



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 239 OF 2014

ESTHER WANJUGU MURAGURI.....PLAINTIFF/RESPONDENT

-VERSUS-

NELSON MWANGI MURAGURI.....DEFENDANT/APPLICANT

RULING

1. Vide a Notice of Motion dated 17th July 2019 the Applicant herein seeks leave to file a Notice of Appeal out of time against the judgment/decision of L N Waithaka J, delivered on the 25th February 2019.
2. The application is premised on the grounds on its face as well as the supporting affidavit of the Applicant sworn on the 17th July 2019.
3. The Application was opposed by the Respondent's Replying affidavit dated the 31st July 2019 and was disposed of by way of written submissions.
4. The Applicant's written submissions was that the judgment, which was to be delivered on the 11th February 2019 was not delivered on the scheduled day wherein he had been informed by his Counsel that he would be notified once the notice for the judgment was issued by the Court.
5. Unfortunately this was not to be and he came to learn late in time that the judgment had been delivered on the 25th February 2019. He thus sought for a copy of the same on the 29th April 2019 and being aggrieved by the Court's decision, he intends to file an Appeal against the judgment.
6. The Applicant's further submission was that the delay in filing the Notice of Appeal was occasioned by the fact that he had not been informed on the date when the judgment was to be delivered.
7. The Applicant relied on the provisions of Section 7 of the Appellate Jurisdiction Act and on the decided case in **Eastleigh Mattresses Limited vs Stephen Mihango Kariuki to & 2 Others [2014] eKLR** to submit that this Court had jurisdiction to extend time to file a Notice of intention to Appeal.
8. The Applicant's further submission was that notice of judgment had also not been served upon his former Advocate as there had been no evidence of an affidavit of service.
9. That further, pursuant to an application dated 17th to May 2019 seeking leave to appoint his present Advocate after judgment had been delivered, the same had only be allowed on the 11th July 2019 wherein he had then filed the present application. That the delay of 3 (three) months was not inordinate in the circumstance.
10. That at this stage it was not necessary for him to show that the intended Appeal had high chances of success as was held in the case of **Eastleigh Mattresses Limited** (Supra) and therefore the Court would still grant the prayers as sought in this Application without him demonstrating that the intended Appeal was arguable.
11. In opposing the Application, the Respondent submitted that on the 20th February 2019, the Court had issued a notice that judgment would be delivered on 22nd February 2019. That wherein her Advocate acknowledged receipt of the said notice on the 22nd February 2019, the Applicant's Counsel who was also based in the same town must have also received a copy of the same on the same date but during the delivery of the judgment neither the Applicant nor his Counsel had been present.

12. The Applicant had not informed the Court as to when he came to know that judgment had delivered and neither had his previous Counsel sworn an affidavit stating that he had not received the Notice of Judgment. That the period of 60 days before the Applicant obtained a copy of the judgment and another 120 days to change his Advocate was grossly inordinate, unexplained and inconsistent with the conduct of a party who was supposed to be vigilant. Reliance was placed on the decided case in **Donald O Raballa vs The Judicial Service Commission & Another. Nairobi Civil Application No. 10 of 2015.(UR)**

13. That the extension of time was not a right of a party as it was an equitable remedy that was only available to a deserving party. The Applicant in the present instance was not a deserving party to benefit from the Court's discretion. That should the application be allowed, there would be delay in the distribution of her husband's estate to the prejudice of the larger family as the matter had been pending since 1995. The Respondent sought for the dismissal of the application with costs.

Determination.

14. I have considered the Applicant's application, the Respondent's opposition to the application, Counsel's submissions, the applicable law as well as the authorities herein cited. I find the issue arising for determination as being whether to grant the orders set herein.

15. The principles that guide a Court in considering an application for leave to file an Appeal out of time were laid down by the Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited [2015] eKLR** as follows:-

*The parameters for the exercise of such discretion are clear. See **MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR)**, **MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486** and **FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported)** where this Court rendered itself thus:*

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure 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 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 matter to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In **MWANGI V KENYA AIRWAYS LTD**, [supra], the Court having set out matters which a single judge should take into account when exercising the discretion under Rule 4, held:*

“The list of factors a Court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge 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 so long as the factor is relevant to the issue being considered.”

*It is upon the Applicant to place sufficient material before the Court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the Applicant with those of the Respondent. This was well stated in the case **M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997** where the Court stated:*

“That right of Appeal must be balanced against an equally weighty right, which of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

*A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in **MONICA MALEL & ANOR V R, ELDORET CIVIL APPLN NO. NAI 246 OF 2008**, stated:*

“When a reason is proposed to show why there was a delay in filing an Appeal it must be specific and not based on guess work as Counsel for the Applicants appears to show the Applicants are not quite sure of why the delay in filing the notice of Appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

*It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in **HAYWOOD V COPE, (1858) 25 BEAV 140**:*

“the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the Court may oblige him to do so.”

16. Upon considering the above captioned finding by the Court of Appeal and the peculiar circumstances of this case in that the judgment that is intended to be Appealed against was delivered in the absence of the Applicant and his Counsel, that there was no evidence that the said parties had been served with the notice of Judgment, and further that pursuant to the fact that upon the Judgment having been delivered and there having been another Application dated 17th May 2019 by the Applicant seeking leave to appoint his present Advocate, and that the Application had been allowed on the 11th July 2019 before the present application was filed, I find that was no inordinate delay in the

circumstance.

17. The Respondent has not demonstrated the kind of prejudice, if any she would suffer if the application is allowed other than stating that there would be delay in the distribution of her husband's estate to the prejudice of the larger family. I am, therefore, inclined to exercise the discretion vested in this Court in favour of the Applicant. Accordingly, I make the following orders:-

- i. The time within which the Applicant ought to have filed an Appeal to the Court of Appeal is extended by forty-five (45) days from the date of this ruling.
- ii. If the Applicant has not been supplied with the documents required to prepare the record of Appeal, the Applicant's Counsel to liaise with the Deputy Registrar of this Court and ensure that the same are supplied within fifteen (15) days of this order.
- iii. If the Applicant does not file the Appeal within the time stipulated in (i) above the window granted to file the Appeal shall automatically lapse.
- iv. The Applicant shall bear the costs of this Application

Orders accordingly.

Dated and delivered at Nakuru this 6th day of August 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE