



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL MISC. APPL. NO. 447 OF 2010

MUGAMBI & CO. ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

JOHN OKAL OGWAYO.....CLIENT/1ST APPLICANT

RUTH REBECCA AUMA.....CLIENT/2ND APPLICANT

RULING

1. The application dated 24th September, 2018 seeks orders that this honourable court be pleased enlarge time for the Applicants to file a Notice of appeal out of time as advised by the Deputy Registrar.

2. It is stated in the grounds and the two affidavits in support of the application that the Notice of Appeal was not filed within time due to the Advocate's assistant having forgotten to diarize the matter. That further delay was occasioned by the non- availability of the court file. That after perusal of the file and the ruling, an attempt to file a Notice of Appeal was declined at the registry. It is contended that the Applicants stand to suffer great prejudice if the orders sought are not granted.

3. The application was opposed. It is stated in the replying affidavit that the application is incurably defective as enlargement of time within which to appeal from the ruling herein ought to be sought in the Court of Appeal in accordance with Rule 4 of the Court of Appeal Rules. That there has been a delay of two years before the application at hand was filed following demand for payment of the decretal sum. That parties had notice of the date of the delivery of the ruling. That there is no letter exhibited to demonstrate that the file had been requested for perusal or any receipt for the same. The Respondent saw the instant application as an attempt to delay him from enjoying the fruits of his judgment.

4. I have considered the application, the response to the same and the submissions made by counsel for the respective parties.

5. I first turn to the issue whether this court has the requisite jurisdiction to entertain the application at hand. In support of his submissions, the Respondent's counsel referred this court to Rule No. 4 of the Court of Appeal Rules 2010 which provides as follows:

“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 of a superior court, for the doing of any act authorized or required by these 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.”

6. The Respondent's counsel placed further reliance on the case of **Niazons (K) Ltd v China Road & bridge Corporations (Kenya) [2000] eKLR**. While it is noteworthy that the year 2010 Court of Appeal Rules could not have been applicable then, the application in the said authority was on an application made in the Court of Appeal unlike in the instant case where the application is made before the High Court. However, the principles on the considerations to be taken into account in an application on merits are applicable herein.

7. I have looked for example at the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR** wherein it was held as follows in a similar case on the jurisdiction of the High Court:

“...Section 7 of the Appellate Jurisdiction Act, Cap 9 is drawn as follows:-

Section 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...It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of 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. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. 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 drawn as follows:"

8. I am in agreement with the exposition in the persuasive authorities aforesaid that there is the option to file an application for extension of time for the filing of a Notice of Appeal either in the High Court or in the Court of Appeal. This is the position provided for in Rule 41 of the Court of Appeal Rules provides as follows:

"The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court."

9. This position is buttressed by the Court of Appeal ruling in **Kenya Airports Authority & another v Timothy Nduvi Mutungi [2014] eKLR** where the Court of Appeal held as follows:

"The application of 10th December, 2012 (the application for extension of time to lodge Notice of Appeal out of time), was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:- (Section 7 of the Appellate jurisdiction Act set down ...Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined..."

10. This court therefore is clothed with the requisite jurisdiction to entertain the application at hand.

11. In the **Niazson (K) Ltd (Supra)** it was held as follows:

"As regards extension of time in which to file Notice of Appeal and lodge Record of Appeal under Rule 4 of the Rules of this Court, there are numerous decisions of this Court to the effect that this Court has unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion ought to be exercised in its favour. Although this is unfettered discretion but like all judicial discretion, it must be exercised on reason not caprice, and the exercise of that discretion must not be arbitrary or oppressive.

In Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil application No. NAI 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"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."

12. In the case of **Nicholas Kiptoo Salat Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** the Supreme Court of Kenya referred to the following Court of Appeal decisions:

(a) The case of **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR**.

(b) In the case of **Leo Sila Mutiso (supra)**

In these two decisions, the principles laid out are similar to those set out in the **Niazsons (K) Ltd (supra)**.

13. In the **Nicholas Kiptoo Salat Arap Korir Salat** case (supra) the Supreme Courts exposition was as follows:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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. “

14. Turning back to the case at hand, the ruling the subject of the intended appeal was delivered on 30th November, 2016 in the presence of both parties. The application at hand dated 24th September, 2018 was filed on 25th September, 2018. That is a period of almost two years. The explanation given is not supported by any letter to the Deputy Registrar requesting for the file soon after the delivery of the ruling. The letter annexed is reflected as dated 6th September, 2018 and received in court on 7th September, 2018, about two years after the delivery of the ruling. This gives credence to the Respondent’s position that the Applicant was only woken up by the threat of execution proceedings.

15. On the mistake in the diarization of the matter, such mistakes happen. As stated by the Court of Appeal in the case of **Republic & 3 others v Joseph Mburu Gitau & 635 others [2015] eKLR** as follows:

“...mistakes by counsel and/or their clerks would not in themselves deprive an otherwise deserving litigant of a favourable exercise of the Court’s discretion.

Depending on the circumstances of each case, this Court, while not condoning those mistakes, often excuses them in the interest of justice.”

16. Taking into account the circumstances of this case which involves a claim for professional fees by the advocate wherein the Advocate Bill of Costs was taxed by the Taxing Master at Ksh.714,502/= in the primary case involving damages claimed for the death of a minor, and further taking into account that the appeal is possibly arguable, the prejudice, if any, to be visited on the Respondent can be compensated by way of costs.

17. With the foregoing, and to meet the wider interests of justice, this court is inclined to exercise discretion and allow the application without undue reliance on technicalities of procedure.

18. To balance the competing interests of the parties herein, the application is allowed on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels or in court within 30 days from the date hereof. Costs of this application to the Respondent/Advocate.

Dated, signed and delivered at Nairobi this 8th day of April, 2019

B.THURANIRA JADEN

JUDGE