IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 292 OF 2004 (ELD.7/2004)

BETWEEN

FRANCIS ORIGO

PETER PANYAKO …….APPLICANTS

AND

JACOB KUMALI MUNG'ALA …… RESPONDENT

(An application for extension of time for validating Civil Appeal No.149 of 2001 lodged in Court on 2nd July, 2001 in an Appeal from the Judgment of the High Court of Kenya at Eldoret (Alnashir Visram,Commissioner of Assize) dated 20th November, 2000

in

H.C.C.C. NO. 10 OF 1980)
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R U L I NG

This is an application made under rule 4 of this Court's Rules seeking an order for extension of time for the filing of Civil Appeal No. 149 of 2001 lodged on 2nd July, 2001 in such manner as to validate the said appeal. The appeal alluded to was against a decision of the superior court (Alnashir Visram, Commissioner of Assize) (as he then was) made on 20th November, 2000. It is common ground that a Notice of Appeal was timeously filed after that decision, and that the applicants made a written request for copies of the proceedings and ruling within two days of the ruling. It however took the registry upto 26th April, 2001 to type and certify the proceedings and upto 30th April, 2001 to type and certify the ruling. That information is contained in a certificate of delay issued by the Deputy Registrar, Eldoret which was signed and issued on 3rd May, 2001.

Believing that the time for filing the appeal would run from the date of issuance of the certificate of delay, the applicants calculated that they would be within the 60 days period if they filed the appeal on or before 2nd July, 2001. They did infact file the appeal on that date and it subsequently came up for hearing before this Court. It was then that doubts were expressed about the validity of the appeal, which was adjourned unheard. The basis for such doubts arose because the certificate issued by the Registrar certified the period necessary for the preparation and delivery of copies of proceedings and ruling upto

30th April, 2001. That would be the strict wording of Rule 81 of the rules in which event the last day of filing the appeal would have been 29th June, 2001. On that basis the appeal would have been filed three days out of time. Hence the decision by the applicants to take out the application before me.

The discretion which I must exercise under Rule 4 is in terms unfettered. It should nevertheless be exercised judicially or in other words on sound reason rather than whim, caprice or sympathy. The objective of the Court is to do justice between the parties. In weighing the scales of justice, the Court will, amongst other things, consider the length of delay, the explanation for the delay, whether or not the appeal is arguable, whether the grant of the application would prejudice the respondent, the public importance of the matter, if any, and generally the requirements of the interests of justice. Those are not new principles. They have been restated and followed by this Court in numerous cases before but I will cite only one for emphasis*:* ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*** (*Civil Application No. Nai. 251 of 1997 (unreported).*

> ***"It is now well settled that the decision whether or not to extend 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, third ly (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".***

With those principles in mind, I am satisfied that the delay occasioned herein was not inordinate. There was of course the argument advanced by learned counsel for the respondent, Mr. Momanyi that copies of the proceedings and rulings were available for collection much earlier than certified by the Deputy Registrar and therefore it was not true that there was only a delay of three days. The certificate of delay was however produced by the respondent himself in his replying affidavit. I want to believe that he presented it as truthful and wished to rely on it. I will not allow him to approbate and reprobate on that certificate of delay. I accept it as drawn. It was also submitted by Mr. Momanyi that the appeal ought to have been filed soon after the proceedings and ruling were obtained in April instead of waiting upto July. The response by Mr. Machio, learned counsel for the applicant, was that they were preparing the appeal record over the period and it cannot be argued that they were out of time at any time before the sixty days period of appeal had expired. As a matter of prudence I think Mr. Momanyi is right that the applicants ought to have filed the appeal soon after receiving copies of the proceedings and ruling to the superior court in April. The rules, however, do not envisage any penalty against a party who files his appeal anytime within the time span of 60 days set by the Rules or any time that may be extended by the Court.

The explanation given for the delay is that Mr. Machio misconstrued the provisions of the Proviso to ***Rule 81 (1)*** of our Rules. In relevant part, the Proviso states:

> ***"… 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 s uch copy".***

In Mr. Machio's view, the date of certification of that period by the Deputy Registrar, which it is agreed, was 3rd May, 2001 was the operative date under the proviso, in which case the appeal was filed timeously. Mr. Momanyi retorts that there is no room for such misconstruction of the rule and it is not therefore a mistake of counsel that is pardonable.

The straight answer is of course that Mr. Machio was wrong in construing the proviso the way he did. The period certified by the Registrar within the provisions of the Rule is clearly stated in his Certificate. It is immaterial when that Certificate was signed and issued out and the rule says nothing about such date. Nevertheless, applicants have previously been insulated against mistakes of law committed by their Advocates. The most memorable pronouncement in that regard was by Madan JA (as he then was) in ***Murai v. Wainaina (No. 4)*** [1982] KLR 38 where he said:

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less***

pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mi stake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of just ice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interests of justice".

I am inclined to extend similar indulgence to the applicant in this case and I do so.

The dispute relates to land and has refused to go away since its debue in the courts as long ago as 1979. It is as emotive as all land matters in this country can get. It is certainly in the interest of both parties that the matter be resolved with finality, if possible on merits, by the highest court in the land.

For those reasons, I exercise my discretion in favour of extension of time in order to validate the appeal, already filed and pending hearing before this Court. The application is granted. The time for filing *Civil Appeal No. 149 of 2001* is hereby extended by a period of 7 days with the effect that the appeal was validly filed. The costs of the application shall be borne by the applicant in any event, and are hereby assessed at Shs.10,000/=.

Dated and delivered at Eldoret this 18th day of February, 2005.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR