



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J.A. IN CHAMBERS]

MOMBASA CIVIL APPLICATION NO. 51 OF 2020

BETWEEN

P.N. MASHRU LIMITED.....APPLICANT

AND

NEO MAKUPA GARAGE LIMITED.....RESPONDENT

(Being an application for enlargement of time to file and serve the Notice of Appeal from the

judgment of the High Court of Kenya at Mombasa (Chepkwony,J.)

dated 24th September, 2019 **in HCCA NO. 45 OF 2019)**

RULING OF THE COURT

Before me is an application dated **16th July, 2020** filed by the applicant, **P.N. Mashru Limited** seeking, in the main, the following order under rule 4 of the Court of appeal Rules, 2010:

“That this Honourable Court be pleased to enlarge time within which the applicant can file their Notice of Appeal against the judgment delivered on 24th September, 2019 at the High Court at Mombasa by Honourable Lady Justice Chepkwony in HCCA No. 45 OF 2013”.

The grounds in support of the application as appearing on the face of the motion and reiterated in the supporting affidavit of the applicant’s advocate **James Kituku Munguti**, dated **16th July, 2020** are that: judgment was to be delivered on **4th September, 2019** but the same was not ready and the court indicated that it would be delivered on notice; that the applicant wrote to the Court on **27th September, 2019** enquiring on the status of the judgment; that the impugned judgment was delivered on **24th September, 2019** without notice and the applicant only became aware of the same when it received the respondent’s draft bill of costs vide a letter dated **4th February, 2020**; that the scaling down of the Court Registry operations in a bid to curb the spread of Covid 19 hampered the applicant’s efforts to obtain a copy of the judgment and typed proceedings; that the delay is not inordinate and the respondent will suffer no prejudice if the orders sought are granted.

The respondent opposed the application vide a replying affidavit sworn on **17th September, 2020**. In their filed submissions dated **3rd November, 2020**, the respondent conceded that the court did not give notice of delivery of judgment.

It contended that when the respondent’s clerk stumbled on the judgment, it informed the applicant’s counsel vide its letter of **4th February, 2020** and which letter was received by the applicant’s counsel on **12th February, 2020**. The respondent maintained that the applicant had not explained the delay in filing the instant application after discovering that judgment in the matter had been delivered. It was also alleged that the applicant had not requested or served typed proceedings pursuant to **Rule 77 and 82** of this Court’s Rules nor had it sought extension of time to deal with the procedural lapses which would result in the record of appeal being out of time. Lastly, it was pointed out that the applicant had not placed any material to enable the court determine the possibility of success of its intended appeal.

I have considered the application, the respondent’s submissions and the law. The grant of orders under **Rule 4**, though free and unfettered, is to be exercised judiciously and not capriciously. The relevant factors to be considered in an application for extension of time is the length of

delay; the reason for the delay; the chances of the appeal succeeding and the degree of prejudice (if any) likely to be caused to the respondent if extensions is granted. See **Leo Sila Mutiso vs. Hellen Wangarir Mwangi, Civil Application No. Nai 255 of 1997**).

In my view, the beginning point which is uncontested is that the judgment sought to be challenged on appeal by the applicant was delivered in the absence of both the respondent and the applicant. The respondent opposed the motion as it is of the view that it informed the applicant of the judgment vide its letter of **4th February, 2020** and which letter was received by the applicant's counsel on **12th February, 2020**. On the other hand, the applicant's counsel had explained the delay in moving this Court due to the scaling down of the operations of the registry on account of the Covid 19 pandemic which hit this country from the beginning of **March, 2020**. In my view, this explanation is plausible. It is also regretted that the judgment, the subject of the intended appeal was delivered without notice. It is for these reasons that I exercise my discretion in favour of the applicant.

Accordingly, I allow the motion dated **16th July, 2020**. Costs shall be in the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 29th Day of January, 2020.

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR