IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Ringera Ag JA (In Chambers))

CIVIL APPLICATION NO NAI 294 OF 2003

E C N G …..... APPLICANT

VERSUS

F N N ……..…….. RESPONDENT

(An application for extension of time to file and serve notice and record of appeal from a judgment and decree of the High Court of Kenya at Nairobi (Aganyanya, J) dated 5th July, 2001 in HCDC No 143 of 1999)

RULING

E C N G, the applicant herein, was the petitioner in High Court Divorce Case No 143 of 1999 wherein he sought to divorce his wife F N N, the respondent therein and herein, on grounds of cruelty. Mr Justice Aganyanya, who heard the petition was not impressed by the merits of it and dismissed the same. The learned judge found the applicant had not proved the alleged cruelty beyond reasonable doubt and surmised that the real motive of the applicant was to rid himself of his wife in order that he could give his undivided attention to his mistress. The judgment of the superior court was pronounced on 5th July, 2001.The applicant was aggrieved by that judgment. He filed a notice of appeal on 17. 7. 01 and subsequently lodged a record of appeal. That appeal came for hearing on the 7th day of October, 2003 when this Court on its own motion struck it out on the basis that the record of appeal did not include a primary document, namely the copy of the order dismissing the petition. That was quite proper for rule 85(1)(h) of the Court of Appeal Rules (the Rules) makes it mandatory for the record of appeal to contain the certified copy of the decree or order appealed against. Mr Githiaka is determined to appeal. He has accordingly filed a motion on notice and the provisions of rule 4 of the rules for extension of time within which to lodge and serve a fresh notice of appeal and file and serve a new record of appeal. He states that he has already obtained the requisite order of the superior court (the same was issued on 22. 10. 03) and is therefore in a position to file a complaint record of appeal.

At the hearing of the application, Mr Kabaka, the applicant's counsel, admitted that it was his own mistake not to include the order appealed from in the record of appeal. He said the mistake was honest and prayed that the same should not be visited on his client. He added that he had moved expeditiously to correct the situation and the delay in filing the motion was only five days considering that the certified order was issued and obtained on 22. 10. 03. He relied on the decision of the single judge (*Owuor, JA*) in Civil Application No Nai 249 of 1998. *George Roine Titus & another vs John P Nanguri* where the learned judge held that: -

"a mistake is a mistake whether or not it originates from an advocate's ignorance or negligence and so long as it is genuine it does not disentitle an applicant to the discretion of the Court being exercised in its favour."

Mrs P N Ndung'u, counsel for the respondent, vigorously opposed the application. She contended that the Court would only exercise its discretion if the application for the extension of time is filed without delay after it becomes necessary to do so. She pointed out that in the matter at hand there was a delay of 20 days (and not 5 days) by the applicant for the intended appeal had been struck out on 7/10/05 and the present application was lodged on 27/10/03. In the *Nangurai* case (supra), she pointed out, the application for the extension of time had been filed the day following the striking out of the appeal. She further contended that for the Court to act on the basis of a mistake, the mistake must be acknowledged and explained in the supporting affidavit. She said there was no such acceptance or explanation here. Counsel further argued that the appeal was incompetent in respects other than the omission of a primary document in the record of appeal. In that regard she pointed out that the applicant's letter requesting for proceedings had not been copied to the respondent and, accordingly, the applicant could not have benefited from a certificate of delay according to the provisions of rule 81 and the appeal which had been lodged outside the 60 days prescribed by rule 81(1) was incompetent.

Last but not least, counsel submitted that the Court should not act in vain as the intended appeal had no merit. She submitted that the judge in the superior court had appreciated the standard of proof and found no merit in the petition. She asked that the application be dismissed.

In a short reply, Mr Kabaka insisted that the delay in filing the motion for extension of time was only 5 days as he could not have filed the same without first obtaining a copy of the certified order. He also admitted and accepted his mistake in not including a primary document in the record of appeal. He submitted that other mistakes to do with the incompetence of the appeal struck out were irrelevant as the Court on its own motion had struck out the appeal on the ground that the order appealed from was not in the record of appeal. In any case, he argued, respondent's counsel was now estopped from raising those matters, as she had not applied to strike out the appeal on that basis. Mr Kabaka further argued out that the intended appeal was arguable as evident from the grounds contained in the memorandum of appeal. In particular, he said, the judge erred in applying the standard of proof beyond reasonable doubt to the petition.

I have now considered the matter. I think it is necessary to first appreciate the nature of the discretion under rule 4 and the consideration governing its exercise before pronouncing the decision I have arrived at. Under rule 4 the Court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its own decisions. Such a discretion, like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court's primary concern should be to do justice to the parties.

In considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case. In *Murai vs Wainaina* (No 3) [1982] KLR 33, Law JA sitting as a single judge stated that in order to exercise his discretion under rule 4 he had to consider such matters as delay, the public importance of the matter and the prospects of success of the intended appeal. That view was affirmed by the full court in *Murai vs Wainaina* (No 4) [1982] KLR 38 with Madan, JA, who delivered the lead judgment adding to those matters the requirements of the interest of justice. And in *John Ongeri Mariaria & others vs Paul Matundura* (Civil Application No, Nai 301 of 2003) (unreported) O'kubasu, JA referred to the decision of this Court in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No Nai 251 of 1997) (unreported) where it was stated:-

"It is now well settled that the decision whether or not to extend the 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 the extension of time are first the length of the delay, secondly the reason given

for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly the degree of the prejudice to the respondent if the application is granted."

Applying those principles to the matter at hand, it is evident that the applicant's record of appeal was struck out for failure to include a primary document. The omission to include the primary document was explained to be due to the mistake of his advocate. Although the affidavit in support of the application for extension of time was not profuse with acknowledgment and repentance of the error, paragraph 9 thereof which deposed that "we have already obtained the requisite dismissal order to regularize the inadvertence which anyway should not be visited against the appellant litigant" coupled with counsel's full acknowledgment of his mistake from the bar, in my opinion, lay a foundation for considering the matter on the premise that the root of the default was the mistake by applicant's counsel. In that regard, there is abundant authority of this Court that mistakes by counsel are not a reason for denying an otherwise deserving applicant of a favourable exercise of discretion. The most memorable pronouncement in that regard was by Madan JA in *Murai vs Wainaina* (No 4) (supra) 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 person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates.

It is known that courts of justice themselves make mistakes which is politically 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 also done in the interest of justice."

And in *Grindlays Bank International (K) Ltd & another vs Barboor* (Civil Application No Nai 257 of 1995) (unreported) Lakha, JA said:

"oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake…. Mistake may and normally does arise through negligence."

I accept that Mr Kabaka's failure to include a copy of the order sought to be appealed against was a genuine mistake. The same should not be visited on the applicant. And having realized the mistake, counsel has taken expeditious action to regularize the same. Whether one counts 20 days or 5 days the delay in filing the application for extension of time is not in any way inordinate. As regards the prospects of the intended appeal, I am persuaded that the same is not frivolous; it is definitely arguable at least on the point that the learned judge applied a higher standard of proof than required by law. And that is also a point of public importance. Should petitioners in divorce causes brace themselves to be proving the ground of cruelty beyond any reasonable doubt? As regards prejudice to the respondent if the application is heard, I can see none. Her status *vis-à-vis* the applicant's cannot and will not be affected at all by the preferment of the appeal. Thus, all in all, I am of the conviction that the interests of justice tilt in favour of acceding to the extension of time.

In the result, I allow the motion dated 27th October, 2003 and order that a fresh notice and record of appeal be lodged and filed within 14 days of today failing which the motion will stand dismissed. The applicant will pay the respondent's costs of the motion.

Dated and delivered at Nairobi this 25th day of June, 2004

A.G. RINGERA

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Ag JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR