REPUBLIC OF KENYA

IN THE COURT APPEAL
AT NAIROBI
(CORAM: WAKI J.A (IN CHAMBERS)
CIVIL APPEAL (APPLI) 200 OF 2005
BETWEEN

MWEA RICE GROWERS MULTI-PURPOSE

CO-OPERATIVE SOCIETY LTD……..……APPLICANTS/APPELLANTS

AND

A.N. NDAMBIRI & CO. ADVOCATES……..…….....…..….RESPONDENT

(An application to file the memorandum and notice of appeal out of time from a Ruling of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Waweru, J.) dated 10th June, 2005

in MISC. APPL. NO. 698 OF 2004)

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RULING

Mwea Rice Growers Multi-purpose Society Ltd (hereinafter the "applicant") is embroiled in a legal tussle with its former Advocates, **M/S A.N. Ndambiri & Co.** on the quantum of legal fees payable to the Advocates (hereinafter the "respondent"). The respondent filed a bill of costs for taxation in September 2004 and the Deputy Registrar (E.N.Maina), as the taxing master, assessed the fees at Shs. 1,365,790/= on 01.11.04.The respondent then applied to the High Court to have the judgment entered and the ensuing decree executed. In a **"Ruling"** dated 9th June, 2005 and delivered on 10th June, 2005, the superior court (Waweru, J.) entered judgment accordingly and attempts have since been made by the respondent to levy execution for the decretal amount.

Aggrieved by that Ruling, which resulted into a decree after entry of judgment, the applicant sought to challenge it before this Court and so filed a notice of appeal timeously on 24.06.05. There is a clear court stamp, and I am told an official receipt too, to confirm the filing on that date. Service of the notice of appeal was also made timeously on 01.07.05. It followed under Rule 80 of the Court of Appeal Rules, that the appeal should have been lodged in the court registry on or before 24.08.05 which is 60 days of the date of lodging the notice of appeal. The appeal was however lodged and filed on 25.08.05, which was one day out of time.

That is why the applicant returned to this court six days later on 31.08.05 and took out a notice of motion seeking the court's discretion under **Rule** 4 for orders: -

> **"1. That this Honourable court be pleased to extend the time of filing the memorandum of appeal and record of appeal herein.**

a) That the filed memorandum of appeal and record of appeal herein be deemed as duly filed on time.

b) That this Honourable court be pleased to give further orders as it may deem fit and just.

c) That the costs of this application be costs in the main appeal."

An appeal may only be validly instituted if the following are timeously lodged with the appropriate registry simultaneously: -

a) a memorandum of appeal, in quadruplicate;

b) the record of appeal, in quadruplicate;

c) the prescribed fee; and

d) security for the costs of the appeal.

The discretion sought under Rule 4 is, of course, unfettered. It cannot however be exercised on whim or caprice. As I stated in **Fakir Mohammed v Joseph Mugambi & 2 others** Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

"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 delay in lodging the appeal was one day. The explanation for the delay is given in an affidavit sworn by the applicant's counsel Mr. Kahigah who depones that he obtained all the proceedings within time save for the decree which was problematic. It was problematic because he thought at first that an order would ensue from the ruling given by the superior court but on submitting the draft order to the respondent it was rejected. Thereafter, there was a series of correspondence between counsel culminating in a mention of the matter before the Deputy Registrar where the issue was settled on 19.08.05 which was Friday. Mr. Kahigah then prepared the record of appeal and was at the Court registry on the last day of filing on 24.08.05 when he was informed that the court fees and security for costs that go with the filing of the appeal was Shs.168,180/=. He did not have such money in cash as he only carried some Shs.9,500/= believing it to be the amount necessary to mount an appeal. He had to secure a Banker's cheque; but his bankers are in Kerugoya town where his law firm operates from. It was in the process of organizing that payment that the delay occurred. Finally Mr. Kahigah submitted that the intended appeal was not frivolous as the applicant will argue some pints of law; first, whether execution may follow automatically from a taxation of a Bill of costs or it must be preceded by a suit, and secondly, whether the taxation was inclusive of the legal fees paid to the respondent in the sum of Shs.1.5 million prior to the filing of the Bill of Costs. No prejudice, in his view, would arise if the application was granted.

Mr. Ndamibiri who appeared for his firm was not impressed by those depositions and submissions. He took the uncharitable view that Mr. Kahigah was negligent and should not be treated with mercy. The first

salvo fired was on technicalities: that the notice of appeal itself was defective as it was filed and served out of time and ought to be struck out; and that the notice of appeal was in respect of a ruling and not a decree. The first objection is not within my province to deal with and indeed there is an application on record pending hearing before the full court.Whether it will survive the requirement of the proviso to Rule 80 must await the decision of a competent court. The second objection also appears to require an application for striking out, which has not been made, but in my view it does not preclude me from considering the application before me.

The second salvo was on merits of the application and Mr. Ndambiri pointed out some documents which he contended had erroneous information which ought to be expunged. He blamed Mr. Kahigah for not knowing that assessments of fees for appeals are not uniform. He also blamed him for failure to extract a correct decree and in the end delaying the filing of the appeal. The respondent, he submitted, was innocent in all this and will be prejudiced if any indulgence is given to the applicant.

As I said earlier the view taken by counsel for the respondent on the perceived negligence of counsel for the applicant is rather harsh and uncharitable. That Mr. Kahigah assumed, as it turned out erroneously, that the filing fees for the appeal would be 9,500/= I think was an honest mistake. It would have been easily rectified if he practiced law in Nairobi and had his client's account there. But he came from Kerugoya and it is understandable why it took him one day to organize a banker's cheque. It is not a factor I would be inclined to hold against him that he extracted a formal "order" from the "Ruling" of the superior court when he should have extracted a "decree". It was not an obvious mistake and indeed it took a mention by both parties before the Deputy Registrar to resolve the issue. Madan JA (as he then was) would have readily respondent: -

> **"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."**

- See Murai v Wainaina (No. 4) (Supra)

The issues that will be raised in the intended appeal are prima facie, not frivolous. And if there is any prejudice to the respondent it will be in waiting a little longer to recover what he believes is the balance of his fees after being paid. Shs. 1.5 million by his client. That, I think, is compensable in further costs if the applicant fails in the appeal.

In all the circumstances of this case I see no reason why I should not exercise my discretion in favour of the applicant. Accordingly the application is granted. The time for filing the memorandum and record of appeal is hereby extended and the appeal filed on 25th August, 2005 is hereby deemed to have been filed within time.

Costs of the application shall be in the main appeal.

Dated and delivered at Nairobi this 3rd 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