



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appli 37 of 2008 (NAK 5/08)

JOSEPH D. HALAKE APPLICANT

AND

YUNIS MALIK RESPONDENT

(Application for enlargement of time to file Notice of appeal and that time be extended to admit the intended appeal out of time from the judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated 18th October, 2007

in

H.C.C.S. NO. 230 OF 2004

R U L I N G

This is an application under *rule 4* of the Rules of this Court, brought by *Joseph D. Halake*, the unsuccessful plaintiff in a suit for specific performance of an oral contract for the sale of land. The respondent and owner of the property, the subject matter of that agreement, is *Yunis Malik*. There were infact two pieces of land in issue namely *L.R. No. 19912/6 and 19912/7* both situated within Nakuru Municipality.

Judgment regarding the two parcels of land was delivered on *18th October, 2007* by *Kimaru, J.* By the rules of this Court, a party aggrieved was required to file an appeal within *14 days* by filing a Notice of Appeal as a first step. The applicant herein was aggrieved by the judgment delivered on *18th October, 2007*, and was desirous of appealing against it. He did not however file a notice of appeal within the time stipulated under *rule 74* of this Court's Rules. By dint of *rule 4* of the same rules he had the right to move this Court for an order extending the time within which to file such notice and for lodging a record of appeal.

The applicant neither filed his notice of appeal within the stipulated period nor moved this Court promptly for an extension of time within which to do so. In his affidavit in support of this application he has deponed that he was not made aware of the judgment until late *December, 2007*, by which time the time for filing the notice of appeal had expired. The delay in notifying him of the judgment was because his advocate, *One Omae*, was and is still indisposed. The applicant also deponed that by the end of *December, 2007*, and several weeks thereafter there were skirmishes in and around Nakuru Municipality

that it was not possible to take the essential step of filing a notice of appeal.

The applicant has given a third reason for the delay, namely that he was not able to get soonest counsel to represent him in place of his ailing advocate because it was Court Vacation and most advocates had closed their offices.

The applicant filed and served his notice of appeal on *14th February, 2008*, about *4 months* after the date of judgment against which an appeal is intended. This was obviously way out of the time stipulated under the rules.

The power of the Court under *rule 4*, above, is both wide and discretionary. The exercise of that discretion is guided by various principles which have evolved over time. The case of *LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI Civil Appeal No. 255 of 1997*, lays down general principles to guide the Court in applications of this nature. The Court rendered itself thus:-

“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.”

It has been said time and time again, that the above list is by no means exhaustive. Besides, it is a general principle that each case has to be considered on the basis of its peculiar facts and circumstances.

The main issue in an application of this nature is delay. For an applicant to succeed, he is obliged to explain to the satisfaction of the Court the cause of the delay in taking the essential step. Mr. Kagucia, for the applicant, cited several authorities on the question of delay and urged me to hold that the delay in the matter before me was short and not inordinate. What amounts to long and inordinate delay is a question of fact and varies from one case to another. Indeed, the several authorities he cited demonstrate this. A delay of one week in one case may be short but in another too long and inordinate. As I stated earlier the issue of delay is a question of fact.

The decision against which an appeal is intended was delivered on *18th October, 2007*. The applicant says he was unaware of it until end of *December, 2007*. If that be so, one would have expected that the applicant would take urgent steps to file the notice of appeal with promptitude. However, no action was taken in that regard until over a month later. That delay is not by any standard short. But as I stated earlier although the delay may appear *prima facie* long, the circumstances leading to it may be such that such delay may not be considered as inordinately long. What are the circumstances of this matter?

I earlier set out the applicant's case. But in his replying affidavit, the respondent has brought out additional facts which merit mention. On *26th November, 2007*, Mr. D.M. Kimatta, for the respondent, addressed a letter to the applicant's then advocate, Mr. Omae, enclosing copies of the draft decree for his approval. It is apparent that he did not respond and if he did, I have no evidence to that effect. Then on *10th January, 2008* Mr. Kimatta addressed another letter to the same advocate enclosing a copy of the decree and requiring the applicant to vacate the suit property within *30 days* of the date of the letter, and warning that default will elicit forcible eviction. Mr. Omae responded to that letter by his letter dated *24th January, 2008*. In that letter, he acknowledged receipt of Mr. Kimatta's letter of *10th January, 2008* and lamented that although the letter said a decree had been enclosed, none was. He therefore requested to be supplied with one to enable him take instructions *“regarding the contents of the rest of your letter.”* One S.M. Omae signed the letter. In the course of hearing this application an issue arose as to whether or not the firm of Omae & Co., is a sole proprietorship or a partnership. Mr. Kagucia, drew my attention to the letter head of the firm and inferred that it was a sole proprietorship judging from the fact that under the firm name only the name of S.M. Omae is given.

Be that as it may, by his letter of *6th February, 2008* Mr. Kimatta forwarded the copy of the decree.

What followed is that Mr. Kagucia appeared at the scene when by his letter to Mr. Kimatta dated 12th February, 2008 he too referred to Mr. Kimatta's letter of 10th January, 2008 and said that the same was brought to his attention by the applicant on 7th February, 2008. He also added that he had perused the pleadings and the proceedings and in his view the threat of eviction was without any basis, legal or otherwise. He retorted that "*any ill advised action upon the suit property, pending the determination of the Appeal lodged against the judgment delivered on 18th October, 2007, will be vigorously defended.*"

By this time no notice of appeal had been filed nor had any intimation been given that an appeal was contemplated. Nor did Mr. Kagucia request for any indulgence regarding the filing of the notice of appeal. The letter was copied to the applicant.

Mr. Kimatta's response to that letter was swift. By his letter dated 15th February, 2008 he stated that he had no evidence that an appeal had been lodged and requested for copies of the appeal papers. By another letter dated 25th February, 2008 to Mr. Kagucia, he pointed out that a notice of appeal which had been filed and served upon him was "*made in disregard of rule 74 and 76 of the Court of Appeal Rules.*" He then notified Mr. Kagucia that he would be proceeding to apply for orders to facilitate the eviction of the applicant.

This application was not filed until 29th February, 2008, well over 14 days since Mr. Kagucia was made aware of the judgment against which an appeal is intended. In an application like the one before me, the conduct of the applicant since the date of the decision he intends to challenge on appeal is relevant in the determination of the issue whether or not the delay is or may be regarded as inordinate. I will now proceed to consider the applicant's conduct.

By his own admission, he became aware of the judgment in this matter by end of December, 2007. He stated that he went around looking for counsel to act for him in place of the ailing Omae and because of the Court vacation it took him long. It is however clear from the facts as earlier outlined that by 7th February, 2008 he had contacted Mr. Kagucia. Mr. Kagucia did not file any affidavit to explain delay on his part to file this application. He has not deposed that because of the alleged security situation in Nakuru, Courts were not operational or that he himself had closed his office for that reason. He was able to address correspondence to Mr. Kimatta and in none of his letters did he raise the issue of insecurity. It may be argued that between 7th and 12th February, 2008 he was contacting his client. However, by 12th February, 2008 he knew a notice of appeal had not been filed nor any step taken towards filing an appeal.

It should also be noted that whatever sickness was ailing Mr. Omae, it was not such that he would not have filed a notice of appeal, which is a simple document. He was able to address a letter to Mr. Kimatta on 24th January, 2008. It has not been suggested that the letter was not signed by him. I am not in any way trying to downplay the sickness Mr. Omae may be having. Mr. Kagucia stated from the bar that Mr. Omae suffered a stroke. That may well be so, but that he was able to draft and sign his letter of 24th January, 2008, is clear evidence that he was up and about.

For the foregoing reasons, it is my view that this is not a case in which I should exercise my discretion in favour of the applicant.

Mr. Kagucia drummed up the merits of the applicant's intended appeal; more particularly that the judgment of the superior court was inconclusive. In my view, if that was the case then the applicant should have acted with promptitude and taken the essential steps to lodge an appeal. The circumstances of this case show that neither Mr. Omae nor Mr. Kagucia acted promptly to take the necessary steps towards filing an appeal. Their delay reflects negatively on the applicant on whose instructions they were presumed to act. Their dilatoriness are referable to him.

In the result, I disallow the applicant's application dated 28th February, 2008 and filed in Court on 29th February, 2008, and accordingly order that it be and is hereby dismissed with costs.

Dated and delivered at Nakuru this 3rd day of October, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR