



**ELISHA JUMA OWUOR..... APPLICANT**

**AND**

**WALTER MBOYA ONYANGO**

**HON. ATTORNEY GENERALR.....ESPONDENTS**

**RULING**

This is an application for extension of time from which to file a notice of appeal and a record of appeal following the striking out by this Court of a defective record of appeal on 15<sup>th</sup> October, 2010. The struck out record had been timeously filed.

At the hearing of the application the applicant was represented by Mr. P. J. O. Otieno advocate whereas the respondent was represented by Mr. Okero, advocate.

In support of the application Mr. Otieno relied on the affidavit in support which was sworn by him on 27<sup>th</sup> October, 2010 and on a supplementary affidavit similarly sworn by him and filed on 16<sup>th</sup> June, 2011. In opposition to the application, Mr. Okero, learned counsel for the respondent relied on the replying affidavit sworn by George Vincent Odunga on 8<sup>th</sup> November, 2010.

Mr. Otieno, centred his submissions on the fact that after the striking out he tried to apply for extension of time diligently but his effort was hampered by the absence of his client who was in the US and for this reason could not give instructions to appeal in good time, resulting in a delay of 10 days which he stated could not be said to be inordinate. Aware that the previous record of appeal had been struck out for not containing essential exhibits, Mr. Otieno submitted that as clearly explained in the supplementary affidavit that he had obtained an order from the Deputy Registrar Kisumu, to the effect that exhibits 5 to 10 should be excluded from the Record of Appeal to be filed.

Mr. Okero learned Counsel for the respondent in the main, submitted that as the previous Record of Appeal had been struck out for not incorporating all the exhibits, the Deputy Registrar's order excluding them from any new Record of Appeal, is not capable of curing the defect and this might in future result in a new defective Record of Appeal. For this reason he urged that the application should be struck out because it would be pointless extending time for yet another defective record of appeal.

It is common ground that the factors which this Court has hitherto taken into account when considering whether or not to extend time under **Rule 4** of the Court's Rules are firstly, the length of 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 – see ***Leo Sila Mutiso v. Hellen Wangari Mwangi CA 251 of 1997***. Taking the above factors into account it is not in contest that the delay was to the extent of 10 days and it is also clear from the

contents of the affidavit in support that the applicant has explained the delay as attributable to the applicant's counsel dealing with a client who was not based in the country when the record was struck out and for this reason, the advocate used the services of the applicant's brother to trace him. In the replying affidavit and in the respondent counsel's submission the reason and the length of delay have not been challenged at all nor has the respondent shown the prejudice he might suffer in view of the fact that he has not denied that the applicant is in occupation of the disputed piece of land.

My inclination based on the above reasons would be to extend time since the applicant does in my view satisfy the requirements of **rule 4**. However the respondents have raised a novel point which is: Can a Deputy Registrar's Order excluding certain exhibits cure the defects and enable the applicant to file another record of appeal without the exhibits some of which led to the striking out of the previous record by a full Court"

To my mind, such a point can only be resolved by a full Court. In addition what is in the forefront of my mind, is that at the end of the day what the applicant seeks in substance, is the right to file an appeal and have it heard on merit. The question is, should I deny him that right in a dispute involving land in which he is in possession" The answer I give is an emphatic no – for the reason that the right of appeal ought not be readily thwarted and on the contrary it ought to be facilitated by the court. In the case of **Dorcas Wasike Indombi vs Benson Wamalwa Khisa & 2 Others – Civil Appeal (Application) No. 87 of 2004** this Court held that the overriding objective has both procedural and substantive dimensions. I could not agree more. It is a statutory requirement which supersedes any rule made pursuant to the Appellate Jurisdiction Act and the provisions of the Act. In particular in the case it was held as follows:

***“A conflict is however unlikely to arise because Section 3A (1) of the Act not only enacts the overriding objective principle but also expressly superimposes the overriding objective to the application of the existing rules with the result that the Court is enjoined to apply the overriding objective principle in both the substantive and procedural matters. That is to say that the rules should also be construed in a manner which facilitates the just, expeditious, proportionate and affordable resolution of the appeals.”***

To my mind, all that the overriding objective requires, is for the Court to act justly in every situation before it. On my part I find that I do not have the power to determine in advance the adequacy of the record of appeal contemplated to be filed since that will be in the province of a full bench. For now in order to place myself in a position to act justly, I must therefore facilitate the applicants right of appeal and leave the issue of exhibits to the determination by a full bench. Consequently, in my opinion notwithstanding past precedents on **rule 4**, the advent of the overriding objective has drastically changed the relevant considerations with regard to rule 4. Rule 4 factors, though relevant must now be understood from the standpoint of the more extensive checklist as contained in **sections 3 A** and **3 B** of the Appellate Jurisdiction Act. In other words rule 4 must be interpreted with the overriding objective checklist in view. In the case of **Kenya Commercial Bank Limited vs Kenya Planters Co-operative Union – Civil Appl. No. Nai. 85 of 2010 (UR. 62/2010)** I held as follows:

***“The reason for this is that, although the court rules have a very special value as handmaidens of justice as often expressed, and in ensuring certainty, efficiency, predictability and curtailing arbitrariness, the O<sub>2</sub> principle now demands that whenever this Court is exercising any of its powers under the Act or the rules or interpreting them, the Court must give effect to the O<sub>2</sub> principle. Therefore since in the circumstances of this case, I am called upon to exercise the powers conferred on me by Rule 4 of this Court's rules, I must as a matter of statute law give effect to the O<sub>2</sub> principle. The net effect in my view is that, while the four factors will continue to assist the Court in assessing whether it has discharged its duty under sections 3A and 3B, it is***

***the considerations set out in the sections which take precedence and which must prevail.”***

In my view **section 3 A** and **3 B** are umbrella provisions, the check list of which must be taken into account in every situation when the Court is exercising power under any rule or provision of the Appellate Jurisdiction Act.

Consequently, notwithstanding the weighty arguments on the exhibits as set out above, it is my view that an extension of time in the circumstances, should be granted in order for the applicant to be facilitated in exercising his right of appeal. This is what embraces, facilitates and furthers the overriding objective in the circumstances of the case before me. In the result, I hereby extend time by specifically granting leave to the applicant to file and serve all the required documents set out in prayer (a) of the application dated 27<sup>th</sup> October, 2010 **within 14 days** of today’s date. I further order that the costs of the application be in the intended appeal.

It is so ordered.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of March, 2012.**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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