IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, J.A. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 249 OF 2000

BETWEEN

ATTORNEY GENERAL

WILLIAM CHANGE WAMBUGU..... APPLICANTS

AND

PHYLIS WANGARI MAINA

WACHIRA WAIKWA ..... RESPONDENTS

(Being an application for reinstatement for enlarging

time against the decision of the High Court of Kenya

at Nairobi (Mitey J) dated 18th October, 1999

in

H.C.C.C. NO. 1301 OF 1994)

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R U L I N G:

According to the decree contained in the record of appeal before me, on 18th October, 1999, **Phylis Wangari Maina and Wachira Waikwa,** the respondents herein, obtained judgment against the Honourable the **Attorney General and William Change Wambugu,** the applicants herein, in the total sum of KShs.1,628,360/= in **High Court Civil Case No. 1301 of 1994**. It is no concern to me what the money was awarded for; it is sufficient for my purposes that the money was awarded by the High Court, Mitey, J. to the respondents. High Court Civil Case No 1301 of 1994 had more than two defendants; in addition to the applicants there were **James Muriithi** as second defendant and **Jackson Kaguri Muhara** as the fourth defendant. The Honourable the Attorney General was the first defendant while William Change Wambugu was the third defendant.

Judgment having been entered on 18th October, 1999, the applicants, that is, the Attorney General and William Change Wambugu, were minded to appeal. ***Rule 74 (2) of the Court's rules, the rules***, obliged them to file their notice of appeal within fourteen days from the date of judgment. The notice of

appeal I see in the record before me was lodged in the High Court on 29th October, 1999. I presume it was lodged with leave of the court for it was clearly lodged out of time. Be that as it may, the record of appeal was filed on 12th September, 2000. There were only two appellants, the applicants and only two respondents, namely, Phylis and Wachira. It is not clear what had happened to the other two defendants in the High Court namely the 2nd and 4th defendants.

So on 12th June, 2001, the two respondents herein lodged in the appeal, a notice on motion under rules 42 (1) and 80 and among the orders sought in that motion were that:

"1.The Notice of Appeal herein dated 29th October, 1999 be struck out.

2.The appeal filed by the respondents herein be struck out."

The grounds upon which these orders were sought were stated to be that:

"1.The Notice of Appeal herein is defective/incompetent as it does not comply with the mandatory provisions of Rules 74 (3) and 76 (1) of this Honourable Court's rules.

2.The respondents have failed to serve the Notice of Appeal dated 29th day of Octobe r, 1999 on all interested/directly affected parties in this matter.

3.The respondents have failed to file the record of appeal within the prescribed time and/or the respondents have failed to take an essential step within the prescribed time."

Rule 74 (3) of the rules requires that a notice of appeal shall state whether it is intended to appeal against the whole or part only of a decision, and where it is intended to appeal against a part only of the decision, that part must be specified, and that the names and addresses of the persons intended to be served with the notice shall also be stated. **Rule 76 (1)** requires of an intending appellant that he shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal:

*"Provided that the Court may on application which may be made **ex parte** within seven days direct that service need not be effected on any person who took no part in the proceedings in the superior court."*

It appears that in their motion to strike out the notice and record of appeal, the respondents were alleging that the applicants had failed to comply with all these requirements. The motion to strike out the notice and record of appeal is still pending in the Court and I am not competent to deal with it. Faced with the motion to strike out the notice and record of appeal and which, as I have said, was lodged in Court on 12th June, 2001, the applicants lodged their own motion on 2nd October, 2001; that was some three months after the motion to strike out was lodged. In the motion lodged by the applicants, the orders sought were that:

"1.The Honourable Court be pleased to extend time within which to file an application to dispense with service of notice of appeal upon the 2nd and 4th Defendants in HCCC 1301 of 1994.

2.The application herein be deemed to be duly filed.

3.The service of the notice of appeal on the 2nd and 4th Defendants be dispensed with."

It is clear from these prayers that the applicants did not serve the other two defendants in the superior court with the notice of appeal; it is also clear that they did not seek the direction of the court whether or not to serve the other defendants with the notice; the applicants were required to seek the direction of the court within seven days. These admitted defaults by the applicants were the direct cause of the motion by the respondents to strike out the notice and record of appeal. The applicants, as I have said took nearly three months to file their motion to rectify their defaults.

The applicants' motion to rectify their defaults was fixed for hearing before me on 25th September, 2001. That was after it had been adjourned on 25th June, 2001 and the recorded reason for the adjournment was that the applicants had not served the respondents with the notice of motion. It was agreed before me that the hearing date of 25th September, 2001 had been taken out by consent. Come that date and Mrs Madahana who is conducting the matter on behalf of the applicants was not present. She did not come to Court at all that day. As I saw no reason for adjourning the motion, I dismissed it under **rule 55 (1) of the rules .**

The applicants now return to me under **rule 55 (3) of the rules**. That rule provides:

"Where an application has been dismissed under sub -rule (1) ... the party in whose absence the application was determined may apply to the court to restore the application for hearing ... if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing."

This rule, unlike **rule 4** , still provides that for the Court to exercise its discretion, the person seeking the exercise of the discretion in his favour must show that he was prevented from attending by **"sufficient cause".** The difference between **rule 4** and **rule 55 (3)** is that the discretion exercisable by the Court under rule 4 is wholly unfettered while that under rule 55 (3) is fettered in the sense that before the Court can exercise its discretion in favour of an applicant, **"sufficient cause**" has to be shown. What, then, constitutes **"sufficient cause"**?

In the old days, **Rule 9 of the Rules of the Court of Appeal for Eastern Africa** , from which the current rule 4 is derived, provided as follows:

"9 (1)The Court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by order of the court or by these Rules or by order of a superior court or by any written law of any of the territories.

(2)In any order extending the time for doing any act the court shall specify the time within which such act shall be done."

The relevance of this provision is that it gave the then Court of Appeal for Eastern Africa a discretion to extend the time for the doing of any act if **"sufficient reason"** was shown. From the authorities I have been able to lay my hands on, no-one has ever attempted to define what would constitute sufficient reason. In **NGONI-MATENGO CO -OPERATIVE MARKETING UNION LTD VS ALIMAHOMED OSMAN [1959] EA 577** , the facts were that an applicant for extension of time had filed his appeal on the very last day allowed for filing the appeal. On the day before he filed the appeal, he had applied for and obtained from the registrar of the High Court a copy of what both he and the registrar believed to be the relevant decree which was incorporated in the record of appeal. Subsequently, the applicant discovered that the copy decree supplied was an earlier decree in the same action. At the hearing of the appeal, the Court of Appeal "**dismissed"** the appeal as incompetent on the ground that the proper decree was not lodged with the record of appeal. The applicant thereafter applied for an extension of time to enable him file a fresh record incorporating the correct decree. The single Judge held that though the applicant had shown "sufficient reason" to warrant time being extended for him, the application would be dismissed because the applicant's previous appeal had been "**dismissed"** and not struck out. A reference was then made to the full court and on the issue of **"sufficient reason"** WINDHAM, J.A. who delivered the ruling with which the other two members of the Court agreed, stated as follows:

*"... But for the moment I would say that, i n my view, the learned judge was justified in deciding that in the circumstances a sufficient reason had been shown. In so deciding he held, following the principle laid down in **Gatti V Shoosmith, [1939] 3 All E.R. 916** , that he had an unfettered discretio n for sufficient reason to grant an extension of time, notwithstanding the mistake of applicant's counsel in not checking*

the decree handed to him by the Registry on January 5, to see it was the correct one. The general principle laid down in that case, that a mistake of counsel, is not necessarily a bar to his obtaining an extension of time, has been followed by this court in a number of cases, among which may be mentioned ***Shabir Din V Ram Parkash Anand (1955) 22 EACA 48*** *. More recently, it is true, this court has laid down that, in view of the clear terms of the relevant rules requiring the decree or order to be extracted before an appeal is lodged, in particular r.56, an advocate who fails to take steps to comply with that requirement cannot excuse himself by pleading that his failure was due to any "error of judgment" on his part, and such failure may not of itself be held to afford "sufficient reason" for the purpose of r.9. It was so held in the recent cases of* ***Farrab Incorporated V The Official Rece iver & Provisional Liquidator [1959] EA 5, Nas Airport Services Ltd V Attorney -General of Kenya, [1959] EA 349 and Commissioner of Transport V The Attorney -General, Uganda & Another [1959] EA 329.*** *But in each of those cases, the applicant's omission to extract the decree or order within the time limited for lodging his appeal had been due to either a failure to appreciate the legal necessity of so doing, or to a lack of diligence in taking steps to see that it was done in time. In the present case the position was very different, since counsel for the applicant was fully aware of the requirement of the Rules and of the relevant decisions of this Court, and had taken all steps to comply with them upto the eve of the lodging of his appeal; and it was the mistake of the Registry of the High Court in then supplying him with a copy of the wrong decree which was the primary cause of his non-compliance. For this reason, I agree with Law, J., that the ap plicant showed "sufficient reason" for extension of time for the purposes of r.9."*

In the above cited case, the "sufficient reason" as can be gleaned from the passage was the mistake of the High Court Registry in supplying counsel for the applicant with the wrong decree and it was of no moment that counsel himself did not check to see that he had got the correct decree.

In the **Nas Airport Services case, supra** , Windham, J.A., stated:

"The appellants allowed a period of almost two months to elapse, namely from October 6, until December 4, before they even submitted the draft of a formal order for the respondent's approval, fully knowing that in a further eight days from that time for lodging their appeal would expire. They advanced certain reasons which, i n our view, did not amount to an adequate excuse for this delay, a delay but for which they should with an ample margin of time have obtained approval of the draft and filed the formal order with their memorandum of appeal. Accordingly, the appellants did not, in our view, show sufficient reason for being granted the indulgence of an extension of time. Nor did the mere fact of the respondent's not opposing the application constitute in itself, in our view, sufficient reason for the extension. The ground of our granting the extension was the fact that the respondent had lodged a cross -appeal and had included the formal order in the record of his cross-appeal, and that a refusal of the application would thus cause unmerited hardship to him by depriving him of his right of cross -appealing through no fault or irregularity on his part. This we considered, constituted a "sufficient reason" under r.9 for allowing the extension of time for filing the appeal, so as to permit the appellants to re-lodge the necessar y documents in the registry, including the formal order. This they duly did."

Here, again, we can discern what does not constitute a "sufficient reason". Pure delay, even though some reason or reasons may be given for it, will not necessarily amount to a sufficient reason. Nor will the fact that the opposite party does not oppose the extension sought amount to a sufficient reason. But depriving a party, through no fault of his own, of an accrued right, such as the right to cross-appealing will amount to a sufficient reason. That is similar to the case of a registrar supplying a wrong document to a party and thus the party is deprived of a right through no fault of his own. These days it appears accepted that the mistake or negligence of an advocate may amount to a sufficient reason. Spry, V.P., put it thus in **HARNAM SINGH & OTHERS VS MISTRI [1971] E.A. 122 at page 125 Letter I to page 126 Letters A-B:**

"... In the course of dealing with the question whether the application for extension of time had any reasonable prospect of success, Mr Slade suggested that a cause of delay might have been negligence on the part of the respondent's advocates and he argued relying on two English cases, that such negligence could not afford sufficient cause for allowing the application. Negligence on the part of his advocate has not been alleged by the respondent and it is unnecessary for us to consider it, but I think I should remark

that in relation to applications to this c ourt for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part, ***Shah Hemraj Bharmal & Bros V Shantosh Kumari [1961] EA 679 ;*** *that would appear a more relevant auth ority."*

If any doubt existed on the matter, the doubt was finally laid to rest in the case of **BELINDA MURAI & NINE OTHERS V AMOS WAINAINA , Civil Application No. Nai 9 of 1978 (unreported**) , where Madan, J.A. made his celebrated remark with regard to mistakes by counsel. He said:

"The former advocate's belief was a mistake on a point of law, however wrong he might have been in this behalf. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely though mistakenly believed his view was correct. A mistake is a mistake. It is not 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 cou nsel 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. ..."

After the ruling in **Belinda's case** , there can be no doubt that a mistake of counsel, whether on a point of law, or fact, can amount to a sufficient reason to warrant the court extending time and thus "**not closing the door of justice**" in the face of a litigant.

I now turn to the application before me. Mrs Madahana, counsel for the applicant, tells me that she made a mistake and if I understood her correctly, the mistake she made was that after she and counsel for the respondents had taken out the hearing date in the court's registry by consent, she entered in her diary only the number of the application, that is, her application for extension of time, but did not write down the full names of the parties. She had another matter in the High Court and it was also entered in the diary on the same day. So on the day when her application came for hearing in this Court, she assumed it was in the High Court, together with the other matter in her diary. The matter did not come up at all in the High Court and as she did not have the cause list for the Court of Appeal, she did not know that the matter had come up in this Court.

I do not know that this is a reasonable explanation for Mrs Madahana's non-appearance. The purpose for taking dates by consent is that it relieves the other side and the court of the duty to ensure that both sides to the case are served with a hearing notice. In this case, it was not necessary for anyone to remind Mrs Madahana that her application was coming for hearing. She had entered it in her diary and she had entered it against the correct date. I would imagine that to distinguish High Court cases from those of the Court of Appeal, the numbering would be something like **"HCCC NO ... OF 2000"** and for the Court of Appeal it would be **"CIVIL APPLICATION/APPEAL NO ... OF ...."**. Mrs Madahana was saying that if she had entered the full names of the parties in her diary that would have helped her determine which court was hearing the matter. I do not know how that would have been but Mrs Madahana did not tell me what efforts, if any, she made to find out where the case was and what had happened to it.

She came to know about the matter on 27th September, 2001, two days after I had dismissed the application. She did not file her present motion until 25th October, 2001, and when I asked her what caused that long delay, her answer was that under **rule 55 (4) of the rules** , she had thirty days within which to file her application. So her reasoning goes something like this:

"Even though through my own mistake I failed to attend court and the respondents through my default obtained an order in their favour, yet I am given thirty days to plead the rectification of my mistake and the respondents must wait for at least twenty - eight days before I move."

I do not think any one who is seeking the indulgence of the Court ought to be allowed to reason like that. The truth of the matter is that her failure to attend on 25th September, 2001, is consistent with their conduct throughout this case. As I pointed out earlier, the applicants' appeal was lodged in the Court on 12th September, 2000. On 12th June, 2001, the respondents lodged in Court their motion to strike out the appeal and as I have said, that motion is still pending. The applicants then took until 2nd October, 2001,

to file their motion which I dismissed on 25th September, 2001, for their non-appearance. For my part, I am satisfied these applicants have not shown a sufficient cause to warrant the exercise of my unfettered discretion in their favour. Confusion and slothfulness cannot constitute sufficient cause. Even if the applicants did not have to show sufficient cause and my discretion was unfettered as that exercised by the court under **rule 4** , I doubt whether I would have been prepared to exercise the discretion in their favour. They do not deserve it. That being my view of the matter the order that I make must be that the motion filed by the applicants on 25th October, 2001, shall be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 21st day December, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR