



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. MOHAMMED, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 86 OF 2020

BETWEEN

AZIM JIWA RAJWANI.....APPLICANT

AND

FIDELITY COMMERCIAL BANK (NOW SBM BANK LIMITED).....RESPONDENT

(An application for extension of time to file and serve a memorandum of appeal and record of

appeal out of time from the Judgment of the High Court of Kenya

at Nairobi (Tuiyott, J.) delivered on 2nd November, 2018

in

HCCC No. 717 of 2006)

RULING

Background

[1] Before me is an application brought under **Rule 4** of the Court of Appeal Rules (this Court's Rules) filed on 18th March, 2020. **Azim Jiwa Rajwani** (the applicant) seeks extension of time to file and serve a memorandum of appeal and record of appeal from the judgment of the High Court of Kenya at Nairobi (**Tuiyott, J.**) delivered on 2nd November 2006. **Fidelity Commercial Bank (now SBM Bank Limited)** is the respondent herein.

[2] The application is premised on the grounds that the applicant partially dissatisfied by the impugned judgment lodged his notice of appeal on 15th November, 2018 and requested for a copy of typed proceedings and judgment vide a letter dated 15th November, 2018; that by a further letter dated 19th February, 2019, the applicant requested and reminded the Deputy Registrar to supply the said copies of proceedings and judgment; that it was not until 26th November, 2019 that the applicant received a notice from the Deputy Registrar informing him that the proceedings were ready for collection upon payment of the requisite court charges; that this was duly done on the same day; that subsequently, on 11th February, 2020, the applicant prepared and forwarded a certificate of delay to be signed and sealed by the Deputy Registrar; that this was not promptly dealt with and the applicant issued further letters on 28th February, 2020 and 11th March, 2020; and that the certificate of delay was signed, sealed and released to the applicant's advocates on 11th March, 2020; that the certificate of delay was issued after the expiry of the statutory 60 days required to lodge a memorandum and record of appeal; that the delay was not intentional and is excusable; and that the applicant has an arguable appeal with high chances of success; and that if the instant application is not allowed, the appeal will be rendered nugatory. The application is supported by the affidavit of the applicant in which he reiterated the grounds on the face of the application.

[3] In opposing the application, the respondent filed a replying affidavit sworn on 7th December, 2020 by **Kevin Kimani**, its Legal Officer. He deposed that the applicant only sent one reminder dated 19th February, 2019 to the Deputy Registrar requesting for the typed proceedings, 94 days after the first request was made; that the proceedings were ready for collection on 26th November, 2019 but it was not

until 11th February, 2020 (77 days later) that the applicant asked the Deputy Registrar to sign a certificate of delay in respect of the matter; that as at 11th February, 2020, the applicant was already time-barred since he was expected to have filed his appeal on or before 25th January, 2020; that the applicant cannot rely on the Deputy Registrar's delay as the reason for filing out of time since at the time of requesting for the certificate of delay, the applicant was already outside time within which the appeal should have been filed; that the applicant has also not offered an explanation on the intervening factors which prevented him from filing his appeal by 25th January, 2020; that the applicant could have filed an initial record of appeal by 25th January, 2020 and thereafter filed a supplementary record of appeal upon receipt of the signed certificate of delay; that the instant application and the intended appeal are a mere attempt by the applicant to deny the respondent the opportunity to enjoy the fruits of its judgment and should be dismissed with costs to the respondent.

Submissions

[4] The application was canvassed by way of written submissions. The applicant in his written submissions dated 1st April, 2020 relied on the case of **Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 others** [2018] eKLR in which this Court set OUT some of the factors for consideration in an application under **Rule 5(2)(b)** of this Court's Rules. The applicant submitted that this application was lodged upon receiving copies of the certificate of delay and without lengthy or unreasonable delay. That the delay in filing the appeal was occasioned when the applicant presented the certificate of delay for engrossment and the same was done 14 days after the lapse of the statutory 60 days. That the failure to sign and avail the certificate of delay timeously was not the applicant's fault but was a mistake or omission on the part of the court for which the applicant should not be blamed and that the notice of appeal was filed on 15th November, 2018 and under **Rule 82** of the Court of Appeal Rules a competent appeal could not be mounted without a signed certificate of delay.

[5] In its written submissions, the respondent challenged the explanation by the applicant that the delay in filing the appeal within the stipulated time was due to the delay in being supplied with the certificate of delay. It was submitted that no sufficient cause for the delay has been shown. The respondent submitted that nothing stopped the applicant from filing an initial record of appeal by 25th January, 2020 and thereafter filing a supplementary record of appeal upon receipt of the signed certificate of delay. The cases of **Wakaba Ndegwa & another v Lucy Nyaguthii** [2017] eKLR, **Gerald Kithu Muchanje v Catherine Muthoni Ngare & another** [2020] eKLR and **County Government of Mombasa v Kooba Kenya Limited** [2019] eKLR where this Court dismissed similar applications for unsatisfactorily explained delays were cited.

Determination

[6] I have considered the application, the grounds in support thereof, the rival affidavits and the law. The issue for determination is whether the application is deserving of the orders sought. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** 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.”

[7] The principles that guide this Court in such an application were discussed by this Court in the *locus classicus* case of **Leo Sila Mutiso v. Hellen Wangari Mwangi**[1999] 2 EA231 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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.” [Emphasis supplied].

[8] This Court found that the factors that the court may take into consideration are discretionary and non-exhaustive in **Fakir Mohammed v. Joseph Mugambi & 2 others** (2005) eKLR:-

“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, (possible) 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 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 factor.”[Emphasis supplied].

[9] Further, in Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019 this Court held that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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 a 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.”[Emphasis supplied].

[10] In considering the delay period, the reason for the delay takes prominence according to this Court in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR where it was stated:

“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 delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

[11] Rule 82 of the Court of Appeal Rules provides that:-

“(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- (i) a memorandum of appeal, in quadruplicate*
- (ii) the record of appeal, in quadruplicate*
- (iii) the prescribed fee, and*
- (iv) security for the costs of the appeal:*

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

[12] In the instant case, the notice of appeal was lodged on **15th November, 2018**. The applicant’s counsel issued a letter bespeaking proceedings to the Deputy Registrar of the High Court at Nairobi on even date. The said letter was served on the respondent’s advocates on **21st November, 2018**.

[13] The Certificate of Delay was issued by the Deputy Registrar of the High Court at Nairobi on **11th March, 2020** and it indicates that a period of 362 days was taken to compile the proceedings from **15th November, 2018** to **6th December 2019**. Therefore, the sixty days provided for the applicant to file the appeal under **Rule 82 (1) of the Court of Appeal Rules** started running from **6th December, 2019**.

[14] The instant motion was filed on 18th March, 2020. In the circumstances, the delay in filing the record of appeal has not been satisfactorily explained. As stated by this Court in Wakaba Ndegwa & Another vs. Lucy Nyaguthii [2017] eKLR

“9...but even if it does lie, the delay in seeking extension of time to institute appeal for the period between 30th October, 2015 and 17th December, 2015 has not been explained. In absence of any explanation, the Court is unable to tell what caused the delay. Where no explanation for delay is given, it cannot be assumed that any exists.

10. In the result, it is my finding that the applicant has failed to satisfy the Court that the extension prayed for is deserved. Accordingly, the application is dismissed with costs to the respondent on the ground that it has no merit. It is so ordered.”

See: County Government of Mombasa vs. Kooba Kenya Limited [2019] eKLR

[15] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant was partially aggrieved by the judgment of the High Court and is desirous of appealing against the said judgment out of time. Conversely, the respondent filed a replying affidavit opposing the application for extension of time and contended that this application, as well as the intended appeal, are mere attempts by the applicant to deny the respondent the opportunity to enjoy the fruits of the impugned judgment.

[16] From the circumstances of the application before me, the applicant has not demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). The upshot is that I find that this application lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2021.

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR