REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIV APPLI 111 OF 2006

LUKAS MWAURA NDUATI ……..…….. APPLICANT

AND

JOHN HENRY OKEYO ……...……...…… RESPONDENT

(Application for extension of time to lodge the record of appeal out of time from a ruling and order of the High Court of Kenya at Kisumu (Hon. Justice Tanui) dated 16th March, 2005

in

H.C.C.C. NO. 96 OF 1992)

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R U L I N G

The affidavits filed in this application, the Ruling of the superior court dated *16th March, 2005* and several other exhibits in the record show that the respondent in this application, ***John H. Okeyo*** filed a suit against the applicant ***Lucas Nduati*** which was *High Court Civil Suit No. 96 of 1992*, on a land dispute. The applicant filed defence and counter-claim in that suit. That defence and counter-claim were on *25th September, 2003* struck out and judgment was entered in favour of the respondent. By an amended *Chamber Summons* dated *24th November, 2004*, the applicant sought to set aside those orders made on *25th September, 2003*. That application was dismissed on *16th March, 2005*. The applicant felt aggrieved by that dismissal and intends to appeal against it. His former advocate filed Notice of Appeal on *30th March, 2005* and that was filed in time. However, thereafter nothing was done in furtherance of the intended appeal till this application was filed on *24th April, 2006*. By this application, the applicant is seeking two orders which are:-

1. That the time for lodging the memorandum and record of appeal from the ruling and order of the High Court of Kenya at Kisumu (Hon. Justice B.K.Tanui) delivered on the 16th March, 2005 in H.C.C.C. NO. 96 of 1992 be and is hereby extended.

2. That the applicant be and is hereby allowed to file the record of appeal within fourteen days of the date of the ruling of this Honourable Court."

The grounds in support of the application are that the applicant is anxious to prosecute the intended appeal to its logical conclusion; that the delay in filing the appeal had been occasioned by the previous

advocates M/s Migiro and Co. Advocates; that the applicant has already filed his notice of appeal; that the applicant has good chances of success in his appeal and that the applicant would suffer irreparable loss, hardship, unless time for lodging the appeal is extended. The applicant annexed in his application an affidavit in support of it and a supplementary affidavit. The respondent opposed the application and filed Replying affidavit and a further replying affidavit. The learned Counsel for both the applicant and respondent addressed me at length on this application. I do, on my part, observe that a large part of all the affidavits dealt with the history of the entire case and also with the bonafide of the applicant. However, I have considered the entire record that was availed before me, the allegations on the affidavits, the submissions by the learned Counsel and the law.

The application is premised on ***Rule 4*** of the Court of Appeal Rules. That Rule states:-

"***4. The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court; for the doing of any act authorized or required by these Rules, whether before or after the doing of the act and a reference in these rule, to any such time shall be construed as a reference to that time extended."***

In considering such an application under ***Rule 4*** of this Courts Rules, the Court exercises unfettered discretion but like all judicial discretions, the same discretion must be exercised upon reasons and not capriciously. To ensure that the courts exercise such discretion fairly and non capriciously, certain guidelines are set through case law which though not exhaustive and not necessarily applicable in all cases as each case must stand or fall in its own circumstances, still the same principles need to be demonstrated by a party seeking to reap the benefits of ***Rule 4*** of this Courts Rules. There are a myriad case law on the issue but I do feel the case of ***MAJOR JOSEPH MWETERI IGWATE VS. MUHURA E'ETHANE & ATTORNEY GENERAL*** *Civil Application No.* ***NAI. 8 of 2000*** *(unreported)* gives a fair summary of these principles. In that case, the Court of Appeal states as follows:-

"***The application made under Rule 4 of the Rules is to be viewed by reference to the underlying principle 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 the compliance with time limits bearing in mind that they were 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 is 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 to them."***

As I have stated herein above, the above factors are not exhaustive. In the case of ***KAGAI KIMOMORI WATATUA VS. NGATIA KAREKO*** *Civil Application No. Nai.77 of 2005*, this Court stated:-

"***The discretion under Rule 4 is unfettered and there is no limit to the number of factors that the Court will consider."***

It is with the above legal principles in mind that I will now proceed to consider this application. Much as the factors giving rise to the judgment that was entered on *25th September, 2003* by the superior court after striking out the applicants defence and counter-claim, may be relevant as the genesis of the entire application before me, I do not feel I am in a position to give any informed consideration to the same as the record does not contain pleadings and the Ruling delivered on *25th September 2003*. I note however, that as a result that that case was not heard and substantive decision made based on evidence, the affidavits before me as regards who had a right to the subject land are seriously conflicting. For purposes of computerizing time, however, the stage to begin is the date on which the Ruling against which the applicant intends to appeal was delivered. That was *16th March, 2005*. The respondent through his counsel, Mr. Macharia says the Notice of Appeal was filed against that ruling on *30th March, 2005*. Thereafter the next action, as I have stated was on *24th April, 2006* when this application was filed. Thus,

general delay period was from *30th March, 2005* when Notice of Appeal was filed till *24th April, 2006* when this application was filed. I say general delay because, from *30th March, 2005* when the Notice of Appeal was filed, the Rules provided that the applicant had sixty (60) days from the date of filing Notice of Appeal to lodge the appeal or record of appeal –

(See Rule 81(1) of this Courts Rules). This is in effect the delay period started from about *31st May, 2005*.

On proper time computerisation, the delay period was about ten and a half months. What explanation is given for that delay? The applicant states at paragraph 12 of his supporting affidavit as follows:-

"***12. That after ruling was delivered on 16th March, 2005 concerning the Chamber Summons application dated 22nd March, 2004 before Tanui, J., my Advocate Mr. Migiro never communicated to me about the outcome, and I was shocked when I was served with eviction orders and orders dismissing the application on 30th March, 2006 (sic). (Annex marked LMVI is a copy of the order dismissing the application."***

The explanation advanced by the applicant is that his advocate let him down in that his advocate never communicated to him that he has lost his application to set aside the main orders granted to the respondent against him. Mr. Menezes has raised two points against this assertion by the applicant. First, is that that allegation cannot be true because at ***paragraph 8*** of the same affidavit of the applicant, he deponed that it was the same advocate Mr. Migiro who filed Notice of Appeal. If I understood Mr. Menezes well, his contention is that Mr. Migiro must have obtained instructions from the applicant so as to file the Notice of Appeal, which means that he (advocate) must have communicated to the applicant after the applicant's application was dismissed and that must have been the reason why he (advocate) filed Notice of Appeal. That is a sensible approach and I do agree that in most cases that is what happens. However, with respect, I cannot rule out that a small percentage of advocates who would file Notice of Appeal even before getting instructions straightway to ensure that time to do so does not run out and hope their clients would endorse the same later. If Migiro was such an advocate, and we can never tell, he may very well have filed the Notice of appeal but later failed to communicate with the applicant. I must say, it would baffle me to see such a keen advocate filing Notice of Appeal and later failing to tell his client but much as it is difficult to imagine the same, one cannot rule out such a possibility. Mr. Menezes also made heavy weather of the past conduct of the applicant when some of his former advocates had to withdraw from acting for him on account of lack of communication with him. Indeed, exhibits of one such copy of an application to withdraw together with supporting affidavit were annexed. None however was demonstrated during the relevant period i.e. the period after the ruling which the appellant intends to challenge. I cannot hold that, because the applicant had been inaccessible to his former Advocates he must have been inaccessible to Mr. Migiro as well. In any event, I have also asked myself why the applicant himself could not go to his advocate to check the fate of his application but whatever answers I may conjure in my mind can only remain mine and are not matters before me in the record to enable me "*punish"* the applicant. The respondent is unable to say categorically that the allegation by the applicant at ***paragraph 12*** of the supporting affidavit that Mr. Migiro did not communicate to him the decision of the court delivered on *16th March 2005* against which he intends to appeal is a lie. I am myself in doubt about that and the doubt must go to the applicant. This was oversight by the advocate for which the applicant cannot be visited.

I have considered the merits of the intended appeal. The application that was before the superior court was dismissed on several grounds, some of which were on technicalities. The applicants defence and counterclaim were also struck out and judgment entered against the applicant without full hearing. In my humble opinion, I do not think the intended appeal can be said to be frivolous. I have considered prejudice to the respondent if this application is allowed. In my view, to avoid perpetual wrangling on the subject property with many allegation by parties, it might be fair and in the interest of all if the appeal was heard and finalised at once to ensure the underlying principles of justice.

The totality of all the above is that this application succeeds, but the applicant will be penalized in costs

as the conduct of the case clearly shows that the applicant and his former advocate may have saved the respondents costs for this matter by taking early action on the entire matter.

The applicant has **fourteen (14)** days from the date hereof to lodge record of appeal. Costs of this application to the respondent in any event.

Dated and delivered at Kisumu this 1st day of December, 2006.

J.W. ONYANGO-OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR