



**Duale v Savage & another (Civil Appeal (Application)
E362 of 2020) [2022] KECA 847 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KECA 847 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E362 OF 2020**

F SICHALE, JA

JULY 27, 2022

BETWEEN

MONA HUSSEIN DUALE APPELLANT

AND

PAUL JAMES SAVAGE 1ST RESPONDENT

LES BELLES SAUVAGES LIMITED (IN LIQUIDATION) 2ND RESPONDENT

*(Being an Application for Extension of Time to serve Notice of Appeal
and Record of Appeal against the Judgment and Decree of Bor J
dated 11th November 2019 IN (Nairobi ELC Case No. 270 of 2017)*

RULING

1. Before me is a motion dated 8th February 2021 brought pursuant to the provisions of Rules 1 (2) and 4 of this Court's Rules and Sections 3A and 3B of the *Appellate Jurisdiction Act* in which Mona Hussein Duale (the applicant herein), seeks the following orders;
 1. That the time limited to serve the Notice of Appeal and the Record of Appeal herein be extended.
 2. That the Notice of Appeal and the Record of Appeal served upon the respondents' counsel on 22nd November 2019 and 4th December 2020 respectively, be deemed as having been served within the extended period.
 3. That costs of this motion do abide the outcome of the appeal."
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant and James Kounah, the advocate who has the conduct of this matter on behalf of the applicant, who deposed *inter alia* that judgment in ELC Case No. 270 of 2017; *Paul James Savage*



V Les Belles Savages Limited (In Liquidation) and Another was delivered on 11th November 2019, whereupon Notice of Appeal in respect of the aforesaid decision was filed on 22nd November 2019, which period was within the period prescribed by law.

3. That, the Record of Appeal was served on 4th December 2020, which period was out of time and that the respondents counsel accepted service of the same without raising any objections and that further the reason for serving the same out of time was due to personal events occurring on the applicant.
4. She further deposed that the delay in service of the Record of Appeal had not caused the respondents any prejudice whatsoever and that further this application had been brought without undue delay and no prejudice would be caused to the respondents if it is granted as prayed.
5. The motion was opposed vide a replying affidavit sworn by Paul James Savage (the 1st respondent herein) on 13th May 2021, who deposed *inter alia* that the applicant ought to have filed her Record of Appeal by 7th February 2020 and that the Record of Appeal herein was only filed on 6th October 2020 which was 8 months late and no explanation had been given for this delay.
6. It was submitted for the applicant that she had an arguable appeal and that she should not be driven away from the seat of justice due to unprecedented illness over which she had no control over and that her circumstances therefore incapacitated her from issuing sufficient instructions to her advocates to file the Record of Appeal.
7. On the other hand, it was submitted for the 1st respondent that neither the applicant nor her advocate had provided any reason for the inordinate delay of 10 months in filing and serving the Record of Appeal, within the time required and over a year delay in filing the application for extension of time.
8. As regards prejudice, it was submitted that the 1st respondent had demonstrated that he is a British subject whose marriage with the appellants, a Kenyan was dissolved in 2009 and that he had purchased the suit property from his entire inheritance from his mother's estate and that he wished to return to England, to be in a position to buy a home and settle there and that if the instant application were to be allowed, he would stand to suffer prejudice. He stated further that the intended appeal did not have any merit and that it was only meant to delay the 1st respondent from executing the judgment in his favour.
9. There was no response from the 2nd respondent.
10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
11. The applicant's motion is brought *inter alia*, under Rule 4 of this Court's Rules. The said Rule provides:

“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 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.”

12. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo*



Sila Mutiso V. Rose Hellen Wangari Mwangi Civil Application No.Nai 251 of 1997 where the Court stated:

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

13. In the instant case, the impugned judgment was delivered on 11th November 2019, pursuant to which the applicant served upon the respondents a Notice of Appeal on 22nd November 2019, which was well within time. The applicant was subsequently thereafter required to file a Record of Appeal within 60 days of 22nd November 2019 i.e. on or before 7th February 2020. This was however not done until 6th October 2020, a period of 8 months' which is way beyond the stipulated period. A period of 8 months is certainly inordinate.
14. The applicant contends that the delay herein was occasioned by "unfortunate but personal events occurring on the appellant". It is imperative to note that these "unfortunate personal events" have not been stated in the supporting affidavit to the motion. However, in the written submissions dated 11th July 2021, the applicant submits that the delay in filing and serving the Record of Appeal was occasioned by a prolonged and unprecedented illness and that for the most part before and after the delivery of the trial court's judgment, the applicant has been feeling unwell and has been in and out of hospitals seeking treatment.
15. Save for the applicant generally stating that she had been sick and that sickness prevented her from filing and serving the Record of Appeal on time, no single document has produced to this Court showing that indeed the applicant had been in and out of hospital as alleged. Similarly, it is instructive to note that there has been an over 1 year delay in filing the instant motion which was filed on 8th February 2021 and no explanation has been forthcoming from the applicant to explain this delay. The contention by the applicant that delay herein is less than 12 months and thus does not qualify for want of prosecution is wholly erroneous since the application before court is for extension of time pursuant to Rule 4 of this Court's Rules and the issue of want of prosecution therefore doesn't certainly arise.
16. From the circumstances of this case, I am of the considered opinion that the delay herein is inordinate and the same has not been satisfactorily explained to this Court.
17. As to whether there is a possibility of the appeal succeeding, I have looked at the averments and the issues raised in paragraph 4 of the supporting affidavit, and I am not satisfied that the appeal will possibly succeed. Of course I am mindful of the fact that I cannot say more regarding this issue as a single Judge.
18. As regards prejudice, and contrary to the applicant's contention that the motion is not opposed, the motion is indeed opposed by a replying affidavit sworn by the 1st respondent on 13th May 2021 who deposed *inter alia* that he is a British subject whose marriage with the appellant, a Kenyan was dissolved in 2009 and that he had purchased the suit property from his entire inheritance from his mother's estate and that he wished to return to England to be in a position to buy a home and settle there, and that if the instant application were to be allowed, he would stand to suffer prejudice. Consequently, I am satisfied that if this matter is delayed further, the respondent will not be able to execute the judgment and his wish to return home will have been greatly curtailed.



19. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court as laid out in *Leo Sila Mutiso case (supra)*, to extend time and therefore decline to extend time to serve Notice of Appeal and Record of Appeal.
20. Accordingly, the applicant's motion dated 8th February 2021, is without merit and the same is hereby dismissed in its entirety with costs to the 1st respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

