



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 4 OF 2013

KHADIJA KHATIOLI OKUTOYI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN MWANZA KENYATTA

MOHAMMED MUSUNGU OKONGO

MOSES OKALIE.....DEFENDANT/APPLICANTS

RULING

The application is dated 29th April 2019 and is brought under section 7 of the Appellate Jurisdiction Act Cap 9 and Article 159 of the Constitution of Kenya 2010 seeking the following orders;

1. This honourable court be pleased to extend the time of filing the Notice of Appeal hereof and the Notice of Appeal lodged in this Court on 21st March, 2019 be deemed as duly filed from the date of granting leave herein.
2. That the costs of this application be costs in the main appeal.

It is based on the grounds that the applicants herein being aggrieved by the entire judgment and orders delivered on 28th February, 2019 filed a Notice of appeal against the same on the 21st of March, 2019 without having sought leave for extension of time. The applicants have an arguable appeal against the said judgment and orders. The applicants lodged a Notice of Appeal on the 21st March, 2019 which was six (6) days outside the time stipulated for filing such notices. The same was served upon the respondent's advocate on 2nd April, 2019. The delay in filing the Notice of Appeal is excusable on the basis of the reason indicated in the annexed supporting affidavit by the counsel for the applicants. The applicants seek that this honourable court be pleased to extend the time of filing the Notice of Appeal and that the Notice of Appeal filed on the 21st March, 2019 be deemed as duly filed from the date of granting leave herein. The delay in filing the Notice of appeal six (6) days out of time stipulated by the rules of the honourable court is not inordinate and the cause thereof has been explained candidly by counsel. The interests of justice would be better served by allowing the orders herein and giving the applicants an opportunity to have the memorandum of appeal and record of appeal filed herein heard to conclusion. This honourable court is possessed of the powers to grant the orders sought. The respondent will suffer no prejudice if this application is granted.

That the application is opposed and the respondents submitted that the applicants have not stated the reasons for the delay in filing the application. That this court is functus officio after delivery of the judgment thus may not entertain the current application. That this court has no jurisdiction to allow an appeal to be filed before an appellant court. That the applicants had legal representation throughout the trial and were in court during the delivery of judgment yet they claim to have scanty information. That the applicants have not shown how they were looking for the court file since 7th March, 2019 which their counsel on record got to locate on 19th March, 2019 That it is not the business of this court to look at the memorandum of appeal as to whether the same raises triable issues. That the application is a waste of this court's time.

This court has considered the application

On the issue of jurisdiction Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-

S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

Section 7 is clear, that the High Court (which now with the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is as follows:-

Rule 4 : Extension of time

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The power to extend time for the filing of a Notice of Appeal in our opinion is vested in both the High Court and Courts of equal status and the Court of Appeal. In the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR the Supreme Court held that;

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; **and**
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

The principles that guide this Court in determining whether to extend time pursuant are set out in this Court’s decision in **Mwangi v. Kenya Airways** [2003] KLR 486 at page 489 as follows:-

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported), the 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.”

These, in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

This court has considered the instant case. The applicant submitted that judgment and orders delivered on 28th February, 2019 in filed a Notice of appeal against the same on the 21st of March, 2019 without having sought leave for extension of time. The applicants have an arguable appeal against the said judgment and orders. The applicants lodged a Notice of Appeal on the 21st March, 2019 which was six (6) days outside the time stipulated for filing such notices. The same was served upon the respondent’s advocate on 2nd April, 2019. The delay in filing the Notice of Appeal is excusable as they could not locate the court file. I find that the delay was not inordinate and accept the reasons given. I find this application is merited and I grant the same with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 2ND JULY 2019.

N.A. MATHEKA

JUDGE