



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NYR 37 OF 2018 (UR) (28/2018)

BETWEEN

AGNES MUMBI WAIRAGU.....APPLICANT

AND

THOMAS A. G. NJERU.....1ST RESPONDENT

ESTHER WANGECHI MATHENGE.....2ND RESPONDENT

(Being an application for leave to appeal out of time against the judgment of the Environment and Land Court at Nyahururu (M. C. Oundo, J.) dated 18th January, 2018

in

Nyahururu E. L. C. No 115 of 2018)

RULING

[1] *Agnes Mumbi Wairagu*, (the applicant) filed the Notice of Motion dated 26th March, 2018 seeking leave to appeal out of time against the judgment delivered on 18th January, 2018 in **Nyahururu ELC No. 115 of 2018** by *Ounda, J.* The brief facts as stated in the grounds in support of the motion as well as the supporting affidavit sworn by the applicant on 26th January, 2018 indicate that when the judgment was delivered, the applicant was absent in court on account of ill health. The applicant has attached a copy of a medical record that shows that she was seen at Lucimed Clinic in Nyahururu on the 18th January, 2018.

[2] The applicant states that on 14th February, 2018 is when she was informed by her Advocate of the outcome of the case and she immediately instructed him to file an appeal. That a Notice of Appeal was lodged in court on 19th February, 2018 but it was late and she therefore filed the instant application seeking extension of time.

[3] This application was placed before me for consideration of the written submissions on 9th November, 2020 without appearance by parties, pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID 19 Pandemic. The record shows that the Deputy Registrar duly informed parties of the hearing date via email. However, the parties did not file written submission and also the respondent did not file a replying affidavit. While noting the motion came up for hearing again of 28th May, 2017 but it was adjourned due to absence of the parties, I will proceed to determine the issue at hand on whether the applicant has satisfied the threshold for granting leave to file an appeal out of time.

[4] Those parameters stem from the provisions of **Rule 4** of this Court Rules which is the premise of the motion. It 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.”

In this regard, 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.

[5] Has the applicant given cogent reasons for the delay? As stated above, the respondent did not oppose the application but that does not lessen the duty imposed upon me when dealing with this kind of application that entails an exercise of judicial discretion. The applicant states that she was taken sick on the day the judgment was delivered and she attached a copy of the medical report. The Notice of Appeal was late by about fourteen (14) days, and the instant motion was filed two months later. The applicant explains that she was taken ill and had to organize her financial position to be able to instruct counsel to put in motion the appeal process.

[6] To me these reasons appear reasonable and, in the event, I would give the applicant a benefit of doubt and allow the application for extension of time. According the applicant is given thirty (30) days from the date of this Ruling to file and serve the Notice and Record of Appeal. I make no order as to costs as the application was not defended.

Dated and delivered at Nairobi this 5th 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