



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)**

**CIVIL APPLICATION NO NAI 50 OF 1983**

**BETWEEN**

**CLEOPHAS WASIKE .....APPELLANT**

**AND**

**MUCHA SWALA.....RESPONDENT**

*(Appeal from the High Court at Eldoret, Mbaya J)*

**JUDGMENT**

Cleophas Wasike (the appellant) is dissatisfied with the decision of a single judge in this civil matter and wishes to have it reversed by the full court and Mucha Swala (the respondent) is opposed to this. The learned judge's ruling was that Cleophas Wasike's application for an extension of the time in which to reinstate his appeal was dismissed with costs on January 20, 1984 in Nairobi. The learned judge gave two reasons for this. First, Cleophas Wasike had to show sufficient reason for the delay which he attributed to his advocate's sloth but the learned judge said this was not sufficient reason. Secondly, he had to show that the appeal if reinstated had an overwhelming probability of success and he failed to do so. The judge said that the principles that apply to the exercise of his discretion to extend the time to take an essential step under the rules applied also to an application for more time in which to reinstate an appeal.

It is difficult to extract from the material in this application any background to the dispute between the parties. All we have is a motion on notice filed on October 26, 1983 by Cleophas Wasike asking for an order that the Civil Appeal 6 of 1983 in this court be reinstated and that the time in which he had to serve Mucha Swala with the memorandum of appeal and the record of appeal be extended. He cites rule 4 of the Court of Appeal Rules (cap 9) as the rule under which he brought his motion on notice. But it is an appeal from the judgment of the High Court at Eldoret of November 19, 1982 in Eldoret High Court Civil Appeal 2 of 1982 so if Cleophas Wasike succeeds before us he will be bringing a second appeal.

He has made allegations against his advocate in Eldoret in the motion on notice and in his affidavit of October 24, 1983 in support of it. He says that his advocate did not serve the advocate for Mucha Swala with the memorandum of appeal in Civil Appeal 6 of 1983 and so the advocate of Mucha Swala asked for it to be struck out when the appeal came on for hearing before this court at Nakuru and that is why he has appeared in person and filed his application to the single judge and the full court in Nairobi. He said his own advocate was dilatory and also complained that the advocate for Mucha Swala was at fault in not collecting the memorandum of appeal and the record of appeal from his advocate, but of course, that is not the task of Mucha Swala's lawyer. Furthermore, Cleophas Wasike submits, the advocate for Mucha Swala drew the agreement of sale for both parties and he knew that the appeal was coming on in the

Court of Appeal and, in all, was not taken by surprise when the appeal came on for hearing before this court at Nakuru.

When the parties made their submissions before us on May 11, 1984 the agreement was said to concern some land for which Cleophas Wasike paid a great deal of money. Mucha Swala pointed out that he had a large family and nowhere else to go to if he was made to leave the land which was the subject matter of the suit in the first court. Cleophas Wasike maintained that Mucha Swala had more land elsewhere (in Kimilili?) and the elders had awarded him this parcel and so had the subordinate court at Kitale and he could not fathom how the High Court in Eldoret had set aside these orders and awarded the land to Mucha Swala. Cleophas Wasike concluded by saying he had purchased this land for the sake of some of the sons of his father and he described them as 'orphans' which is, we think, a plea *ad misericordiam*.

We have obtained a record of the appeal before the High Court at Eldoret, and of the proceedings in the court of the resident magistrate at Kitale, and it is clear that the subject matter of the appeal is land, plot 81 in the Kabafewe Scheme, and of considerable importance to Cleophas Wasike and Mucha Swala and their families. The intended appeal revolves around, among other points, the pecuniary jurisdiction of the subordinate court, the legality of referring the issues to arbitration and the effect of the provisions of the Land Control Act. Matters of some weight, to be sure. Mucha Swala and his family are still on the plot.

Now rule 4 when the matter came before the single judge in this court in January 1984 provided that the applicant had to show sufficient reason for the court to extend the time limited by any rule or any decision of this court or of the High Court. Since February 8, 1984 the court, may, on such terms as it thinks just, extend this time. So in those days, Cleophas Wasike had to account satisfactorily for the delay and, if he succeeded in doing that, then he had to show that there was some merit in his appeal. We do not, with great respect, agree that he had to show that his appeal had an overwhelming probability of success. Today Cleophas Wasike must show that there is merit in his appeal, extending the time to institute it and/or serve it will not cause undue prejudice to Mucha Swala and, finally, the delay is not inordinate. And that is now the descending scale of importance. Compare *Ladud Ltd v Siu* The Times November 24, 1983 CA.

A recent decision of this full court in a reference from a single judge also made it clear that it would, in the circumstances of that case, reverse the decision of the single judge of this court because the intended appeal related to land and because, although the applicant could not technically explain satisfactorily the delay or take advantage of the proviso to rule 81(1), nevertheless the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal. *John Kuria v Kelen Wahito*, Nairobi Civil Application Nai 19 of 1983 April 10, 1984. Here, again, the subject matter is land and Mucha Swala or his advocate have known all along that Cleophas Wasike is determined to institute his appeal.

And, under rule 4, he has persuaded us he is entitled to this indulgence. Therefore, we reverse the decision of the learned judge, allow the application of Cleophas Wasike, order that Civil Appeal 6 of 1983 be reinstated, and that he be given twenty one days from today to serve Mucha Swala with the same memorandum of appeal and the same record of appeal if they are in proper form and thereafter his appeal be set down for hearing on a date to suit the convenience of this court and of the parties. Cleophas Wasike has been granted this considerable indulgence by this court and although he has succeeded in what he set out to do, when he came to the full court, it is, in our view, right that he should pay Mucha Swala for the costs of this application in any event. Those are the orders of this court.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of June , 1984.**

**A.A KNELLER**

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**JUDGE OF APPEAL**

**A.R.W HANCOX**

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**JUDGE OF APPEAL**

**J.O NYARANGI**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**