



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 675 OF 2010**

**CORPORATE INSURANCE COMPANY LTD....PLAINTIFF/RESPONDENT**

**VERSUS**

**KELLANN WANJIKU NJIRIRI .....DEFENDANT/ APPLICANT**

**RULING**

1. The instant Ruling is in respect to a Notice of Motion dated 8<sup>th</sup> July, 2020 by the Defendant brought pursuant to Sections 1A,1B and 75 of the Civil Procedure Code, Order 50 Rule 6 of the Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law.

2. The main prayer sought in the application is that the Court extends time for the filing of the Notice of Appeal. It is also urged that the costs of the application be provided for.

3. The application is premised on the grounds on the face of it and a brief Supporting Affidavit of Kellyann Wanjiku Njiriri, the Applicant herein sworn on 8<sup>th</sup> July, 2020.

4. The gist of the affidavit is that the judgment in this matter was delivered on 19<sup>th</sup> May, 2020 and counsel for the Applicant was not notified of the date through an email link which the court was required to do; that counsel came to learn that the judgment had been delivered after he received a copy of a letter dated 1<sup>st</sup> July, 2020 written by counsel for the Plaintiff on 2<sup>nd</sup> July, 2020 informing him that the Plaintiff was intent on executing the judgment if the Defendant did not settle the same; that the failure therefore to file an appeal on time was not intentional and in any case, neither the Respondent nor the Interested Party would be prejudiced if the orders sought are granted.

5. The Plaintiff/Respondent opposed the application vide a brief Replying Affidavit sworn by one Muturi Kamande, counsel on record for the Respondent herein on 24<sup>th</sup> July, 2020. Counsel deposed that under Rule 74(2) (*I opine he was referring to the Court of Appeal Rules*), the Applicant was required to file a Notice of Appeal within 14 days after the delivery of the judgment; that a delay of 40 days was inordinate and unacceptable; that there was no evidence to show that enquiries had been made in the registry on the delivery of the judgment after 5<sup>th</sup> May, 2020 the date the judgment was slated to be delivered and that therefore there was no good reason the Applicant had advanced to warrant the grant of the orders sought. It was thus urged that the application be dismissed with costs.

#### **Submissions**

6. The application was canvassed by way of written submissions. Only the Applicant's counsel filed submissions. Counsel for the Respondent unfortunately only attended court on 23<sup>rd</sup> November, 2020. He was subsequently severally served with notices to attend court but did not. The court had no option but to proceed without the Respondent's submissions.

7. The Applicant's brief submissions are dated 30<sup>th</sup> October, 2020. They basically reiterate the fact that the delay in filing the Notice of Appeal was not deliberate. That the judgment was delivered during a period when the Commercial Division was conducting trials on the effectiveness of the e-system filing system. Through the virtual platform, the login links were being sent to the parties by email addresses through which the court would also inform the parties of the position of a file including a date fixed for appearance in court.

8. It was the Applicant's submission that his counsel was not sent the login link and was therefore not aware that the judgment had been delivered. Further, that counsel only learnt of the delivery of the judgment after he was sent the letter demanding the settlement of the judgment. That in that case, the delay in filing the Notice of Appeal was not deliberate and the Applicant moved the court as soon as she learnt about the outcome of the judgment.

9. On law, counsel for the Applicant referred the court to, amongst other cases, the cases of Stanley **Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited (2015)e KLR**, **Mutiso v Mwangi- Civil Application NO. NAI 255 of 1997(UR)**, **Fakir Mohammed v Joseph Mugambi & 2 Others, Civil Application NO. NAI 332 OF 2004 (UR)** and **Monica Malel & Another v Eldoret Civil Application NO 246 OF 2008** on the factors that a court should consider when granting extension of time to file an appeal out of time.

### **Analysis and determination**

10. An avalanche of case law is available on the factors that a court should consider in extending time to file an appeal. What is clear is that extending the time to file an appeal is the exercise of discretionary powers of the court. The Court of Appeal in the case of **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited (2020)e KLR** whilst referring to the cases of **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**; **Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR**; **Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited [1998] eKLR**; **Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board [2015] eKLR**; **Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR**; and **Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013]eKLR** among numerous others distilled some of the principles that a court should consider as follows:

**“(i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.**

**(ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Court's indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.**

**(iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.**

**(iv) As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.**

**(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.**

**(vi) The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;**

**(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”;**

**(viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.**

**(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.**

**(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;**

**(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.”**

11. Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others (2014)e KLR** laid down the principles for extension of time when a court is exercising its discretion as follows:

**“(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 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 respondent of the extension is granted.**

**(6) Whether the application has been brought without undue delay; and**

**(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”**

12. In the present case, there is no doubt that the Applicant has set out a satisfactory explanation as to why she was not able to file the Notice of Appeal on time. A look at the court record is a testament that the judgment was initially reserved to be delivered on 5<sup>th</sup> May, 2020. As it were, the judgment was not delivered on this day and nothing on record shows the date on which it was further reserved for delivery.

13. As counsel for the Applicant submits, it is within public knowledge that during this period, the Commercial Division was undergoing a transition from physical to virtual hearing of cases and communication to parties. It was not controverted in this regard and more so that the registry ought to have sent an email login link through which the parties would have been notified of the judgment date and that such a link was not received by the Applicant’s counsel.

14. It is therefore not a complaint in vain that the Applicant was never notified of the date the judgment was delivered. As such, without knowledge of the outcome of the judgment she could not have taken any steps to appeal.

15. It cannot also be said from these facts that there was inordinate delay in bringing this application. The letter attaching a copy of the judgment was received on 2<sup>nd</sup> July, 2020 by the Applicant’s counsel. He moved with speed and filed the instant application on 8<sup>th</sup> July, 2020. Conclusively, there was only a delay of five (5) days.

16. As superior courts have held that, each case should be considered on its merits, this is a case where the Applicant did not sit on the judgment and woke up to its execution. I find the explanation for the delay valid and plausible. I am also of the view that neither the Defendant nor the Interested Party will be prejudiced if the Applicant is granted leave to file an appeal. To the contrary, it is in the interest of justice that the Applicant is accorded an opportunity to ventilate her case by way of an appeal. That accords with granting a party the right to be heard as enshrined in the Constitution.

17. Exercising my discretion therefore, I find the application merited and I allow the same with the following orders.

**a) The Defendant/Applicant is granted leave to file a Notice of Appeal out of time.**

**b) The Notice of Appeal should be filed and served within 14 days of the date of this ruling.**

**c) Costs of this application are awarded to the Plaintiff.**

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> JUNE, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

**1. Mr. Waiganjo for the Defendant/ Applicant.**