



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 33 OF 2016

BETWEEN

JAMES NYASIMI KIANA.....APPLICANT

AND

DAVID NANKONE MBOA.....RESPONDENT

(Application for extension of time to file and serve an Notice of Appeal and Record of Appeal out of time from the Judgment High Court at Kisii , S. Okong'o, J. dated 31st October 2014

in

(ELC Suit No 568 of 1995)

RULING

By a Notice of Motion dated 24th May 2016, **the applicant, James Nyasimi Kiana** has applied for time to be extended to file and serve a Notice and a Record of Appeal under **Rule 4** of the **Court of Appeal Rules 2010**.

The Notice of Motion was filed on grounds that by the time the applicant's counsel notified him of the judgment in mid May 2015, the time for filing of the notice of appeal had lapsed. The applicant then instructed his counsel Mr. Bosire of Bosire Gichana & Company advocates to file an appeal, but that it was not until early February 2016 that the applicant learnt that the former advocate had not taken any steps to file the appeal. This led him to instruct the firm of Begi and Company Advocates to file the appeal instead. It was further contended that there was an arguable appeal which would be rendered nugatory if leave was not granted to the applicant to file the appeal out of time, and that the respondent would not suffer any prejudice.

In a supporting affidavit sworn by the applicant on 24th March 2016, the applicant deponed that when the judgment was delivered on 31st October 2014, he was not present in court, and that his former counsel was informed of the decision in mid May 2015. That due to the failure of the former advocates to file an appeal, he instructed the firm of Begi and Company Advocates in early February 2016. The applicant

blamed his former counsel for the delay in the filing of the appeal.

In a replying affidavit sworn on 20th May 2016 by the respondent, it was averred that the judgment was delivered in the presence of both parties; that on 11th November 2014 his counsel was served with a copy of a request for proceedings by the firm of Ndemo Mokaya and Company Advocates; that on 14th November 2014 the same firm of advocates served his counsel with a notice of appeal; that it was therefore not true that the applicant's counsel had not taken steps to file the appeal. It was further averred that in the event the applicant's complaints against his former counsel were true, then the former counsel should have confirmed the averments in an affidavit. It was further deponed that the application herein was intended to deny the respondent of the fruits of his judgment, given the inordinate delay in filing the intended appeal, where no plausible explanation had been proffered.

In his submissions, learned counsel for the applicant, **Mr. Begi** reiterated the averments in the application, but added that, the application had been under preparation from February until 24th May 2016 when it was eventually filed. Counsel squarely blamed the firm of Bosire Gichana and Company Advocates for the delay in filing the appeal, which he contended was due to their failure to expeditiously grant consent for Mr. Begi to file the intended appeal on behalf of the applicant. It was counsel's view that the applicant's former advocate's mistake should not be visited upon the applicant.

Learned counsel for the respondent, **Mr. K. Onyancha** opposed the application and submitted that after the letter requesting for the proceedings and the Notice of Appeal was served upon his firm, no further steps were taken to file the record of appeal. Counsel further submitted that no explanation was provided as to how the firm of Ndemo Mokaya and Company Advocates which filed the notice of appeal was instructed or, when the firm of Bosire Gichana was instructed; that both firms should have filed affidavits to explain the reasons for the delay.

The application is brought under **rule 4** of this Courts rules, where under it is settled that the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercise judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought. The case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** these principles were set out thus;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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 judgment was delivered on 31st October 2014. On 11th November 2014 the respondent's counsel was served with a request for proceedings, and thereafter with a notice of appeal on 14th November 2014 by the firm of Ndemo Mokaya and Company Advocates. This application was filed on 24th May 2016, which about 19 months from the date the judgment was delivered.

According to the applicant, after his former counsel Mr. Bosire informed him of the decision of the High Court sometime in May 2015, he immediately instructed him to lodge an appeal. By this time the period for lodging the notice of appeal had already lapsed. It was when his former counsel failed to file the appeal that he was forced to seek alternative legal assistance. The firm of Begi and Company Advocates was thereafter instructed, after which it took a further three months for preparation and filing of the instant application. The blame for this delay was again attributed to the firm of Bosire Gichana and Company Advocates, this time it was contended that it failed to expeditiously consent to Begi and Company Advocates filing the appeal on behalf of the applicant.

In determining whether the delay has been adequately explained, it will be necessary to consider whether

firstly, the period between the time the judgment was delivered upto the time when Mr. Begi received instructions was adequately explained, and secondly, whether the period after Mr. Begi was appointed to the time when this application was lodged was also adequately explained.

It is evident from the record that the firm of Mokaya and Company Advocates, were initially instructed by the applicant to file the appeal, as it was this firm that requested for proceedings on 11th November 2014 and lodged notice of appeal on 14th November 2014 both of which were served on the respondent's counsel. It is instructive that this notice of appeal was filed within the prescribed period.

The applicant blamed the firm of Bosire Gichana and Company Advocates for failure to lodge the notice of appeal and the record of appeal, yet no mention is made of the role played by Ndemo Mokaya and Company Advocates. There is also no explanation as to when and how the firm of Bosire Gichana and Company Advocates was instructed. Neither the firm of Ndemo Mokaya and Company Advocates nor Bosire Gichana and Company Advocates explained the anomaly of the dual representation of the applicant, or the reason for the delay.

Consequently, in much as the applicant has laid blame at the doorstep of Bosire Gichana and Company Advocates, I can find nothing to show that the delay was attributable to them. In my view therefore, the delay between the date of the judgment and the date Mr. Begi was instructed has not been satisfactorily explained.

Then there is a period of three months between the date Mr. Begi was instructed, and the date this application was filed that still requires to be explained. According to Mr. Begi, the delay was again attributed to Bosire Gichana and Company Advocates, as the latter had delayed in issuing a letter of consent authorising the former to take over the appeal.

The record shows that Ndemo Mokaya and Company Advocates, who filed the notice of appeal were the advocates on record for the applicant in this Court. This being the case, Mr. Begi ought to have sought their consent to represent the applicant in the intended appeal, and not that of Bosire Gichana and Company Advocates. Clearly, Mr. Bosire's firm was not at the time representing the applicant, and therefore the reason given that the delay in filing this application was attributable to Mr. Bosire is in my view, untenable. Given the foregoing, I find that the delay in filing this application has also not been explained to my satisfaction.

This now brings me to the question of the prayers to file a notice of appeal in this application. The record shows that a notice of appeal was filed on 14th November 2014. In this application the applicant prays for extension of time to file a notice of appeal and a record of appeal. Should I grant the orders as prayed, would mean that there would be two notices of appeal on the record. Is this feasible?

In the case of **Ocean Freight Shipping Company Limited vs. Oakdale Commodities Limited – Civil Application No. Nai. 198 of 1995**, a full bench of this Court dealt with a similar question from a ruling of Shah J.A as a single judge on the same issue. It stated as follows:

“The applicant made its motion asking that it be allowed to file its notice of appeal out of time. The motion, as is the practice of the Court, was heard by a single judge (Shah, J.A). The learned single judge took the view that since the applicant had already filed a notice of appeal which was still on record, to extend the time to file a notice of appeal would be in effect to allow the applicant to file two notices of appeal. The learned Judge thought rightly, in my view, that what the applicant ought to have asked him to do was to extend time by such a period as would validate the notice of appeal lodged on the 21st August, 1992. The applicant did not do so and the learned single Judge thought that:

‘So effectively I am asked to disregard the notice of appeal filed on 21st August, 1992, and allow the filing of another notice of appeal out of time and then validate ex post facto, the appeal already filed without there being an extension of time to validate the notice of appeal filed on 21st

August, 1992. I cannot do so. The applicant is taking too many short cuts.”

The applicant has ignored the notice of appeal filed on 14th November 2014, and to grant the orders as prayed would result in two notices of appeal on the record. What the applicant ought to have done was to file an application seeking to validate the existing notice of appeal, so as to enable a record of appeal to be filed thereafter within the prescribed time. This was not done; which has in effect rendered this application incompetent.

On the chances of success of the appeal, a draft memorandum of appeal had been included in the record specifying 4 grounds. The applicant complains that the learned judge construed the evidence of the respondent's occupation of the suit property to be that of adverse possession, that the learned judge failed to interrogate the source of the three agreements; that the court failed to critically interrogate the particulars of fraud and finally disregarded the appellant's evidence. Without going into the merits of the appeal, when the grounds are considered as against the judgment, I am not certain that they raise discernable complaints, and as a consequence, I am unable to gauge the probability of their success.

Accordingly, having taken all of the required factors into account in the exercise of my discretion under **rule 4** of this Court's rules I have come to the conclusion that the application for extension of time fail. The Notice of Motion dated 25th April 2014 is dismissed with costs to the respondent.

DATED and DELIVERED at Kisumu this 16th day of December, 2016.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR