



EMP v FNM (Civil Application 55 of 2020) [2023] KECA 871 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 871 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 55 OF 2020**

JW LESSIT, JA

JULY 7, 2023

BETWEEN

EMP APPLICANT

AND

FNM RESPONDENT

(An application seeking to file an appeal out of time against the judgement and orders of the High Court of Kenya at Mombasa, (Thande, J), delivered on 5th May 2020 in HCCC Divorce Cause No. 31 of 2015 (O.S))

RULING

1. By a Notice of Motion dated August 6, 2020 brought pursuant to Section 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 4, 5(b), 41 and 42 of the [Court of Appeal Rules, 2010](#) (now Rules 4, 5 (2)(b), 43 and 44 of the 2022 [Rules](#)) (hereinafter the Rules), EMP who is the Applicant seeks orders:
 - i. Moot
 - ii. That the Honourable Court be pleased to grant the Applicant leave to file a memorandum of appeal and record of appeal out of time against the judgment and orders of the High Court at Mombasa made on May 5, 2020 in Divorce Cause No 31 of 2015.
 - iii. That upon grant of leave out of time, the memorandum of appeal and the record of appeal lodged herein be deemed as duly filed.
 - iv. That costs of this application be provided for.
2. The grounds of the application are on the face of the application and in the supporting affidavit of the Applicant of even date. The Applicant contends that she filed the Divorce Cause against the FNM, the Respondent, in the High Court at Mombasa Divorce Cause No 31 of 2015. That judgment in the



matter was to be delivered on May 5, 2020 Zoom virtual platform. That due to technical hitches, the Applicant's advocate on record was not able to log into the platform on time and that the judgement delivered in his absence. The Applicant contends that the judgment was not emailed to them by the court registry as should have happened.

3. That despite various attempts by the advocates' clerk, the registry did not supply the judgment, until the May 25, 2020. The Decree in the case was issued on June 11, 2020 and is annexure 'EMP-1'. That the Applicant instructed her advocates to file an appeal on the May 27, 2020 and on May 28, 2020 the Notice of Appeal was filed. The Notice of Appeal is annexure 'EMP- 2' in the Applicant's affidavit. That the proceedings to the case were not supplied and instead the Applicant's advocates were supplied with hand written notes on 11th June 2020. The request for proceedings is annexure 'EMP-3', dated May 28, 2020. That the advocates took it upon themselves to type the hand written notes and then forwarded them to the court for proof reading and certification. The letter forwarding the typed copy is dated June 22, 2020, annexure 'EMP-4'. The Applicant deposed that her advocates on record filed a record of appeal on July 3, 2020 after they were unable to obtain typed proceedings. and memorandum of appeal
4. The Applicant has annexed a copy of Notice of Closure of Mombasa Law Courts until further notice, dated June 19th 2020 signed by the Chief Justice David Maraga. The notice said that a decision to suspend all open court activities in Mombasa law courts after several members of staff tested positive for Covid-19.
5. The Respondent has opposed the application by his replying affidavit dated December 19, 2020. The Respondent admits that the firm of Kipsang and co. advocates for the Applicant logged on and off the virtual platform, the day the judgment was delivered. He deposes that there was no evidence that the firm applied for the proceedings. He deposed that the application to extend time was only filed by the Applicant after he filed an application to strikeout the Notice of Appeal in Miscellaneous Civil Application No 49 of 2020, which is still pending. He deposed that his advocates have not been served with a letter applying for proceedings and that to date, no typed proceedings have been filed in court. He deposes that the Applicant had no arguable appeal.
6. The application was heard through this Court virtual platform on the February 27, 2023. Present for the Respondent was learned counsel Ms. Pauline Osino The firm of Christine Kipsang and company advocates was absent despite service upon them of the hearing notice.
7. Ms. Osino submitted that the firm of Mutisya and Company advocates were on record for the Applicant, that they had spoken that morning. She urged the Court to rule on the application based on the written submissions filed by both counsel to the parties, not wishing to highlight her submissions.
8. My mandate to intervene has been invoked on the main under Rule 4 of the Rules. That Rule provides.

“ Rule 4 of this Court's Rules (the Rules) 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.”



9. The principles that guide the court in the exercise of its mandate under Rule 4 of the *Rules* are set out in the case law. The court in *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR while referring to other authorities on the applicable principles observed:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No Nai. 26 of 2004*, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486* in which this Court stated:-“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 -vs- 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.” [Emphasis added]

10. The Court has to consider the length of the delay involved in this matter and the explanation the Applicant has given for the delay. Ms. Kipsang for the Applicant rehashed the explanations given in the Applicant’s affidavit. She submitted that she was unable to join the zoom platform on May 5, 2020 when the judgment in the matter was delivered due to technical hitches. She urged that after several attempts, she was only able to get the copy of the judgment on May 25, 2020. She passed it on to her client on May 25, 2020, and on May 27, 2020 she was instructed to file an appeal. That she filed Notice of Appeal on May 28, 2020. She urged that Covid-19 pandemic caused further delay in the filing of the record of appeal because the registry staff started working on shifts. That eventually she took upon herself to type the proceedings after which she forwarded to the court registry for certification and that she was still waiting for the certification. That she was forced to file the record of appeal without the typed proceedings.
11. Counsel relied on the case of *Salim Ali Sheikh vs. Kenya Power and Lighting Company Ltd* [2020] eKLR for the proposition that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time. Counsel urged that they have given sufficient reason why the appeal was not filed in time, and that it was circumstances beyond the control of the Applicant.



12. Counsel relied on *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, Civil Application No NAI 255 of 1997 (unreported) and *Salim Ali Sheikh v. Kenya Power & Lighting Company Limited* (2020) eKLR on the matters the court should take into consideration in an application for extension of time under Rule 4 of the Rules. This included the question whether the applicant gave sufficient grounds to aid the Court in exercising its discretion. She submitted that the Applicant has given sufficient reasons to this Court for not filing the Notice of Appeal in time and that the Applicant is not guilty of laches as her counsel on record communicated in good time with the trial court to be supplied with the certified proceedings and judgement.
13. Ms. Osino in her written submissions urged the Court to dismiss the application for being incompetent on two grounds. The first ground is that the Notice of Appeal was served upon them on June 8, 2020 through email, and on June 16, 2020 physically. That the Notice of Appeal should have been filed by May 19, 2020 as prescribed under Rule 77 (79 under 2022 *Rules*). That they were not served with the letter bespeaking proceedings contrary to requirement of Rule 77. Counsel urged that the Applicant was guilty of laches. She urged that the application should be dismissed with costs, since it was clear the present application was merely filed after the Applicant was served with an application to strike out the Notice of Appeal in Civil Application No 49 of 2020 involving the parties herein. Hence, the respondent contended that the record of appeal filed before this Court lacks the proceedings to date and the same lacks the contents of what should constitute an intended appeal.
14. Ms. Osino relied on the case of *County Government of Mombasa v. Kooba Kenya Limited* (2019) eKLR for the proposition that the Court's discretion to extend time only comes into existence after sufficient reason has been established. That only then does the Court consider absence of prejudice and prospects of success of the intended appeal.
15. I have considered the submissions by counsel, the affidavits for and against the application and the cases and the law relied on. The power of Court to extend time are wide and discretionary. However, they ought not to be exercised capriciously or whimsically.
16. In addition to the long line of cases from this Court that discuss the principles that should guide the Court in determining an application for extension of time is the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and of *Abdul Aziz Ngoma v Mungai Mathayo & another* [1976] eKLR. In both cases, it was held that that any delay should be satisfactorily explained. That 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 favourably exercisable.
17. It is imperative that in the exercise of this Court's unfettered discretion under Rule 4 the Court must consider whether there are any extenuating circumstances that would allow it to extend time wherein an Applicant is expected to sufficiently demonstrate to warrant the orders sought.
18. On the question of delay, the Applicant admits that there has been delay in the filing of the record and memorandum of appeal. The delay in filing the memorandum and the record of appeal from May 28, 2020 when the Notice of Appeal was filed to July 3, 2020 when the Record of Appeal was filed is 7 days. That is, considering that the appeal should have been filed within 30 days from the date the filing of the Notice of Appeal.
19. The Respondent has argued that the Notice of Appeal should have been filed by May 19, 2020. The Respondent in his affidavit admits that the Applicants counsel lodged in then out on the date was delivered. That gives credence to Applicant's deposition that her advocate had technical hitch and was unable to log into the virtual court in time and so was absent when the judgment was delivered. The Applicant has demonstrated the great length they went to obtain the copy judgment on May 25, 2020,



- the filing of the Notice of Appeal within three days, and the filing of the Record of Appeal 7 days out of time.
20. Ms. Kipsang has shown that Covid -19 pandemic led to several measures being taken to prevent the spread of the disease. I take Judicial Notice of the fact that due to Covid-19, there were a raft of measures taken by the Courts. From May 2020, no litigants were allowed in Courts; there was drastic reduction of Court staff going to work in Courts country wide, the numbers being reduced to the basic minimum. Eventually, litigants were expected to serve court processes and communication through email. Some Courts were closed completely, as in the case of Mombasa when staff contracted the disease.
 21. It is clear that the Applicant was a victim of the above- mentioned Covid-19 measures. Considering all these factors I find that the Applicant has given sufficient cause and satisfactory explanation why the filing of the Memorandum and the Record of Appeal were delayed. I find the reasons and the explanations given were valid and clear reasons. I must say that the efforts made by the Applicant demonstrates diligence and proof she was desirous to pursue the appeal to this Court, which is a constitutional right that has accrued to the Applicant.
 22. Let me mention that the grounds urged by the Respondent why the application should be struck out are not relevant to an application for extension of time. They are relevant in an application for striking out of the Notice of Appeal, which can only be heard by the full bench of this Court.
 23. Both parties made submissions on the issue of prejudice each stands to suffer if the ruling is not in their favour, let me consider that point as well. The Applicant submits that in the event the orders sought are denied, she stands to be evicted out of the matrimonial home as the Respondent has threatened to sell the said home and continues to deny her access to some of the properties, including a salon, which the court awarded to her. She annexed pictures of the Notice of Sale of the matrimonial home as ‘EMP-6.’
 24. The Respondent urged that the application is only meant to deny him the enjoyment of the fruits of his judgement and if the orders sought are granted, the same shall prejudice him, as he will be kept away from the use of the property awarded to him by the trial court. The applicant continues to enjoy free occupation without payment of rent while benefitting from the properties awarded to her by the court. He lamented that he required medical care and needed to sell the house to get the money to meet that need.
 25. I do appreciate the challenges each of the parties to this application are experiencing. However, the Applicant has an undoubted right to appeal from the decision of the Superior Court which right has accrued to her. She cannot be denied that right. I find that she will stand to suffer greater prejudice in the circumstances, if the application is declined.
 26. The last factor for consideration is the likelihood of the appeal succeeding. I see no need to look into that, especially because I am sitting as a single.
 27. The orders which commend themselves to me are as follows:
 - i. That the application dated August 6, 2020 is allowed.
 - ii. That leave is hereby granted to the Applicant to file a Memorandum of Appeal and Record of Appeal out of time against the judgment and orders of the High Court at Mombasa made on May 5, 2020 in Divorce Cause No 31 of 2015.
 - iii. That the Memorandum of Appeal and the Record of Appeal lodged herein be deemed as duly filed.



- iv. If none has been lodged, the Applicant shall have 30 days from today within which to file and serve the Memorandum of Appeal and the Record of Appeal.
- v. In default of (iv) above, the leave granted herein shall lapse.
- vi. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

