



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 163 OF 2019

BETWEEN

SHAZEEN CHATUR.....APPLICANT

AND

PRAMUKH CASH AND CARRY LIMITED.....RESPONDENT

(Being an application for extension of time to file and serve notice of appeal and record of appeal out of time from the judgment of (T.W. Cherere J.,) delivered on 3rd October, 2019

in

KSM. HCCC No. 17 of 2018)

RULING

[1] *Shazeen Chatur* (the applicant) filed the Notice of Motion dated 18th December, 2019 which is premised on the provisions of **Rule 4** of the Court of Appeal Rules and she is seeking leave to extend time within which to file Notice and Record of Appeal out of time.

[2] Briefly, the applicant states in the grounds in support of the motion and also by her supporting affidavit sworn on 17th December 2019 that, as at the time when the judgment was delivered on 3rd October 2019 she was out of the country and therefore she did not become aware of it. Although the applicant was sent a notice for delivery of the judgment via email, she states under paragraph 4 of the said affidavit as follows:-

“That, at the time the judgment was being read I had travelled out of the country hence I did not receive communication of the outcome on time. Annexed herewith is a copy of the letter informing me of the judgement marked SC1”

The copy of the passport that is attached to the application is stamped at Heathrow Airport on 10th October, 2019.

[3] The applicant also states that the instant application was filed without unreasonable delay on the 17th December, 2019 immediately she was apprised of the outcome of the suit before the High Court; that the intended appeal is arguable and unless the order extending time to file the appeal is granted she will be shut out of the justice system.

[4] The application was opposed by the respondent who filed a replying affidavit on 6th February, 2020. The respondent discounts the contention that the applicant was out of the country and that it is not possible that while out of the country she was unable to access her emails for a period of two (2) months. According to the respondent, this application was an afterthought which is meant to prolong the term of tenancy in question beyond the expiry date which was March 2020.

[5] This application was heard by considering the notice of motion and the replying affidavit without appearance of the parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. This application is predicated under **Rule 4** of this Court Rules which 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”.

See also **Fakir Mohamed vs. Joseph Mugambi & 2 Others** Civil Appl. 332/04 (UR), thus: -

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

[6] That said, I may also mention the duty imposed on the court under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

[7] Has the applicant given cogent reasons for the delay? On whether the intended appeal is arguable, the applicant did not attach a copy of the impugned judgment therefore I am not able to comment or gauge whether the intended appeal is plausible. On the delay, since the judgment was delivered on 3rd October, 2019 the applicant has attached a passport copy that shows a stamp at Heathrow Airport on 10th October 2019. Although the applicant seems to be economical with information on whether that was the date when she entered that country or it was when she exited, whatever the case, if it was entry, it means she was in the country when the judgment was delivered and if it was exit to return to Kenya it was within time for her to file the Notice of Appeal.

[8] I therefore find no cogent explanation offered at all for a delay of two (2) months and accordingly I decline to exercise of my discretion in favour of extending time. That being my view of the matter, the application is dismissed with no order as to costs.

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

M. K. KOOME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR