



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Omolo JA )**

**CIVIL APPLICATION NO. NAI. 166 OF 1994**

**BETWEEN**

**1. ITUTE INGU**

**2. JOHN MALAVU MUTUNGU.....APPLICANTS**

**AND**

**ISUMAEL MWAKAVI MWENDWA.....RESPONDENT**

**(Application for leave to file notice and record of appeal out of time in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Mr Justice O’Kubasu), dated 14th March, 1985**

**in**

**HCCA No 357 of 1980)**

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**RULING**

I must frankly admit that this application has caused me a lot of anxiety, particularly in view of the fact that the subject matter of the dispute is land, and it would seem land of considerable acreage. Again it is clear that the two applicants, Itute Ingui and John Malavu Mutungu, have always wished to appeal against the ruling of the High Court dated the 4th January, 1983 but delivered on the 14th March, 1985. The ruling is said to be that of Mr Justice O’Kubasu but that is really not correct. The ruling is clearly that of Mr Justice Muli (as he then was) and Mr Justice O’Kubasu only read it out on behalf of Mr Justice Muli, who was then obviously not serving in the High Court. The applicants did not append a copy of the ruling to their application, but during the hearing before me, Dr Mutunga who appears for the respondent, Isumael Mwakavi Mwendwa, made a copy available to me.

It appears that the dispute between the applicants and the respondent started somewhere in a subordinate court. The respondent would appear to have lost in the subordinate court. He then appealed to the High Court and that appeal was entered in that Court as Civil Appeal No 357 of 1980. It would seem that at some stage the High Court, instead of dealing with the appeal itself, referred the matter for adjudication by a panel of elders and that panel duly filed its award in the High Court. The award so filed was dated the 17th May, 1982. It would appear from the ruling of Mr Justice Muli, which the applicants seek to

challenge, that after the award was filed, some persons named in the ruling as Kivunnya Munguti, Mbuthu Mutuku, Mwova Muthoma, Peter Mbithi and Dr E Mutune applied to the High Court by a notice of motion that the award ought to be set

aside. The application to set aside was heard by Mr Justice Muli and he wrote a ruling dated the 4th January, 1983, and which, as I have said was read out on his behalf by Mr Justice O’Kubasu on the 14th March, 1985. I understand from Mr Mogikoyo, for the applicants that the applicants were then unrepresented. They filed a notice of appeal on the 22nd March, 1985. That was within the 14 days allowed by the Rules of this Court. The applicant John Malavu Mutunga, in his supporting affidavit attempts to explain what happened after the notice of appeal was filed. They went to M/s PTM Kisongoa & Co Advocates of Nairobi and instructed them to prosecute the appeal on their behalf. Mr Kisongoa assured them that he would take all the necessary steps to file the appeal and having thus assured them, the applicants left the matter entirely in his hands. They then kept on visiting the offices of Mr Kisongoa but that every time they went there they were told that the Court of Appeal registry had not set down the appeal for hearing. This went on until the 12th July, 1994, some nine years later, when they received a letter from the lands office asking them to surrender the title of the disputed land. They ran to Nairobi to find out from the court registry what had happened and it was only then that they realised that the record of appeal had in fact never been filed. Even the notice of appeal which they had filed on their own on the 22nd March, 1985 had been struck out on the 10th March, 1993. The applicants then ran to their present advocates and filed this application on the 4th August, 1994. I would remark here that the present application was filed within about two weeks of the applicants knowing what had in fact happened. This fact, taken together with the fact that when still acting in person, the applicants had filed their notice of appeal within time shows clearly that the applicants have always wanted to appeal against the decision which in effect deprived them of their land. In asking me to exercise my discretion in their favour, what the applicants are telling me is this:

“We have been deprived of our land - in our view unjustly. As soon as the order depriving us of the land was made, we took immediate steps to appeal to this Court and having filed our notice of appeal, we handed over the matter to our lawyer. For some nine years, that lawyer cheated us that he had filed an appeal when he had in fact not done so. As soon as we realised that our lawyer was cheating us, we changed lawyers and we have promptly come before this Court with this application. The sins of our previous lawyer ought not to be visited upon us, and accordingly the Court should extend for us the time within which to file the appeal.”

The applicants cited to me the case of *Owino Ger v Marmanet Forest Co-operative & Credit Society Ltd* Civil Application No NAI 7 and 166 of 1986 (consolidated) – unreported – wherein this Court remarked as follows at pages 4 to 5:-

“... True enough at one time, the discretion to extend time was exercised within strict boundaries, and mistakes of advocates and their clerks for whom they were responsible, were not matters which would attract the exercise of the discretion. Very strict rules were observed as to the quality of the reasons to be given for the extension of time. Mr Muthoga cited examples of this nature. But fortunately the tide changed originally with the decision in *Gatti v Shoosmith* [1939] All ER 916, and taken in the same spirit was the amendment of rule 4 of this Court’s Rules. It was wise to leave this Court with unfettered discretion to examine the quality of all the mistakes which may occur, whether by an advocate and his firm or a client himself. But even before the amendment it was foreshadowed by such important decisions as *Belinda Murai v Amos Wainaina* Civil Application No 9 of 1978, when an advocates *bona fide* error on a point of law was held to be a mistake in the nature of a special reason. Again in *Cassam v Sachania* Civil Application No 1 of 1981, an advocates wrong interpretation of a rule led to the exercise of discretion. ...”

What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is *bona fide*, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine

the nature or quality of the mistake or mistakes. What is the mistake alleged here? It is that the advocate in fact filed no appeal at all and that for some nine years he kept cheating the applicants that he had filed an appeal and the applicants believed him. The advocate obtained the proceedings within a reasonable time. He next obtained a certificate of delay. In all these he made no mistake of a legal nature, as far as I can see. He simply did not file the appeal and the applicants have not told me if they asked him why he had not filed the appeal and the reason he would have given them for his failure to act in the matter. It seems that as

soon as the applicants learned that no appeal had been filed, they simply instructed their present advocates, and it is not surprising that I do not have before me any kind of explanation whatsoever as to why no appeal was in fact filed. True, the previous advocates may have, for some reason of their own, cheated these applicants, but I have to weigh that against the fact that the present respondent waited for the applicants to take action in the matter until on the 6th October, 1992, some 7 years after the original judgment, when he filed his notice of motion to strike out the notice of appeal. That motion was itself unchallenged and the respondent obtained an order upon it on the 10th March 1993. The present application was filed some 16 months thereafter. The applicants are entitled to justice, but the respondent is equally entitled to it. If for some nine years the applicants were let down by their advocates, then they, ie applicants, cannot now seek to saddle the respondent with that mistake. There ought to be an end to litigation, and in my view to allow the present application would amount to saying that so long as a mistake, of whatever nature, is shown to have been made by an advocate and not the client, then the client is entitled to a favourable consideration from the Courts. I would myself reject that kind of contention and hold that while a mistake by counsel is not necessarily a legal bar to the Court exercising its discretion in favour of the victim of the mistake, the Court is nevertheless entitled to examine the nature and quality of the mistake before deciding in which direction the discretion should go. I hold that in the particular circumstances, the delay of some nine years is grossly inordinate and has not been satisfactorily explained. As I have said I have not been told why the advocate failed to act in the matter. I accordingly refuse to exercise my discretion in favour of the applicants and that being my view of the matter, this application fails and I order it dismissed with costs to the respondents.

**Dated and Delivered at Nairobi this 27th day of September 1994.**

**R.S.C.OMOLO**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**