



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & KANTAL, J.J.A)

CIVIL APPLICATION NO. 177 OF 2019

BETWEEN

JNM.....APPLICANT

AND

JNMRESPONDENT

(Being a reference under Rule 55 of the Court of Appeal Rules from the Ruling of (Karanja, JA) dated 5th June 2020 in an application for extension of time to file an appeal out of time against the Ruling of the High Court of Kenya at Nairobi (Achode, J.) dated 9th July, 2015

in

HC Civil suit No. 1 of 2015)

RULING OF THE COURT

JNM, the applicant herein was aggrieved by the dismissal of her application for enlargement of time within which to file an appeal out of time by a single Judge of this Court (Karanja, JA) on 05th June 2020. By way of reference under **Rule 55 (1) (b)** of the **Court of Appeal Rules**, she seeks a reversal of that decision.

The genesis of this application is traceable to **Civil Suit No. 1 of 2015** (formerly known as **Civil Suit 4270 of 1991**), filed by the applicant against the respondent, her ex-husband. Therein she besought the High Court to set aside a 23 year old consent order made on 2nd December 1992. In response, the respondent raised a preliminary objection stating that the applicant was guilty of inordinate delay. Furthermore, the application was statutorily barred by dint of **Section 4 (1) (a)** of the **Limitation of Actions Act**. Achode, J by a ruling delivered on 9th July 2015, upheld the objection and dismissed the application.

A full four years later, by a Motion dated 17th June 2019, the applicant made a **Rule 4** application seeking time extension to file an appeal against that ruling. The application was heard by Karanja, JA who dismissed it as devoid of merit as the delay of four years was inordinate and unexplained, and granting it would be prejudicial to the respondent given the lapse of time involved.

The applicant charges that the learned single Judge misdirected herself in exercising her unfettered discretion and patently erred by declining to look into the validity of the challenged consent order. Further, by declining to address herself to the arguability of the intended appeal, she greatly prejudiced the applicant’s chances of benefiting from the relief. She urged the Court to allow the application.

In opposition, the respondent argued that the applicant had failed to demonstrate how the single Judge wrongly exercised her discretion or how the Judge misapprehended the law. He urged us to disallow this application as the learned single Judge took into account all the relevant factors under **Rule 4** of the **Court of Appeal Rules** and thus came to the right conclusion.

We have considered the application and the submissions made by the parties herein. We shall proceed with caution as we must always consider that a single Judge in exercising the discretionary power under **Rule 4** does so on behalf of the full Court and therefore such decisions ought not to be easily dislodged. In **NJUGUNA V. MAGICHU & 73 OTHERS [2003] KLR 507**, Waki, JA stated as follows:-

“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis.” See also **DONALD O. RABALLA V JUDICIAL SERVICE COMMISSION & ANOTHER [2018] eKLR**

We are cognisant that our jurisdiction under **Rule 55** of the Court Rules does not entail the substitution of our discretion for that of the learned single Judge. The interference of such discretion can only be justified if, the applicant demonstrates that the learned Judge exercised her discretion contrary to law, that is, that she misapprehended the applicable law, or failed to take into account a relevant factor or took into account an irrelevant one, or that the decision is shown to be plainly wrong. See **HEZEKIAH MICHOKI VS ELIZAPHAN ONYANCHA OMBONGI [2015] eKLR.**

The factors to be considered in a **Rule 4** application are old hat. They were explained in the oft cited **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231** as 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.

On the issue of delay, the applicant alleged that she was ‘devastated’ by the High Court’s decision and therefore needed time to compose herself and plan for her next move. She further claimed that she lacked finances “to draft pleadings”. Having carefully considered the application, we inevitably came to the same conclusion as the learned single Judge that the delay was inordinate and the same was inexcusable. We found the four year delay explanation given by the applicant was implausible given that she failed to avail medical evidence to support her allegation of shock. Regarding lack of finances, the applicant had the option of seeking appropriate relief under **Rule 115** of the rules of this Court.

Regarding the applicant’s complaint that the learned single Judge failed to consider the merits of the appeal and to determine its arguability, we must restate that it is not a primary, lest still mandatory, consideration. The crucial issues for consideration are the length of delay and the reasons given for the delay. Once an application flounders and fails on them, the rest of the limbs cannot cure or save it. We reiterate the holding of this Court in **THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR.**

“It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a ‘possible’ consideration, not that it must be considered.”

In the result, we find this reference to be devoid of merit and the same is hereby dismissed.

In the circumstances of this case which involves a former couple, the order that commends itself to us is that, each party bears its own costs.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR