REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: O'KUBASU, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 67 OF 2004

BETWEEN

KARIUKI WAITHAKA …….…….…… APPLICANT

AND

LOLDIA LIMITED …….. RESPONDENT

(Application for extension of file & server notice of appeal from the judgment & decree of the High Court of Kenya at Nakuru(Rimita J) dated 22nd November, 1999

in H.C.C.C. NO. 234 OF 1996)

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R U L I N G

This is an application by way of notice of motion under ***Rule 4 of the Court of Appeal Rules (the Rules) i***n which the applicant ***Kariuki Waithaka*** seeks the following orders:

> "1. THAT this Honourable (sic) may be pleased to grant the Applicant leave to file a notice of appeal to this Honourable court out of time and that notice of appeal already filed (on 22.12.2003) be validated and be deemed to have been filed timeously.
>
> 2. THAT costs of this application be provided for."

The judgment of the superior court to be appealed against was delivered on 22nd November, 1999. The applicant who had been represented by counsel filed a notice of appeal on 6th December, 1999. That notice of appeal was however struck out by this Court on 1st October, 2003. In striking out that notice of appeal this Court stated **inter alia**:

"Apart from the letter of 2nd December, 1999 there is nothing Mr Karanja has done to expedite the preparation of proceedings. In these circumstances when 31/2 years have elapsed we are satisfied that he has shown less than proper diligence to prosecute his appeal. It is not enough for one to apply for proceedings and then go to sleep with nothing more done. For these reasons, the application succeeds. The notice of appeal filed on 6th December, 1999 is struck out with costs to the applicant and the order of stay granted by the superior court is hereby vacated."

It would appear that instead of filing an application for extension of time in which to file a notice of appeal in this Court the applicant decided to file that application in the superior court which application was rejected on 1st March, 2004. It was after that dismissal of the application that the applicant came back to this Court by filing the current application on 12th March, 2004.

Mr Muthoni for the applicant argued that failure to file notice of appeal in time was due to the applicant's previous counsel who misled him. It was further argued that the dispute relates to a piece of land on which the applicant has lived since 1936.

In opposing the application, Mr Mbeche for the respondent submitted that the applicant had already been evicted from the land in dispute. He also pointed out that it is now six years since the High Court gave its judgment, and that no good reason has been given to explain the delay. He also referred to two affidavits sworn by the applicant in which the applicant gives two conflicting reasons for the delay.

Rule 4 of the Rules (under which the current application was brought) gives this Court unfettered discretion in granting or refusing to extend time. In ***LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI*** – Civil Application No NAI 251 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve notice of appeal and record of appeal 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 an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted."

The Court continued:

"Bearing these principles in mind and applying them to the instant case the appellant took almost three and half months to file the present application after the appeal was struck out for the second time. In our judgment with respect, the period of delay of almost three and half months, in any view of it is substantial. In ***SAMKEN LTD & ANOR VS MERCEDES SANCHEZ REV TUSSEL & ANOR –*** *Civil Application No NAI 21 of 1999 (unreported) this Court found a delay of about three months long. In* ***RAVASHDEH V LANE [1988] 40 E.G. 100****, a delay was said to be much longer – it was six weeks in fact. In addition there is no explanation for the delay. None is put forward in the affidavit of that applicant sworn in support of this application on 24th September, 1997."*

In the present application, the judgment to be appealed from was delivered on 22nd November, 1999 and a notice of appeal filed not immediately but on 6th December, 1999. It was however within time. The applicant (and his counsel) went to sleep. For the next three and half years nothing happened. It was therefore not surprising that the notice of appeal was struck out by this Court on 1st October, 2003. That meant the applicant had to start the appeal process afresh. As already stated earlier in this ruling this application was filed on 12th March, 2004. From 1st October, 2003 to the time the application was filed there was a delay of slightly over four months. What was the explanation for this delay? That the previous

advocate was to blame as he let down his client.

This Court's attention has been drawn to the two affidavits sworn by the applicant. In these affidavits the applicant gives conflicting reasons for the delay.

Having considered what has been urged before me I find that there has been no sufficient explanation for the delay. Again no attempt was made to demonstrate that the intended appeal was arguable. It was pointed out that this litigation has come to an end since the applicant has already been evicted from the land in dispute.

In ***THE DUE PROCESS OF LAW (1980)*** London Butterworths at p. 93 Rt.

Hon. Lord Denning M.R. said:

> *"Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time, or serve it in time, or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done."*

The above passage is relevant to the present application in which the applicant is putting blame on his previous counsel.

Justice must look both ways. Here the respondent obtained a judgment way back in 1999. The applicant has actually been evicted from this land. As of now the land could have changed hands. It is too late to reverse the process.

In view of the foregoing, I am satisfied that this is not a proper case in which to exercise my discretion in favour of the applicant. Consequently, this application must fail and it is accordingly dismissed with costs to the respondents.

Dated and delivered at Nakuru this 24th day of September, 2004.

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR