



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. E005 OF 2020

(CORAM: OKWENGU, JA (IN CHAMBERS))

BETWEEN

REPUBLICAPPLICANT

EXPARTE: NYORO CONSTRUCTION COMPANY LIMITED

AND

THE HON. GENERAL appearing for the Minister In Charge

Roads Government Of Kenya.....1ST RESPONDENT

ENG. A. O. ROGO.....2ND RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of the High Court in Nairobi (**Mativo J**), delivered on 11th November, 2019 in HC JR. No. 222 of 2018)

RULING

[1] By a notice of motion dated 9th July, 2020, **Nyoro Construction Company Limited**, the *ex parte* applicant in High Court Judicial Review No. 222 of 2018, seeks to have time extended to enable it file an appeal against the ruling and order of the High Court (**Mativo, J**) delivered on 11th November, 2019.

[2] The applicant had filed a notice of appeal against the judgment on 18th November, 2019 but explains that it was unable to file the record of appeal in time, as it only received certified copies of the proceedings and judgment on 4th March, 2020. Thereafter, due to challenges arising from the Covid-19 pandemic and the lockdown measures imposed by the Government and the Judiciary, its advocate was unable to prepare and file the record of appeal until the court issued guidelines by way of Practice Rules and Directions.

[3] The applicant's advocate, Mr. Mutiso adds that due to his age, he had minimal access to his chambers during the lockdown period. In written submissions, the applicant's advocate relying on **Donald O. Raballa v Judicial Service Commission and Anor [2018] eKLR**, urged the Court to exercise its unfettered discretion in the applicant's favour.

[4] The 1st respondent did not file any response to the applicant's motion, but the 2nd respondent Eng. A. Rogo filed written submissions in which he urged the Court to dismiss the applicant's motion, maintaining that the certified copies of proceedings and judgment having been ready for collection on 4th March, 2020, the applicant had more than two weeks before the courts were shut down on 16th March, 2020 due to the Covid-19 pandemic. Relying on **Imperial Bank Limited, (In receivership) & Anor vs Alnashir Popat & 18 Others [2018] eKLR**, the 2nd respondent maintained that the applicant did not demonstrate due diligence in observing the timelines set in law, and being indolent, was not entitled to the relief sought.

[5] I have carefully considered the motion before me. It is now well established that in an application for extension of time, the Court exercises a discretionary power which is unfettered, but which must be exercised judicially. The factors to be taken into account in the exercise of such discretion includes, the reasons for the delay, whether the application for extension of time has been brought without undue delay, and whether there will be any prejudice suffered by the respondent if the application is granted. (See **Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997**; and **Imperial Bank Limited (In**

Receivership) & another v Alnashir Popat & 18 others [2018] eKLR.)

[6] The applicant filed its notice of appeal within time but did not file the record of appeal. The applicant has explained the reasons why it was unable to file the record of appeal in time. The fact that the proceedings, judgment and order of the court were not availed to it until 5th March 2020 have been substantiated by a certificate of delay duly signed by the Deputy Registrar of the High Court.

[7] The Court takes judicial notice of the existence of the Covid-19 pandemic and the challenges that ensued therefrom, as this is common knowledge. The applicant had 60 days within which to file its record of appeal. It cannot therefore be condemned as indolent for not having filed the record of appeal within the two weeks before the Covid-19 pandemic was declared.

[8] I am satisfied that the reason given by the applicant for the failure to file the record of appeal within time, is plausible. No prejudice will be suffered by the respondent if time is extended. To the contrary, it is in the interest of justice that the applicant is given an opportunity to exhaust its rights in bringing this acrimonious litigation to a logical conclusion.

[9] For these reasons, I allow the applicant's motion and extend time for the applicant to file and serve a record of appeal within 21 days from the date hereof. I make no orders as to costs.

Dated and delivered at Nairobi this 19th day of February, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR