REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 362 OF 1999

BETWEEN

1. MOHAMED YAKUB

2. MOHAMED YUSUF t/a YASSER BUTCHERY ....APPLICANTS

and

1. MRS. BABURI NASA

2. SAIDI NASHEAN

3. ROBERT M. CHEGE t/a COVENANT AUCTIONEERS ....RESPONDENTS

(Application for extension of time to lodge a Notice of

appeal from the Ruling of the High Court of Kenya at Nairobi (Mr. Justice Githinji) dated 22nd June, 1998 in H.C.C.C. No. 1945 of 1995)

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R U L I N G

The applicant, Mohammed Yakub and Mohamed Yusuf t/a "Yasser Butchery" have brought this Notice of motion under rule 4 of the Court of Appeal Rules, seeking orders that time for lodging a Notice of appeal against the ruling of Githinji J. dated 22nd June, 1998 be extended for one week from the date of the order. Secondly that time for filing a late appeal and the record of appeal against the foresaid ruling be suitably extended and leave be granted to re-file the record of Civil Appeal No. 209 of 1998 to be given a new number. Mr. Satish Gautama, counsel for the applicants has listed and argued six grounds upon which the Notice of motion is based. It suffices to state that some of the matters raised involved other litigations though in the same suit and between the same parties, but not strictly part of this application and which I do not think are relevant to this Notice of motioTnh.e ruling which the applicant is dissatisfied with was delivered in the superior court by Githinji J. on 22nd June 1998. The applicant gave Notice of Appeal and filed the same on 26th June, 1998 and thereafter lodged the appeal on 6th

October, 1998. According to the certificate of delay attached to Mr. Kamara's, counsel for the applicants affidavit, the proceedings were collected by the respondent on 27th July, 1998. So by the time the appeal was filed, time had already expired on 25th September, 1998.

According to M/s Rodrigues, counsel for the applicant in the superior court and who filed an affidavit in this motion, the delay in filing the appeal was her mistake. In that she "erroneously assumed that the 60 days period for filing the appeal commenced to run from the date the certificate of delay was received, since without, it the record of appeal if filed would ex-facie appear to be filed out of time".

Civil Appeal No. 209 of 1998 came up for hearing on 3rd May, 1999. It was struck out in the absence of the respondent, who had not been served with a hearing notice nor had he made any application for the appeal to be struck out on the ground that the same had been filed out of time and without leave.

Immediately after that, Mr. Gautama who had already noticed the defect and informed the court about it filed this application immediately on 17th March, 1999. It is the applicants' contention that the delay of only eleven days cannot in the light of the explanation be construed as inordinate as to disentitle them from my discretion being exercised in their favour.

In addition to the confusion in M/S Rodrigues mind as to when she had to file the appeal, there was the additional factor as deponed in her affidavit that she was sick and out of her office for most of September. I agree with Mr. Kitonga that if counsel wanted this factor to be taken into consideration she should have supported the same with some credible documentary evidence, as to her ill health.

Finally, Mr. Gautama asserted that if the intended appeal is not admitted out of time the applicants will suffer irreversible and irreparable damage through no fault of their own. They have been carrying on their business of a butchery in the premises for several decades under different landlords previous to the respondents. Their tenancy being a controlled one, they have been in the premises for over 12 years. During this long period they have made substantial improvement including a cold storage facility whose value is in several million shillings. Finally in the intended appeal the applicants will canvass serious grounds of appeal, eleven in number as it had been indicated in the struck out appeal. The grounds are not frivolous.

Mr. Kitonga's strenuous objections to the application were contained in his replying affidavit in which he asserted that this application is just one of the many intrigues by the applicants, in an endeavour to sustain proceedings and thereby prolong their illegal occupation of the suit premises, the subject matter of the litigation. If I am not wrong I was made to understand that the applicants were evicted and are no longer occupying the premises. However, Mr. Kitonga's point is that the appeal having been filed as far back as 6th October, 1998, this application was not filed till the 17th March, 1999. In his view there had been inordinate delay and in the meantime a lot of other litigation have gone between the parties culminating in the dismissal of the respondent's suit by the ruling, subject matter of this appeal. In that regard the prosecution of this application is a mere abuse of the Court process because the applicants merely went to use the suit to perpetuate their illegal occupation of the suit premises.

I need not say anything more than this, that the litigation between these parties has taken a long time. While the principle of the law is that litigation must come to an end, it is equally correct to state that the parties to the litigation must be given a fair chance to be heard on what they perceive to be their rights to a reasonable conclusion. The numerous applications and counterapplications both in the superior court and this Court are in themselves a clear indication as to the importance the whole of this litigation is to both parties.

M/s. Roedrigue has taken blame for her mistake in that she was under the mistaken belief that before filing her appeal she had to be in possession of the certificate of delay and file the same in terms of rule 81(I). The stipulated documents for filing an appeal in terms of rule 81(1) are:-

"a.A Memorandum of appeal in quadruplicate

b. The record of appeal in quadruplicate

c. The prescribed fee and

d.Security for the cost of the appeal".

The excuse of visiting the Registry, writing and waiting for the certificate of delay to be prepared and signed so as to include the same for the purpose of lodging the appeal, was not necessary. This was no doubt a mistake she genuinely made and only became aware of it when Mr. Gautama drew her attention to it. I have seen no evidence or any indication that counsel was not labouring under a mistake belief, or that her action was motivated by any other reason. It has been held by this Court that the cause of the mistake by counsel is immaterial, it makes no difference how the mistake arises so long as it is a genuine mistake. I can put it in no better terms than Madan J.A (as he then was) in the often quoted case of Belinda Murai and Nine others VS Amos Wainaina in Civil application No. Nai. 9 of 1978 (unreported):

"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 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. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not u nknown for a final court of appeal to revers itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice".

As to the complaint that counsel took a long time after filing of this application and having the same heard. Strictly speaking and as pointed out by Mr. Gautama, this is not a matter that is controlled by counsel alone. The court's registry has a part to play.

While I completely agree with Mr. Kitonga that litigation must come to an end, but as stated above, weighing these against other interest of justice that the end of the litigation should be after a hearing on merits of both parties, further being satisfied that the delay was not inordinate, I am of the view that the applicants are entitled to my discretion being exercised in their favour.

In that regard, I hereby grant the application filed on the 17th day of March, 1999 and order that the applicants do file their Notice of Appeal within 7 days from today's date and thereafter file the record of appeal within 14 days from the date of filing the Notice of Appeal. Costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 22nd day of March, 2000.

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR