



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: MURGOR J.A.**

**CIVIL APPLICATION NO. 55 OF 2020**

**BETWEEN**

**THE COUNTY SECRETARY COUNTY GOVERNMENT OF BUSIA.....APPLICANT**

**AND**

**MANWARI & CO. ADVOCATES.....RESPONDENT**

*(Application for extension of time a Notice of Appeal out of time from the Ruling of the*

*High Court at Busia, (Kiarie Waweru Kiarie, J.) dated 12<sup>th</sup> March 2020*

*in*

*Busia High Court Civil Appeal No. 16 of 2018)*

\*\*\*\*\*

**RULING**

By a Notice of Motion lodged on 14<sup>th</sup> June 2016, *the applicant, the Secretary, the County Government of Busia* applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** to file a Notice of Appeal.

The motion was premised on the grounds that by a ruling dated 12<sup>th</sup> March 2020 made in *Busia High Court Civil Appeal No. 16 of 2018* the High Court ordered the arrest and committal to civil jail of the applicant's Finance Executive Member; that the High Court had granted the applicant 14 days within which to file the Notice of appeal, but following a directive issued by the then Hon the Chief Justice, David Maraga on 15<sup>th</sup> March 2020, court operations were scaled down throughout the country on account of the rapidly spreading Covid- 19 pandemic; that this rendered it impossible for the applicant to obtain a copy of the ruling as court staff were unavailable. Further restrictions were put in place on 6<sup>th</sup> April 2020 by the Cabinet Secretary for Health vide Legal Notice. No. 51, "*The Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Nairobi Metropolitan Area*" that made it difficult for the applicant to travel to Nairobi to brief its advocates, and neither were its advocates able to travel to Busia to peruse the court file and prepare the requisite appeal. As a consequence, the filing of the Notice of appeal was delayed, and the applicant's Finance Executive Member was placed in peril of the respondent executing the warrants of arrest.

It was asserted that the applicant's appeal has a high chance of success and therefore it should be provided with the opportunity to fully ventilate its intended appeal. The application was supported with the affidavit of **Nicodemus Mulaku** sworn on 2020 and the applicant's submissions which set out the applicant's case.

Relying on a replying affidavit sworn on 29<sup>th</sup> June 2020 by **Julius Orina Manwari**, an advocate in the respondent's firm who had conduct of the application and their written submission, it was contended that the matter arose from various amounts in respect of legal fees owed by the applicant, and following negotiations between the parties it was agreed that the applicant would settle the sums due; that the applicant failed to pay the sums due in respect of a Bill of costs in Judicial Review Application No. 15 of 2011, prompting the respondent to file a Notice for the representatives of the applicant to show cause why they should not be committed to civil jail. After various applications the High Court allowed the respondent to proceed with execution of the warrants of arrest.

The respondent averred that when the ruling allowing execution of the warrants was delivered on 12<sup>th</sup> March 2020, the firm of Ashioya and Company were present in court and collected a copy of the court's ruling; that therefore, the applicant had sufficient time to file the Notice of

appeal, and no explanation was provided to explain why the applicant failed to file the Notice of appeal at the Kisumu Court of Appeal registry. It was also deponed that extending time for filing of the Notice of appeal will be highly prejudicial to the respondent, particularly as the draft Memorandum of appeal discloses no serious grounds, and the respondent is entitled to enjoy the fruits of its ruling.

The application is brought under **rule 4** of this Court's rules, where it is settled, the Court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought. The case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** these principles were set out thus;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

The applicant explanation for the delay in filing the Notice of appeal was caused by its inability to access the courts both in Nairobi and in Kisumu during the period when the then Hon. the Chief Justice and the Cabinet Secretary of Health had put in place measures to control the spread of the Covid-19 pandemic.

In computing the length of delay between the time the ruling was delivered on 12<sup>th</sup> March 2020, and the filing of this application on 1<sup>st</sup> June 2020, it is observed that a period of 81 days had lapsed. The question that would arise therefore is whether the explanation provided would be sufficient to explain the entire period of delay.

As indicated by the attached notices and circulars, there is no question that soon after the ruling was delivered on 12<sup>th</sup> March 2020, the Government of Kenya imposed stringent measures to curb the spread of the Covid-19 pandemic in the country, and it is not disputed that the measures gave rise to challenges in movement within the country, and the ability of members of the public to access various courts. I am therefore satisfied that the explanation provided for the delay in filing the Notice of appeal is plausible, and therefore, the period of delay, which I do not consider to be inordinate, given the circumstances prevailing at the time, has been sufficiently explained.

Concerning whether there is the likelihood of success of the appeal, without seemingly going into its merits, which is the preserve of a full bench, my view is that the intended appeal is not frivolous or unjustified, and the applicant should have the opportunity to ventilate the issues in contention before this Court.

On the final issue of whether any prejudice would be visited on the respondent if the application to extend time were granted, other than the inconvenience of having to defend the appeal, which can be compensated in costs, there does not seem to me any significant prejudice to the respondent that would result.

For the above reasons, I exercise my discretion to grant an extension of time to file and serve the Notice of Appeal which extension will lapse **seven days** from the date of this Ruling. The Memorandum and record of appeal to be lodged in accordance with **rule 81** of this Court's rules and time for such lodging will commence running from the date of lodging the Notice of Appeal within the period of extension specified in this Ruling. The costs of this application shall be in the intended appeal.

***It is so ordered.***

***Dated and Delivered at Nairobi this 5<sup>th</sup> day of February, 2021.***

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**