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client: or at least their insurers have. So the wrong done by this delay has been remedied as much as can be done."

O'Kubasu JA concluded his ruling in the Mariaria Case stating:-

"I do not think the applicants have given sufficient explanation to warrant the court's discretion being exercised in their favour. It is true that the court has unfettered discretion but like all judicial discretion must be exercised upon reason not capriciously. Even sympathy alone would not assist a party. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent. In view of the foregoing I am satisfied that this is not a proper case in which to exercise my discretion in favour of the applicant. Consequently this application fails."

The Second authority cited by the applicant was ***African Airline International Ltd vs. East and Southern African Trade and Development Bank*** **[PTA Bank] [2003] KLR. 140. Lakha, Owour & Keiwua JJA.**

The relevant findings of the Court on a reference from the decision of a single Judge stressed by the applicant herein were:-

"1. The discretion to extend time is unfettered and should be exercised flexibly with regard to the facts of the particular case.

4. All relevant factors must be taken into account in deciding how to exercise the discretion to extend time; these factors include:-

(a) the length of delay;

(b) the reason for the delay;

(c) whether there is an arguable case on the appeal; and

(d) the degree of prejudice to the defendants if time is extended.

5. There is no invariable rule which requires the Court to determine whether or not there is a good arguable case on appeal in an application to extend time. It is not desired that on every application to extend time there should be a pre appeal hearing in order to consider what the prospects of success are."

The third authority relied upon by the applicant was ***Njuguna v. Magichu & 3 others.*** The findings relied on by the applicant were:-

"1. The discretion exercisable under rule 4 of the Court of Appeal Rules is unfettered and the main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on a sound factual and legal basis.

2. The miscalculation of figures and dates by the applicant's advocates was a fairly human phenomenon which was excusable and the applicant could not be penalized for it.

3. The grant of further limited indulgence to the applicant would only be prejudicial to the respondents to the extent that it delayed the day when they would enjoy the fruits of their judgment. That however, would be outweighed by the interests of justice in this land matter."

In reaching my decision in the matter before me I have taken into account the fact that the case now before me is not a land matter—it arises out of a commercial partnership dispute.

I have also considered that the errors made by counsel for the underlying applicant Ramesh Lila Dhar Shah demonstrate a high degree of lack of attention to, and knowledge of, ***the Rules***.

I have come to the conclusion in the exercise of my unfettered discretion, which is to be exercised judicially that so many mistakes were made by Mr. Mutuli, the learned counsel for the applicant, leading to very lengthy delays amounting to ***169 days,*** or over ***5½ months,*** sought to be excused, that this is an application for extension of time which should be dismissed.

The applicant may not be deprived of all remedies by this adverse decision on his application for extension as he may be able to recoup some if not all of his claim from his advocates or their professional indemnity insurers as the mistakes made by them in relation to the intended appeal were manifold.

After due consideration of all of the above, I hereby order that Civil Application ***No. NAI 209 of 2007*** by Notice of Motion dated 10th August 2007 be and is hereby dismissed.

I further order that the respondent's costs of this application be paid by the applicant to the respondent to be taxed by the Deputy Registrar of the Court of Appeal if not agreed.

Dated and delivered at Nairobi 8th this May, 2008.

W. S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR