REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

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

CIVIL APPLICATION NO. NAI. 77 OF 2005 (NYR 3/2005)

BETWEEN

KAGAI KIMOMORI WATATWA.....APPLICANT

AND

NGATIA KAREKO.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma, J.)

dated 27.06.2003

in

H.C.C.C NO. 3 of 1994)

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RULING

This is yet another application seeking the exercise of this Court's discretion under ***Rule 4*** of the Court of Appeal Rules ('the Rules") for extension of time to file a record of appeal out of time and to validate a notice of appeal. The judgment intended to be challenged was delivered on 27.06.03 and soon thereafter some two Notices of appeal were filed:-

1. An undated and unsigned notice of appeal lodged with the superior court on 10.07.03 by M/S. J.S. Mwangi & Co. advocates for the intended appellant,

2. A notice of appeal dated 10.07.03 signed by the intended appellant in person and lodged in the superior court on 11.07.0.

None of those notices were served on the respondents in clear contravention of ***Rule 76***. The applicant admits that he never wrote any letter bespeaking copies of proceedings or judgment and so the respondent remained in the dark throughout that there was any intention to prefer an appeal. There is no certificate of delay issued by the Registrar either. The respondent remained under that impression until this application which was filed on 21.02.05 was served on him. It is a period in excess of 1 year and 8 months. The attempt by the applicant to explain the delay is in 7 paragraphs of his affidavit as follows: -

"8. THAT I was represented in the said case by the firm of J.S. Mwangi and Company Advocates of Nyeri until the judgment against me on 27th June, 2003 whereby I was aggrieved by the said judgment.

9. THAT after the said judgment Mr. J.S. Mwangi Advocate filed Notice of Appeal on 10th July, 2003 which was well in time (annexed is a copy of the said Notice marked "KKW1".

10. THAT later the firm of J.S. Mwangi and Company Advocates called me and informed me the position of my case and charged me Kshs.50,000/= (Fifty thousand shillings only) being the deposit for lodging the intended appeal which I could not be able to raise.

11. THAT later on the same day 10th July, 2003 I decided to engage another lawyer to lodge the appeal on my behalf and immediately I engaged I.E.K. Mukunya Advocate to lodge (sic) for me.

12. THAT I.E.K. Mukunya Advocate asked me to deposit with him Kshs.10,000/= (ten thousand only) being the deposit to start the preparation of the records in the said intended appeal (annexed are the two receipts from I.E.K. Mukunya marked "KKWII").

13. THAT I was made to sign a document at the said I.E.K. Mukunya's Advocate's office which at the time I did not understand what it was, but recently when I went to check at the High Court registry, I found that I was made to sign another Notice of Appeal instead of Mukunya's Firm lodging and giving their address for service, they gave my name and address without my knowledge or consent, (annexed is the said Notice of Appeal signed by me marked "KKWIII").

14. THAT I am given to understand that the said I.E.K. Mukunya has since been made a Judge of Industrial Court and therefore I am ready to prepare and lodge the records in appropriate Court of Appeal Registry within the time I shall be given by the Honourable Court."

In short the applicant pleads, as often-times parties do, that his advocate was to blame, and that he had no money. The impecuniosity of a party is of course no bar to seeking justice as the law provides relief under ***Rule 112*** of this Court's rules, and therefore that is not an excuse. As for the blame on the advocate, only *bona fide* mistakes qualify for pardon and not pure inaction. There has been no attempt to explain the delay by the applicant's advocate's offices and the applicant himself says nothing about diligent pursuit of his matter. As stated by O'Kubasu J.A in **Kenya Tea Development Authority v Microfilm Equipment Ltd & Anor** Civil Appl. NAI. 221/99 (ur) following **Munyua v. Njoroge** [1999] LLR 2807 (GAK), "where there is no explanation there is no indulgence." But that is not the end of the matter. The discretion under ***Rule 4*** is unfettered and there is no limit to the number of factors that the Court will consider. There are clear guidelines however, set over the years some of which Lakha J.A referred to in **Major Joseph Mweteri Igweta v. Muhura M'Ethare & Attorney General** Civil Appl. NAI. 8/00 (UR) thus:

"***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 was 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."

The delay in this matter is unexplained and is therefore rendered inordinate. The applicant says he has good grounds of appeal although he has not annexed any draft, but that is not an impediment to the exercise of my discretion. I am told it is a land matter, which I am aware is generally considered as sensitive, but even in land matters there must be an end to litigation since justice cuts both ways and the applicant is as much entitled to a right of appeal as the respondent is entitled to enjoy the fruits of his judgment. The parties here are not related and the dispute is about the sharing of a fairly small piece of land apparently bought jointly and occupied by both parties in a Settlement scheme.

All in all, I agree with learned counsel for the respondent Mr. Kiminda that there is no basis laid for the judicious exercise of my discretion and I would dismiss the application with costs, which I now do.

Dated and delivered at Nyeri this 10th day of June, 2005.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR