REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, J.A (IN CHAMBERS)
Civil Appli Nai 221 of 2005 (UR. 130/200

BETWEEN

FRED M.O)

DUNCAN M. MICHARA)

JOHN KIPRUTO)
……..APPLICANTS

AND

SARAH ACHIENG SELLLASIE…….
……..RESPONDENT

(An application for extension of time to file record of appeal in an

intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ransley, C.A) dated 23.10.2002
in
H.C.C.C. NO. 1832 OF 2001)
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R U L I N G

The matter before me is an application made under ***Rule 4*** of this Court's rules seeking an order that the applicants be granted extension of time within which to file a record of appeal. The three applicants were the defendants in the superior court and on the 23rd October, 2002 they were ordered to pay the respondent here, who was the plaintiff, a sum of Shs.7,419,741/= for injuries suffered by the respondent in a road traffic accident.

Aggrieved by the judgment, the applicants, filed and served a notice of appeal on 01.11.02. They also applied for a copy of the proceedings and judgment on 28.10.02 and on 01.12.04 they were informed by the registrar in a letter received in the respondent's advocates' offices on 06.12.04 that the proceedings were ready for collection. But no appeal was filed in accordance with Rule 81 and there is no Certificate of delay under the proviso to that rule. It was until 27.07.05 that this application was filed, which is a period of 2 years 8 months since the notice of appeal was lodged.

The discretion exercised under Rule 4 though unfettered must, as in all judicial discretions, be exercised upon reason, not caprice, and it must not be arbitrary or oppressive. As I stated, after examining several pronouncements of this court, in **Fakir Mohammed v Joseph Mugambi & 2 others** Civil

> **"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. 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- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38."**

As stated above, the apparent delay in instituting the appeal is in excess of 2 ½ years and it requires explanation if it should not be found inordinate.

There are documents on record, and I accept them, to persuade me that the applicant had applied in good time for copies of the proceedings and that they were not ready for collection until 06.12.04 when a letter was served on their advocate by the registrar. But there is still a period of about 8 months of apparent inactivity. This, the applicants' advocate explains in the affidavit in support as follows: -

> **"6. THAT the Deputy Registrar's letter dated 1st December 2004 was received on 6/12/2004 by my secretary one Ms. Jane Mathenge who inadvertently forgot to bring the letter to my attention for the necessary action (Annexed hereto and marked "KM4" is a copy of an affidavit sworn by my secretary).**
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> **7. THAT at the time this letter was received by my secretary, my office was in the verge of breaking for December holiday, as such I had instructed my secretary and her colleagues to re-arrange all the files and dust the office.**
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> **8. THAT I only discovered the Registrar's letter on 13/1/2005 during my routine file bring ups whereupon I promptly wrote a letter to the Registrar High Court, requesting to be supplied with a certified copy of the decree plus exhibits for purposes of the appeal (Annexed hereto and marked "KM 5" is a copy of the letter dated 14/1/2005 addressed to the Deputy Registrar.**
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> **9. THAT our letter of 14/1/2005 was only acted upon by the Deputy Registrar on 16/2/2005 on which date the Deputy Registrar availed us copies of exhibits but failed to avail a certified copy of the decree point out that no decree had been lodged with the court. 10. THAT on 23/2/2005 I wrote to the applicants' advocates enquiring on the issue of the decree and in addition forwarded a draft decree to the applicants' advocates for their approval. (Annexed hereto and marked "KM 6" is a copy of the letter dated 23/2/2005 addressed to the applicants' advocates).**
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> **11. THAT all along I was under the honest and reasonable belief that the applicants' advocates had lodged the Decree with the court as we had tendered our comments to the said advocates vide our letter dated 4/2/2003 (Annexed hereto and marked "KM 7" is a letter dated 28/1/2003 from the applicants advocates forwarding the decree and our letter dated 4/2/2003 communicating our approval of the decree).**
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> **12. THAT on 1/3/2005 we received a response from the applicants' advocates indicating their approval of the draft decree in response to our letter dated 23/5/.2005 (Annexed hereto and "KM 8" is a copy of the applicants' advocates letter dated 28/2/2005 received by us on 1/3/2005.**

13. THAT upon receipt of the draft decree we promptly submitted the same to the court whereupon we were informed that further court fees of Kshs.69,620.00 to the court to facilitate the release of the Decree as it was payable to the court before the decree could be sealed.

14. THAT on being informed of the amount payable, we promptly wrote a letter to the applicants' advocates requesting them to make the payment of Kshs.69,620.00 to the court to facilitate the release of the Decree as it was the responsibility of the applicant to obtain the same. (Annexed hereto and marked "KM 9" is a copy of the letter dated 4/3/2005 addressed to the applicants advocates).

15. THAT the applicants advocates responded to us vide their letter dated 11/3/2005 and indicated that they were not ready to make the required payments (Annexed hereto and marked "KM 10" is copy of the applicant's advocates letter dated 11/3/2005.

16. THAT subsequently we were engaged in various teleconversation with the applicant's advocates with a view of resolving the issue of payment. However when it became clear to us that the applicants' advocates were not ready to change their mind on the issue, we resolved to request the sum required from our instructing client (Annexed hereto and marked "KM 11" is copy of the letter dated 30/3/2005 addressed to our instructing client).

17. THAT on 14th May, 2005 we received the payment on further court fees from our instructing client (annexed hereto and marked "KM 12" is a letter dated 14/5/2005 acknowledging receipt). 18. THAT on 24/5/2005 upon the clearing of our client's cheque we proceeded to make the payments of Kshs.69,625.00 to the court (Annexed hereto and marked "KM 13" is a copy of the receipt dated 24/5/2005 issued upon making the payment.

19. THAT immediately on making the said payment, we lodged the decree and the same was issued on 26/5/2005 (annexed hereto and marked "KM 14" is a copy of the decree issued 26/5/2005.)"

So that, other than the period between 06.12.04 and 13.01.05 when the advocates say they took a break for Christmas holidays, they plead that they were all along until 26.05.05 pursuing copies of exhibits and the decree which are primary documents without which the appeal could not be competently mounted. In all these developments the advocates for the respondents were kept abreast. Those advocates were not impressed by the difficulties facing the applicants however, and attempted to have the applicants' notice of appeal struck out. Their application dated 28.07.04 was however dismissed on 10.06.05 and the notice of appeal was found to be validly on record.

Learned counsel for the applicants Mr. Angote explained that the applicants were preoccupied for several months with putting out the side-fires litup by the respondent and they never gave any impression that they had no intention of pursuing the appeal. The intended appeal will challenge various heads of damages awarded to the respondent by the superior court despite the absence of any pleading for such damages or proof thereof. In particular the award of Shs.5million in general damages for pain suffering and loss of amenities was, in his view, inordinately high and oppressive, and will be challenged too. It is not a frivolous appeal. Finally Mr. Angote submitted that there would be no prejudice caused to the respondent because a sum of Shs.4 million has already been released to her, and the balance of the decretal sum Shs.3,419,741/= is now escrow and will be readily available with interest if the intended appeal does not succeed.

For his part, learned counsel for the respondent Mr. Ombete was of the view that the applicants' advocates were not diligent in pursuing the necessary records for appeal. It was not necessary, in his view, to await the exhibits which could be introduced in a supplementary record, and the decree should have been sought earlier. Such delay must be taken to be unexplained. The exercise of the discretion of

this Court must also take into account that the respondent was a young lady who became a paraplegic on a wheel chair, unemployable and umarriageable due to the fault of the applicants. The merits of the appeal should not be considered at this stage and even if it was, there can be no challenge to the findings of the superior court.

I have carefully considered all the documents on record and the rival submissions of counsel. I am satisfied by the explanations of the applicants on the apparent delay in filing the appeal. Despite Mr. Ombete's submissions, exhibits produced in the course of hearing the suit would be necessary for determination of the appeal and would thus be primary documents without which the appeal would be incompetent. This Court said so in **Commercial Bank of Africa v Ndirangu [2000]** 1 EA 29. The decree too is a primary document and it did not help matters when counsel for the respondent refused to co-operate in obtaining it. Evidently the applicants' advocates have their share of blame as the application for these documents ought to have been made at an early stage. They may also well have taken a calculated risk in taking an early break for Christmas holidays. These I think however, are matters that ought not to visited on the applicants themselves and are in any event atonable in costs. The applicants have shown throughout that they were resolutely pursuing the appeal and the larger part of the period of delay is attributable to the court.

All in all, I am inclined to grant the application as prayed and order that the memorandum of appeal and the record of appeal shall be filed and served within 14 days of the date hereof. Costs of the application shall be borne by the applicants.

Dated and delivered at Nairobi this 8th day of November, 2005.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR