



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Waki JA)

CIVIL APPLICATION NO NAI 228 OF 2002 (UR 114 OF 2002)

NJUGUNA.....APPLICANT

VERSUS

MAGICHU & 3 OTHERS.....RESPONDENT

(An application for the extension of time to file and serve Notice
of Appeal and Record of Appeal in the High Court at
Nairobi from the judgment of the High Court, Angawa J, delivered
on 3rd December 1998 in Succession Cause No 1014 of 1993)

RULING

For the third time in as many years the applicant seeks the indulgence of this court to excuse non-compliance with the Rules of this Court. His plea however is that the non-compliance was all due to the inadvertence on the part of his advocates on record. The sequence of events leading to the current state of affairs is this: Angawa J delivered her judgment in favour of the respondents on 03.12.1998. Being aggrieved by that decision the applicant timeously filed and served a Notice of Appeal and a Record of Appeal No 34/2000. That appeal was however struck out on 16.01.01 due to what the court said was omission to include primary documents in the record. As it turned out later, the documents were never there in the first place. The applicant applied for reinstatement of the appeal and on 23.03.01 Okubasu JA granted leave to do so on the following conditions:

- (a) That a fresh Notice of Appeal be lodged and served within 7 days.
- (b) That a fresh Record of Appeal be filed and served within 21 days.

He stated in the course of his ruling:

“.....the dispute relates to land and as we know such disputes raise emotions hence a careful handling of the matter is called for The applicant should be given the last chance to engage his opponents in this dispute.”

The first condition set by Okubasu JA was complied with but not the second. The Record of Appeal in

CA 69/2002 was filed on 18.04.01 but was not served until 23.04.01. Four months later in August 2001, the applicant realized that the record had not been served in accordance with the Rules and so applied for extension of time to validate the service. Kwach JA obliged and extended time on 27.02.02.

Unknown to the applicant as at the time of seeking extension for service of the record, the record itself was invalid as it had been filed outside the period granted by Okubasu JA. He realized that five months after the ruling of Kwach JA when the appeal was due for hearing on 09.07.02. An attempt to apply informally for extension of time was refused and the appeal was struck out as incompetent. The application before me was then filed two weeks later on 24.07.02.

It is the submission of Mr Kahonge, learned counsel for the applicant, that the omission to comply with the terms set by Okubasu JA was made innocently by counsel then on record and ought not to be visited on the applicant whose intention to appeal against the superior court's decision was made manifest when the original appeal was filed timeously. The delay in filing the appeal was caused by a miscalculation, by one day, of the final day within which the appeal should have been filed. There was no inordinate delay in applying for reinstatement of the appeal which is the right of the applicant as was stated in C APP NAI 337/96 *Jedida Alumasa & 3 Others v S S Kositany* (UR) where Bosire Ag JA (as he then was) stated:

“It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures provided he can be able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal.”

Mr Kahonge further relied on C Appl NAI 64/1990 *Kenya Cannery Ltd v Titus Muiruri Doge* (UR) where a full bench of this court stated:

“This court has held on many occasions that any litigant who wishes to be heard by this court should not be prevented or penalized due to the mistakes of his counsel. The advocate has admitted his mistake in failing to interpret the rules properly. This court has also held that appeals relating to disputes in land should finally be determined by this court. *John Kuria v Karen Wahito* CA Nai 19/83 (UR)”

There was, he conceded, a mistake by counsel in this matter which matter involves land. The issues for determination on appeal, in Mr Kahonge's view, are not frivolous and he enumerated some of them revolving around the issue of implied and constructive trusts in land. The appellant was still in possession of the disputed land and therefore no prejudice would occur in granting the order sought.

For the respondent who opposes the application, learned counsel MS Gateru submitted that although the discretion of the court was wide, it ought to be exercised judicially. The mistakes relied on here were not excusable as they extend over a long period and are several in number.

The intention was to delay the enjoyment of the fruits of the judgment made in favour of the respondents considering that the applicant was in possession of the disputed land. Any further order granted to extend time would be prejudicial to the respondents.

It has been stated time and again, that the discretion exercisable under Rule 4 of this Court's Rules, is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis. The applicant has indeed invoked the provision in this same matter twice before and obtained favorable orders. The principles applicable were restated by Okubasu JA from this court's ruling in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* C App NAI 255/97 (UR), thus:

“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 application before me was taken out within two weeks of the appeal being struck out. On the face of it that is no delay to complain about. It may be argued however that the issue that caused the striking out of the appeal was existing since the appeal was filed on 18.04.01 and was not addressed together with the omission on service when the applicant had the first opportunity to do so before Kwach JA on 27.02.02. From that view point there would be a delay in excess of more than 5 months. The explanation given for failure to seek redress was that the advocate then on record miscalculated the period by one day and did not realize this until attention was drawn to him on 09.07.02. I think the miscalculation of figures and dates is a fairly human phenomenon particularly, as in this case, where public holidays intervene. The respondent's counsel himself did not appear to have noted the miscalculation until that late hour, otherwise he would have applied for striking out of the appeal earlier. It was, in my view, an innocent and therefore excusable mistake of counsel and I would not penalize the applicant for it. The court had earlier extended time to serve the same record of appeal. It would have, I believe, granted similar indulgence on the same reasoning if it became aware of the state of the appeal record to be served. I also think the issues of law raised in the appeal are vexing enough to grant examination and legal interpretation by the final court in this country. The Court's decision, one way or the other, will be of useful precedential value to litigants generally. The status quo before the litigation commenced has not changed as far as the record before me shows. The grant of further limited indulgence to the applicant will only be prejudicial to the respondents to the extent that it delays the day when they will enjoy the fruits of their judgment. That however would be outweighed by the interests of justice in this land matter.

I will in all the circumstances grant the application and make the following orders:

- (a) That the time for instituting the appeal be and is hereby extended.
- (b) That the time for filing and serving the Notice of Appeal be extended and the Notice of appeal be filed and served within 7 days from the due of this ruling.
- (c) That the time for filing the Record of Appeal be extended and the Record of Appeal be filed and served within 7 days of service of the Notice of Appeal.
- (d) The costs of this application assessed at Shs 15,000/= be paid by the applicant to the respondent within 14 days of this ruling and in default execution to issue.

Dated and delivered at Nairobi this 31st day of July, 2003

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR