



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, J.A IN CHAMBERS)

CIVIL APPLICATION NO. 77 OF 2020

BETWEEN

JAYESH AUTOSPARES LTD.....APPLICANT

AND

KAPTERIT RAPID CO. LTD.....1ST RESPONDENT

JOHN WEPUKHULU WALIAULA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an application for extension of time within which to file and serve a notice of appeal as well as the record of appeal out of time arising from the Judgment of the Environment and Land Court (Hon. M. Njoroge, J.) dated 3rd March, 2020

in

Kitale ELC No. 73 of 2013)

RULING OF THE COURT

Before me is a Notice of Motion dated 9th July, 2020 under **Rule 4** of the **Court of Appeal Rules**, substantively seeking orders that the time limited for filing and serving the respondent with the Notice of Appeal as well as filing and serving the record of appeal be enlarged and the same be filed and served within such time as the Court shall deem fit together with an attendant order that costs of or incidental to this application be borne by the applicant.

It is supported by grounds on its body, a supporting affidavit sworn by **Priteshkumar Jayantilal Patel**, together with annexures thereto. It has not been opposed by any replying affidavit.

The application was canvassed through applicant's sole pleadings, written submissions and legal authorities relied upon by the applicant in support of the application. The applicant concedes judgment was delivered on 3rd March, 2020. They desired to appeal against it. They are aware they were obligated to file a notice of appeal within fourteen (14) days from 3rd March, 2020. They gave instructions to their advocate to lodge the notice of appeal but the said advocate was unable to comply with those instructions because on 11th March, 2020 the first case of Covid-19 was reported in Kenya and on 12th March 2020 the Ministry of Health issued directives on preventive measures to curtail the spread of the disease. Among these were suspension of office activities as people were advised to stay at home. In obedience to the Ministry's directives, their advocates offices were closed down on 12th March, 2020. Applicant's company also closed down its operations on 15th March, 2020. Court operations were also shut down. Operations in all the three affected areas mentioned above resumed in June, 2020, by which time, time for lodging a notice of appeal and file a record of appeal had long lapsed hence the filing of the application under consideration which according to them is not only well founded on the facts and the law but also merited and should therefore be sustained, as circumstances causing failure to comply with the timelines set by the Rules were beyond their control.

Relying on the case of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and **Imperial Bank Limited (In Receivership) & Another vs. Alnashir Popat & 18 Others [2018]eKLR** both on the principles that guide the Court in the exercise of its mandate under **Rule 4** of the **Court of Appeal Rules**, a threshold they contend to have satisfied as explained above.

My invitation to intervene on behalf of the applicant has been invoked under **Rule 4** of the **Court of Appeal Rules**. **Rule 4** 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.”

The principles that guide the Court in the exercise of the above unfettered discretionary mandate has been crystallized by case law. **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, among numerous others and **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others.

The principles distilled from the above case law may be enumerated *inter alia* as follows: *The mandate under Rule 4 is discretionary, unfettered, and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the Court's unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance; orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one; the discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered; as the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant; the degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity; whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”; the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for a delay is the key that unlocks the court's flow of discretionary power. There has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya (**M.K. Ibrahim & S.C. Wanjala SCJJ**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

I have considered the record in light of principles of case law crystallized above that guide the Court in the exercise of its mandate under **Rule 4** of the **Court of Appeal Rules**. On the length of the delay, the intended impugned judgment was delivered on 3rd March, 2020, whereas the application under consideration was filed on 9th July 2020, a period of four (4) months and about six (6) days.

In **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the threshold in the above two cases to the uncontroverted position herein, I find the period of delay subject of this application not inordinate. It has also been sufficiently explained and therefore excusable especially when what the applicant has relied on as basis for default in timeously initiating their intended appellate process is a matter in the public domain.

On arguability of appeal, the applicant intends to raise five (5) grounds of appeal, namely, that the learned trial Judge erred in law when he: failed to find that the 1st respondent fraudulently acquired the letter of allotment dated 4th February, 1997 referenced **10089/XXVII**, failed to find that the 1st respondent fraudulently transferred and obtained a certificate of lease in favour of the 2nd respondent when evidence tendered by the applicant clearly demonstrated particulars of fraud pleaded; misdirected himself in law when he held that the 1st and 2nd respondents had legally obtained title to the suit property yet it was evident from the record that the certificate of lease dated 24th October, 2012 was executed by **Patricia Waithera** who was not a director of the 1st respondent's company and was therefore invalid and a nullity, he dismissed applicant's case yet the letter of allotment dated 20th December 1985 was still valid especially when the applicant had proved that it pays the requisite land rates, failed to find that the 3rd respondent acted negligently in issuing title documents to the 1st and 2nd respondents when the same property was owned by applicant.

In law as borne out by principles of case law distilled and highlighted above, an arguable appeal is not necessarily one that will succeed but one that will necessitate not only the opposite party's response thereto but also one that warrants the Court's interrogation. Considering all the above proposed grounds of appeal, I have no doubt they are all arguable notwithstanding that they may not ultimately succeed.

As for any prejudice likely to be suffered by the respondents if the relief sought was granted, none has been demonstrated to exist by absence

of a replying affidavit from both respondents to that effect.

The upshot of the totality of the above assessment and reasoning, is that the application has merit. It is accordingly allowed on the following terms:

- 1) **Applicant has fourteen (14) days of the date of this ruling to file and serve a notice of appeal.**
- 2) **The record of appeal to be filed within sixty (60) days from the date of the lodging of the notice of appeal.**
- 3) **In default of any of items 1 and 2 of the order, leave granted above stand lapsed.**

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR