Case Number:	Civil Application 146 of 2010
Date Delivered:	12 Nov 2010
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Joseph Gregory Nyamu
Citation:	Daniel Kimani Njihia v Francis Mwangi Kimani & another [2010] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	6085 of 1990
Case Outcome:	Application dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J.G. NYAMU (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 146 OF 2010

IN THE MATTER OF INTENDED APPEAL

BETWEEN

DANIEL KIMANI NJIHIA……APPLICANT

AND

FRANCIS MWANGI KIMANI……1ST RESPONDENT

THIKA DISTRICT LAND REGISTRAR…….2ND RESPONDENT

(An application for extension of time to file Notice of Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Osiemo, J.) dated 7th June, 2006

in

H.C.C.C.NO.6085 OF 1990)

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RULING

This is an application brought under ***Rules 4*** and ***74*** of this Court's Rules. The application seeks leave to file Notice and Record of Appeal out of time in the intended appeal from the judgment and decree of the superior court delivered on 7th June 2006 in Nairobi by Osiemo, J.

The dispute relates to alleged excision of land measuring 0.62 acres from Land Parcel/LOCI Mukarara/253 which was allegedly added to parcel LOCI/Mukarara/960. The suit was commenced on 23rd November 1990 nearly 20 years ago.

At the hearing, the applicant was represented by learned counsel Ms Namisi whereas the respondent was represented by learned counsel, Mr Kaai.

The applicant in a nutshell has grounded his application on the grounds that the notice of appeal was timeously filed and served on the respondent as required under the rules; but no further action was taken to lodge a record of appeal for four years due to his counsel having left private practice

and joining gainful employment with the Kenya Anti Corruption Commission (KACC); the applicant's inability to raise fees in the sum of Kshs.150,000 demanded by his advocate and the applicant's indisposition between May 2007 and December 2007. The applicant's advocate concluded her submission by stating that according to the draft memorandum of appeal, the applicant had good chances of success and that that no prejudice was likely to be occasioned to the respondent since he was in possession.

On the other hand, the respondent counsel opposed the application on the grounds that the issue of inability to raise the fees to mount an appeal was a matter between the applicant and his advocate and this should not be visited on the respondent; that the sale agreement annexed in support of the application clearly states that the applicant had acknowledged receipt of Kshs.75,000 on 14th December, 2007 out of the purchase price of Kshs.250,000 and therefore he should have been in a position to pursue his appeal; that the applicant visited his advocates in November 2006, six months after the giving of instructions and that the next visit was after a further period of four months and there was no explanation of this lengthy delay and finally that the delay of four years was in the circumstances inordinate.

I have considered the submissions by counsel together with the affidavit in support of the application and the respondent's affidavit in reply.

I have for reasons that will become apparent later on in this ruling chosen the case of ***FAKIR MOHAMED vs JOSEPH MUGAMBI AND TWO OTHERS Civil Application No. Nai 332 of 2004*** as a starting point. In this case, the Court in a very broad way explained the considerations for ***rule 4*** applications in these terms:

"The exercise of this Court's discretion under *rule 4* ***has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors …"***

The factors discussed in the case represents a very wide spectrum of all past decisions on the point. I have considered the application with all the above considerations in mind.

As regards the challenge to the notice of appeal, there is still a valid notice in the record and although the respondent had the opportunity of challenging its validity within 30 days of its filing he did not do so under ***Rule 80*** of this Court's rules. Concerning the merit of the application, it is clear to me that the Court has not been told that the application for a copy of the proceedings was made within 30 days in accordance with the requirements of ***Rule 81*** of this Court's rules. For this reason, it is clear to me that the Record of Appeal should have been lodged on 8th August, 2006 within 60 days of the decision but this was not done. In addition, no certificate of delay was produced yet the proceedings were availed to the applicant on 14th March 2007. Again the documentary evidence of the alleged indisposition does not show that the six days of hospitalization were the cause of the lengthy delay in taking action since the nature of the illness is undisclosed and the affidavit is silent on it. Similarly the inability to raise money to mount an appeal cannot be an excuse because the applicant could have invoked ***Rule 112*** in seeking relief from fees in civil appeals but did not do so and it is not clear to me why a whooping Kshs.150,000 was needed to mount an appeal! In any event the sale agreement

according to its terms placed in the applicant's hands shs.75,000 which again should have been sufficient to pursue the appeal. I agree with the respondent that client/advocates relationship concerning money should never be visited on the respondent because it can only affect the client/advocate interse. On the issue of arguability or chances of the appeal succeeding, ***prima facie,*** this is not apparent although I cannot at this stage say more. Turning to the consideration of any possible prejudice to the respondent, I agree with the applicant that since both parties are in possession of their respective parcels prejudice is not apparent. However, as regards this consideration of prejudice, I prefer to take a broad view of it. As a single Judge, I consider that the delay of four years in reaching finality could also be regarded as prejudicial in the circumstances taking into account that the matter has been in court now for 20 years. Indeed finality of any matter should be an important cog in the wheel of justice and delay of four years in reaching finality is in my view, even on its own, extremely prejudicial to both parties and the wider interests of justice

Taking a broad view of the situation, the applicant has as per the above analysis failed to explain important time limits and also failed to take essential steps in order to pursue his appeal in terms of ***rule 81*** of this Court's Rules. It is clear to me that the application has been brought after the advent of the overriding objective (O_2), as stipulated in ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act. Failure to observe essential time lines defeats the objectives of a proper case management process. To my mind the omissions and lapses as described above derogate from both the objective of the Appellate Jurisdiction Act and the statutory duty of the Court.

Section 3A reads:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

The marginal note states that the O_2 is the entire ***object*** of the Act.

Section 3B states:-

(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

a) The just determination of the proceedings;

b) The efficient use of the available judicial and administrative resources;

c) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

d) The use of suitable technology.

It is illustrative that the marginal note to the section states that the application of the provision or

section is the ***duty*** of the Court. Thus, although the Rules of this Court as crafted, have considerable value in my view, every rule must henceforth relate or conform to the O_2. As expressed in the last century by a famous judge rules are the handmaids of justice. In modern terms, rules are bound to serve as good servants of the Court in the case management process but they must of necessity be constantly reviewed by the Rules Committee to ensure that they are effective facilitators in the attainment of the ends of justice and the overriding objective.

To my mind the overriding objective is both a procedural and a substantive provision and the Court's role in either exercising its discretion (if any) or exercising any power under the Act or the rules must have the overriding objective in view and indeed the overriding objective (O_2) must constitute the touchstone of the exercise of any power or discretion under any rule or substantive provision. Applying the overriding objective as the touchstone in the circumstances before me, I find the delay is largely unexplained and inordinate and therefore any extension of time in the circumstances would violate ***section 3A(1)*** of the Appellate Jurisdiction Act, because the case is 20 years old which period includes four years of inaction by the applicant and also in failing to take essential steps to institute an appeal. This delay further violates one of the principal aims in furthering the overriding objective namely ***section 3A(c)***, which demands the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties. With respect, the self confessed lack of funds by the applicant is a clear admission that the parties and their counsel did not give consideration to the need to speed up the processes in order to make the entire litigation affordable to the parties.

In other words, I now have a different ball game from the considerations or factors set out in the ***FAKIR MOHAMED case supra*** including the cases which preceded it or handed down thereafter.

In my view, the case for the formulation of a new test is compelling. In my opinion, the previous considerations or factors will have to dovetail into the overriding objective and depending on the circumstances of each case, those factors which go counter to the overriding objective or its principal aims should be regarded as falling on the ***wrong side*** of the overriding objective resulting in the application for extension being rejected whereas those which are not seriously contrary to the overriding objective should be regarded as on the ***right side*** of the overriding objective resulting in the application for extension of time being allowed. The court in undertaking the analysis aimed at conforming to the O_2 would have to do so as a matter of duty and not discretion since the nature of the overriding objective in Kenya is both substantive and procedural. To illustrate the point inordinate and unexplained delays clearly fall on the wrong side of the overriding objective whereas short delays and inadvertent omissions should be regarded as falling on the right side of the objective. A measure of flexibility and broadmindedness on what is fair in the circumstances of each case should be an important consideration.

With the underpinning of the overriding objective although expressed in different terms in the Constitution itself, I envision new pathways of substantive justice being paved by the courts now and in the years ahead. The bottom line is – where an applicant has been reasonably diligent in his endeavours to institute an arguable appeal his endevours ought not be thwarted at the altar of technicalities.

With the above in view, any extension in this matter would violate ***section 3B(1)(c)*** of the Appellate Jurisdiction Act. All in all, the application is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 12th day of November, 2010.

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR