



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**Civil Appli 212 of 2008 (KSM 15/08)**

**HEZEKIA MICHOKI.....APPLICANT**

**AND**

**ELIZAPHAN ONYANCHA OMBONGI.....RESPONDENT**

***(An application for extension of time to serve Notice of Appeal and file record of appeal out of time from the judgment & decree of the High Court of Kenya at Kisii (Kaburu Bauni, J) dated 18<sup>th</sup> October, 2007***

**in**

**H.C.C.C. NO. 207 OF 1988)**

**\*\*\*\*\***

**R U L I N G**

In a judgment dated and delivered on 18<sup>th</sup> October, 2007, the superior court (*Kaburu Bauni, J as he then was*) declared the respondent *ELIZAPHAN ONYANCHA OMBONGI*, the son of and administrator of the estate of the original plaintiff in the suit *JEREMIAH OMBONGI MANYURA*, deceased, the owner of land parcel No. GESIMA/149 and restrained the applicant *HEZEKIAH MICHOKI* by himself, his servants and/or agents from claiming or interfering with the quiet possession and enjoyment of the said land by the respondent. The applicant was also directed to execute documents to transfer the said land to the respondent and in default the court Executive Officer would do the same. The applicant's counter-claim was also dismissed in its entirety and the applicant was ordered to pay costs of the suit. The applicant's advocates are the same advocates representing him now. Apparently, the applicant felt aggrieved by the judgment. His advocate filed Notice of Appeal for him on 23<sup>rd</sup> October, 2007 but that Notice of Appeal was not served upon the respondents though it was signed by the Deputy Registrar on 2<sup>nd</sup> November, 2007. On 7<sup>th</sup> December, 2007, the applicant's advocates were supplied with the certified copies of proceedings and judgment. The applicant's lawyer said in the affidavit before me that at that time they were supplied with certified copies of proceedings and judgment, they were preparing to close their offices for 2007 December holidays. They did so until 7<sup>th</sup> January, 2008 when they opened their offices. The record of appeal was never filed in time. On 21<sup>st</sup> April, 2008, after a delay of some over four

months, from the time the applicant's advocates received the certified copies of proceedings and judgment, the applicant through his advocates filed notice of motion seeking extension of time to file Record of Appeal. In response to that application, the respondents filed a replying affidavit in opposition in which the deponent stated that the applicant had not served Notice of Appeal. The applicant's advocate says that that is the first time he came to know about the omission.

As a result of that aspect, he withdrew that first Notice of Motion on 24<sup>th</sup> June, 2008 so as to be able to apply to have the time of serving the Notice of Appeal extended also. After withdrawing that Notice of Motion on 24<sup>th</sup> June, 2008 he filed this Notice of Motion before me dated 16<sup>th</sup> July, 2008 and filed on 22<sup>nd</sup> July, 2008. It is filed pursuant to *Rules 1(2), 41, 47 and 81* of the Court of Appeal Rules. In the Notice of Motion, the applicant is seeking orders:-

*"1. That the applicant be granted leave to serve the Notice of Appeal dated 23.10.2007 and received at Kisii High Court on the even date out of time.*

*2. That the applicant be granted leave to appeal out of time against the superior court's judgment made on 18<sup>th</sup> October, 2007."*

The grounds in support of the application are in brief that the certified copies of proceedings and judgment were received by the applicant's advocates on 7<sup>th</sup> December, 2007 at a time when the same advocates were preparing to close their offices for 2007 December holidays. That they opened the offices on 7<sup>th</sup> January, 2008 but upto February, 2008 there were some skirmishes all over the country after the announcement of Presidential Election results which were disputed and so Kisumu was a no go zone and/or it was adversely affected; that the intended appeal is arguable; that the Record of Appeal was never filed within time because the applicant's advocate forgot and that was advocate's mistake which should not be visited upon the applicant, and that failure to serve the Notice of Appeal in time was as a result of the mistake and/or oversight of the applicant's advocate. The respondent opposed the application saying that it is incompetent as it is based on wrong rules of the Court and that there was inordinate delay which has not been explained as the proceedings and judgment were received by the applicant's advocates on 7<sup>th</sup> December, 2007 and there is no explanation as to why no action was taken on the same until 21<sup>st</sup> April 2008 when the first application for extension of time to file Record of Appeal was filed. In any event, the events of January, 2008 were not relevant as the applicant's Notice of Appeal was filed on 23<sup>rd</sup> October, 2007 so that by January, 14<sup>th</sup> 2008, the sixty days allowed by the Rules for filing Record of Appeal had expired, and further, the respondents stated, after the alleged skirmishes, there was no proper explanation given as to why the applicant had to wait till 21<sup>st</sup> April, 2008 to file application for extension of time.

I have anxiously considered the record, the rival arguments, the affidavits on record, the grounds of the application, the judgment of the superior court and the law. It is not in dispute that the Notice of Motion was brought under wrong rules. The correct rule was *rule 4* of this Court's Rules which was not cited. That in my mind is however, a technicality which should not defeat substantive law from operating. It is clear to me and both parties did accept that though wrong procedural rules were cited and the correct rule omitted nonetheless, the application could have only been brought under *rule 4* of this Court's rules and none other. Both parties proceeded and addressed me with that rule in mind and I will proceed on the basis that it was indeed brought under *rule 4* of this Court's rules and consider it as such an application.

It is now settled law that when considering an application brought such as this which is clearly under *rule 4* of the court's rules, the courts exercise unfettered discretionary jurisdiction. In doing so however, the courts must exercise such discretion upon reason in other words judiciously and not

capriciously or upon its own whims. To ensure that the courts exercise such discretion judiciously, the court has, through previous pronouncements, set out matters that do guide it in deciding such an application. One such case in which these guiding principles are spelt out is the case of LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI - Civil Application No. Nai. 255 of 1997 (unreported) where this Court expressed itself thus:-

*"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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."*

It is upon these guidelines, that I will now proceed to decide this notice of motion before me. The notice of appeal was filed on 23<sup>rd</sup> October, 2007. Thereafter the applicant had sixty days to file the Record of Appeal. Parties agree that that time expired on 14<sup>th</sup> January, 2008, but the first application for extension of time was filed on 21<sup>st</sup> April, 2008. That in effect means that the first length of delay the applicant needed to explain in respect of filing the Record of Appeal is about 96 days. Thereafter I would not consider the period between 21<sup>st</sup> April, 2008 and 24<sup>th</sup> June, 2008 as there was an application for extension in place. The length of delay again starts on 25<sup>th</sup> June, till 22<sup>nd</sup> July, 2008 when this application was filed. That again is about 26 days. As far as the application for extension to file record of appeal is concerned, these are the delays the applicant needed to explain to my satisfaction. As to delay in serving the Notice of Appeal, the delay starts seven days after 23<sup>rd</sup> October, 2007 when it was lodged in court. I say so because in law, Notice of Appeal once filed, can be served upon the other parties notwithstanding - that it has not been endorsed by the Deputy Registrar. So the delay is from 31<sup>st</sup> October, 2007 to date. What explanation does the applicant offer for these delays?"

I will start with the delay to serve the Notice of Appeal. The applicant's explanation is stated in the supporting affidavit. It is found at paragraphs 10, 11, 12 and 13 of the supporting affidavit sworn by *Joseph Momanyi Aunga*, the advocate who represented the applicant and is handling this matter before me on behalf of the applicant. He states that the Notice of Appeal was lodged in court on 23<sup>rd</sup> October, 2007 and was signed by the Deputy Registrar on 2<sup>nd</sup> November, 2007. He received a copy on 5<sup>th</sup> November, 2007 and gave it to his secretary with instructions to make photocopies and then give the copies to private Process server to serve them on the advocates for the respondent. He never knew of what happened thereafter till he read affidavit of one of the respondent's advocates sworn on 17<sup>th</sup> June, 2008, in which it was stated that the Notice of Appeal was never served upon the respondent. He thereafter checked with the private process server who confirmed the allegation that respondent was not served with the Notice of appeal. By that time the alleged Process Server had left their service. The part of this statement which I find difficult to understand is why the alleged secretary's name was not disclosed in the affidavit, and why no follow up was made to ensure that the respondent was served or not served so as to make amends if need be. I find it difficult to appreciate that the advocate could find it difficult to know and disclose the name of a secretary who might have served them for sometime before she left their service. I also find it difficult to accept that the advocate never checked with the secretary as to whether his duties were actually carried out.

The next matter I will now consider is the delay of 96 days to file Record of Appeal. The applicant's explanation of this delay is that when they received the copies of proceedings and judgment on 7<sup>th</sup> December, 2007, they were closing their offices for December holidays. The second explanation is that when they opened offices on 7<sup>th</sup> January, 2008, there were skirmishes resulting from the result of the 2007 Presidential Election and that continued till the month of February, 2008. Thereafter he says as concerns the delay after February, 2008 as follows:-

*“18. That I know of my own knowledge that the filing of the Record of Appeal escaped my notice because of the said skirmishes and so many of my relatives who were staying in Eldoret, Kericho, Nairobi, Kisumu and Molo were affected and I was involved in one way or another to assist them.*

*19. I know of my own knowledge that I did not remember of this matter until on or about 17<sup>th</sup> March, 2008 when the applicant came personally to my chambers to inquire about his appeal to the Court of Appeal.”*

In short, no explanation is made for the delay to file Record of Appeal from 7<sup>th</sup> December, 2007 when the applicant's advocate received the proceedings to 17<sup>th</sup> March, 2007 when he was reminded of the appeal. I say no explanation is made of the delay because any conscientious advocate, duly aware of his duties could not close his offices for holidays having received such vital documents i.e. certified proceedings and judgment for appeal without first ensuring that the Record of Appeal was prepared and filed. The December holiday for which the advocates were closing their offices and which stopped them from proceeding to file the Record of Appeal at least before the Courts Christmas Vacation was not an official advocates vacation period that would have necessitated the advocates stopping to deal with this matter when the courts were still open. Secondly, I say no reasons are advanced for that delay because the applicant talks of skirmishes being there and Kisumu being no-go zone, yet he did not state specifically how, the skirmishes stopped him from acting on this matter. He did not state for example, that he prepared record, made an attempt to go to file the same in Kisumu but was stopped on the way by the skirmishes. Thirdly, the applicant's advocate admits that he slept on the matter and did nothing about it till 17<sup>th</sup> March, 2008 when the applicant went to his chambers. After 17<sup>th</sup> March, 2008 the applicant's advocate says the applicant went home to search for money to enable the appeal to be mounted. Unfortunately, the applicant has not sworn an affidavit to that effect and the delay between 17<sup>th</sup> March, 2008 and 21<sup>st</sup> April, 2008 when the first application for extension was made was another 34 days of which 14 days were for preparing record and the advocate says was taken up in sourcing for money yet the applicant who was supposed to be sourcing for money has not sworn an affidavit to that effect. Lastly, the delay between 24<sup>th</sup> June, 2008 when the first application was withdrawn and 22<sup>nd</sup> July, 2008 when this Notice of Motion was filed has not been explained at all. *Mr. Bosire* says that was the time required for preparation of the record before me. I find it unusual to believe that the said record before me, composed of 119 pages could have taken that long to prepare. I have on my own considered all explanations for the delay including the allegation that the applicants advocate was an election observer in the last elections. That again is neither here nor there as the elections ended in December, 2007 and could not restrain the advocate from taking action on the matter from 14<sup>th</sup> January, 2008 onwards. The same advocate, having failed in his duties, says his failure should not be visited upon the applicant who is still his client. Surely, he was chosen by the applicant and all his actions are on behalf of his client, the applicant who from the date the judgment was delivered on 18<sup>th</sup> October, 2007, never cared to check with him (advocate) as to what he was doing about his appeal till 17<sup>th</sup> March, 2008. I do not think it is fair for the advocate to ask me to ignore this failure on the basis that they are advocate's failures. That to me would be abusing the doctrine that advocates mistakes should not be visited upon their clients.

I have perused the judgment. I would not state either way whether the intended appeal is arguable as there is no draft Memorandum of Appeal annexed to the application. All there is are allegations in the affidavit in support of the application. As to the prejudice, I was not addressed on that aspect and I leave it at that.

In conclusion, I am not persuaded that the delay which is clearly inordinate has been explained to my satisfaction. That being my view of the matter, and as I have stated that I cannot make an informed view as to the arguability of the intended appeal, I would decline to exercise my discretion in favour of the

applicant in respect of the two orders sought.

The upshot is that the Notice of Motion dated 16<sup>th</sup> July, 2008 lacks merit. It is dismissed with costs to the respondent.

***DATED and DELIVERED at KISUMU this 5<sup>th</sup> day of DECEMBER, 2008.***

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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