



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: OMOLO, GITHINJI & WAKI, J.J.A.)
CIVIL APPLICATION NAI 330 OF 2004
BETWEEN**

LUCY WAMBUI MAINA 1ST APPLICANT

SAMWEL MUNUA 2ND APPLICANT

FRANCIS MUTINDA MUINDI 3RD APPLICANT

AND

PETER SUNDRA MAINARESPONDENT

**(An application for extension of time within which the
applicants may file a record of appeal from the judgment of the
High Court of Kenya at Nakuru (Rimita, J.) dated 22.09.1999**

in

H.C.C.C. NO. 5 OF 1991)

RULING OF THE COURT

What is before us is a reference made by the three applicants who were dissatisfied with the refusal by a single Judge of this Court to allow their application for extension of time to validate their record of appeal in civil appeal No. 174/00 filed on 12.06.00. The applicants intended to appeal against the decision of the superior court (Rimita, J.) made on 22.09.99. They lodged a notice of appeal on 27.09.99 and applied for copies of proceedings on 28.09.99. The copies were not supplied until 11.04.00 and the registrar certified the period of delay. It was on the strength of the certificate of delay that the appeal was filed on 12.06.00, the applicants believing that they were still within time to do so in accordance with the rules. But when the appeal came up for hearing on 22.09.04, it was indicated to the applicants by the court that it may well have been filed out of time. It was adjourned pending an application for extension of time, which application was eventually made some six weeks later. Upon hearing the matter, the learned single Judge (Deverell, J.A) dismissed it stating:

“I have come to the conclusion that I should, in the exercise of my discretion, decline to grant the extension of time sought. There have been too many failures by the applicant in the steps taken in relation to the intended appeal which include the following: -

- 1. The failure diligently to chase up the registry for production of the proceedings;**
- 2. The failure to take steps to extract the decree while the proceedings were being produced by the Court;**

3. The failure to move more speedily in the filing of the Notice of Motion for the extension sought. (To take as long as 6 weeks to obtain instructions from the clients even if they were not in Nakuru demonstrates a lack of diligence and sense of urgency.)

These failures have led to a cumulative delay which renders it unfair on the respondent for an extension to be granted after so long even though the respondent has been in possession of the suit property throughout.”

As stated earlier this is a reference and not an appeal. The single Judge in making the decision was doing so on behalf of the full court. The full court nevertheless has the power under rule 54 (1) (b) of the rules of this Court to “vary, discharge or reverse” the decision of the single Judge. In doing so however, the full court must be mindful that the single Judge was exercising a discretion which is in terms unfettered, though exercisable judicially, and also be satisfied that the single Judge took into account some irrelevant factor or that he has failed to take into account a relevant factor or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong. - See Mwangi vs. Kenya Airways Ltd. [2003] KLR 486 and Mbogo v Shah [1968] EA 93.

There is no exhaustive list of the factors that a single judge considering a matter under rule 4 ought to consider. In this case the learned single Judge was referred to several authorities that set out the principles applicable and he stated that he had considered them without stating what those principles were. In the end, the sole reason he gave for rejecting the application was that the apparent delay was caused by the failure by counsel for the applicants to pursue relevant documents diligently. There is ofcourse no requirement that the single Judge ought to consider all or any number of the relevant factors. But we are invited by the applicants to examine whether any other factor outweighed the sole consideration made by the single judge in reaching the conclusion he did.

We may at this stage remind ourselves about some of the relevant factors if only to keep them in focus, and we take them from decisions of this Court in Leo Sila Mutiso v Rose Hellen Wangari Mwangi C. Appl. Nai. 255/95 (ur), Mwangi v Kenya Airways (Supra), Murai vs. Wainaina (No.4) (1982) KLR 38, Major Igweta vs. M’Ethare & Anor Civ. Appl. Nai. 8/00 (ur), to wit:

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance.”

Learned counsel for the applicants Mr. Karanja submitted that it was only the length of delay that was considered and there was no proper or any consideration of the reasons advanced therefor. The court registry took more than six months to type out and supply the proceedings which were timeously applied for and there was a certificate of delay on record from the registrar to confirm that. The only problem was that the letter bespeaking copies of the proceedings was not copied to the respondents. This however only disentitles the applicants from taking advantage of the proviso to rule 81 of this Court’s rules but does not preclude them from relying on the certificate of delay to explain that they were not at fault in obtaining the proceedings when they did. Mr.

Karanja further submitted that the decree could not be obtained when the file was detained by the registry. In any event there was no basis for the finding that it took too long to obtain it. As for the six weeks taken to file the application to regularise the appeal, Mr. Karanja submitted that the delay was neither inordinate nor prejudicial to the respondent. The respondent was aware of the existence of the appeal all along since it was filed on 12.06.00 and had not taken any steps to question its validity. On the contrary, both parties were ready to argue the appeal on 22.09.04 but the court raised the issue suo motu. Nor did the respondent take any steps to have the appeal struck out on the basis that the delay of six weeks before filing the application to regularize the appeal was inordinate. In any event, the respondent is in possession of the disputed land.

Finally Mr. Karanja invited us to consider, which the learned single Judge did not do although the record was before him, that the appeal involves land and more specifically the cancellation of a title issued on a first registration under the Registered Land Act. A wider latitude, he submitted, ought to have been given to the applicants for ventilation of their grievances on appeal.

For his part learned counsel for the respondent, Mr. Mbeche, thought the delay which was established by the learned single Judge was not just blameable on the advocates but was common between them and their clients. The applicants ought to have urged their advocates on for timely pursuit of their appeal. The single Judge cannot therefore be faulted for concluding that there was lack of diligence and his decision should be affirmed.

We have carefully considered the submissions of counsel and examined the record before us. The learned single Judge dismissed the application purely on the consideration that the applicants' advocates took too long to put together the documents necessary for the appeal, namely, the proceedings, the decree, and in filing the application then under consideration before him. At no stage did the learned single Judge make a finding that the transgressions of the advocates amounted to pure inaction by them, which is inexcusable, or that they were mistakes of counsel which could be visited on the applicants themselves. As this Court has held on many occasions, there are excusable mistakes of counsel which ought not to be visited on their clients. The most memorable dicta on that proposition was pronounced in **Murai v Wainaina** (Supra) per Madan J.A (as he then was):

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of 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 mistake 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.”

The mistake that was the undoing of the applicants in this matter, as found by the single Judge, was that the advocates were not diligent in pursuing documents for the appeal records. The record however shows that it was the registrar who for some reason took more than six months to prepare and supply copies of the proceedings and he certified that in writing. We do not think this transgression ought to have been visited on the applicants or their advocates. We also think it was necessary, in the circumstances of this case, to consider the nature of the dispute between the parties and to make a finding whether it could outweigh other considerations. The appeal relates to land, which this Court has oftentimes taken judicial notice that it is a sensitive and emotive matter in this country. That is not to say, however, that in all cases where land is the subject of a dispute extension of time must be given. In **Wasike v Swala** [1984] KLR 591, this Court stated: -

“A recent decision of this full court in a reference from a single judge also made it clear that it would, in the circumstances of that case, reverse the decision of the single judge of this court because the intended appeal related to land and because, although the applicant could not technically explain satisfactorily the delay or take advantage of the proviso to rule 81(1), nevertheless the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal. *John Kuria v Kelen Wahito*, Nairobi Civil Application Nai. 19 of 1983 April 10, 1984. Here, again, the subject matter is land and Mucha Swala or his advocate have known all along that Cleophas Wasike is determined to institute his appeal.”

There was an existing appeal in this matter which both parties were ready to argue if the court did not question its validity. The respondent knew all along that the applicants were intent on pursuing the appeal. There is no denial that it is a land matter and the issues of law raised do not appear to be frivolous. We think in the circumstances that this was a relevant factor that was not considered thus entitling us to interfere with the discretion of the learned single Judge.

In the event we allow the reference and set aside the order of the single Judge dismissing the application for extension of time. We substitute therefor an order granting the application dated 16.10.04 with the

result that the time within which the applicants may file the record of appeal is hereby extended and the record of appeal filed in Civil Appeal No. 174 of 2000 on 12.06.00 is hereby deemed to have been filed within time. The costs of this reference and of the application shall be borne by the applicants in any event.

Dated and delivered at Nairobi this 18th day of November, 2005.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR