



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: O'KUBASU J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI 205 OF 2002

BETWEEN

**MUHURU BAY FISHERMEN CO-OPERATIVE UNION SOCIETY
LIMITED.....APPLICANT**

AND

CO-OPERATIVE BAN OF KENYA1ST RESPONDENT

JOSHUA OGOT2ND RESPONDENT

JAVAN ONYANGO3ND RESPONDENT

WILLIAM BURUNGO4TH RESPONDENT

RICHARD NGONGO5TH RESPONDENT

WIILIAM AIRA6TH RESPONDENT

BONIFACE ORANGA7TH RESPONDENT

RAPHAEL MUGAWE8TH RESPONDENT

NARIKISIO OKEMBI9TH RESPONDENT

CHARLES NYANGWESO10TH RESPONDENT

SHADRACK NOBOORI11TH RESPONDENT

(Application for extension of time to lodge Record of
Appeal in an intended appeal from the judgment of
the High Court of Kenya at Nairobi (The Hon.
Commissioner of Assize P. Ransley) dated 19th July,

2002

in

RULING

This is an application brought by way of Notice of Motion under rule 4 of the Court of Appeal Rules. The applicant seeks extension of time in which to file the record of appeal.

This application is brought on the ground that the applicant's counsel inadvertently failed to procure a certified copy of the decree thereby failing to file the intended record of appeal. The applicant gave a detailed account of what led to the delay in filing the record of appeal. The explanation is contained in the supporting affidavit and in his submission before me. The undisputed facts are to the effect that judgment of the superior court was delivered on 19th July, 2001 and a Notice of Appeal was filed thereafter within the prescribed time. The applicant's counsel applied for proceedings and judgment and as there was a delay in obtaining these several reminders were sent. Mr. Odera also made an application seeking an order to dispense with service on other respondents which application was granted by Tonui, J.A. On 16th May, 2002 counsel for the applicant received a letter to the effect that typed proceedings were ready for collection. Counsel for the applicant then started preparing the appeal but then he discovered that he had not extracted the decree. He had to do this and then send the decree to his opponents. Due to this counsel for the applicant found himself out of time by four days. This delay then necessitated the filing of this application for extension of time. Mr. Odera conceded that the mistake in not filing the appeal in time was mistake of counsel, and in his view, this was excusable mistake.

Miss Okioga in opposing this application stated that the reason given for the delay is unjustified and unacceptable.

This court has wide and unfettered discretion under rule 4 of this Court's Rules in dealing with extension of time. In an application of this nature the court is being asked to exercise its discretion. It is, therefore, upon an applicant seeking extension of time to explain to the satisfaction of the court that this discretion ought to be exercised in its favour. The issue in the current application is whether the explanation given for this delay is acceptable to the Court.

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 inter alia:-

"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 (probably) the chances of the appeal succeeding if the application is granted, and fourthly, the decree of prejudice to the respondent if the application is granted".

In the present application there was a delay of only four days. What led to this delay has been explained to be the mistake of counsel who inadvertently failed to procure a certified copy of the decree in good time.

On this issue of mistake by counsel, I would refer to *Murai v. Murai* (No.4) [1982] KLR 38 in which Madan JA (as he then was) said at pp. 47-48:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was 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".

In the present application there was a delay of only four days. This delay was, in my view, adequately explained and this was due to a mistake of counsel. What happened herein was an unfortunate slip. Mr. Odera, counsel for the applicant, is an experienced man in matters of this nature, but even men of experience do make mistakes.

Having regard to all the circumstances of this matter I consider that this is a fit and a proper case for the exercise of my discretion in favour of the applicant. Accordingly, the application is granted. I order that the applicant do file the record of appeal within 21 days from the date of this ruling.

Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 7th day of March, 2003.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR