



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 78 OF 2019

BETWEEN

MOSES WAMALWA MUKHAMARIAPPLICANT

AND

JOHN O. MAKALI1ST RESPONDENT

JOHN MUTALI WEKESA 2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

(Being an application for an intended appeal from the judgment of the High Court of Kenya at Bungoma (**Ali-Aroni, J**) dated **29th March, 2018**)

RULING OF THE COURT

[1] This matter was listed before me today for hearing of a notice of motion dated 4th July, 2019. Under the Covid-19 Practice Directions, the hearing was to proceed by way of written submissions without the presence of the parties or the advocates. The applicant and the 1st and 2nd respondents have filed written submissions but no submissions were received from the 3rd respondent.

[2] The motion which is filed by the applicant in person is said to be brought under **Rules 39, 42 and 43 of Cap 9 of the Laws of Kenya**. However, Cap 9 of the Laws of Kenya which is the Judicata Act has only 8 provisions. Obviously, the applicant has cited the wrong provisions.

[3] Be that as it may, the applicant is seeking to be granted leave to appeal out of time. So I assume that the application was intended to be brought under Rule 39 of the Court of Appeal Rules, which provides for leave to appeal. However, looking at the supporting affidavit sworn by the applicant, it would appear that the applicant is really seeking extension of time to file his appeal and **Rule 4** of the Court Rules gives this Court discretion to extend time for the doing of any act under the Rules.

[4] I note that under **Rule 75(4)** of the Court Rules, unless an appeal lies only with leave, or on a certificate that a point of law of general public importance is involved, it is not necessary to obtain leave or certificate before lodging the notice of appeal. **Rule 75(1) and (2)** provides that a party wishing to appeal to this Court from a ruling or judgment of the High Court must file a notice of appeal in the High Court within 14 days of the decision against which it is desired to appeal.

[5] The applicant has admitted that the judgment subject of the intended appeal was delivered on 29th March, 2018. Although he deposes that he filed a notice of appeal on 23rd May, 2018, he has annexed a copy of a notice of appeal which indicates that it was lodged in the High Court on 4th April, 2018. Since the notice bears a stamp of the High Court and it is signed by the Deputy Registrar, Bungoma, I am ready to accept that the notice was filed in time.

[6] The applicant was required under **Rule 77** of the Court Rules to serve the notice of appeal on the respondents but this does not appear to have been done as the respondents was only served on 23rd May, 2018.

[7] In addition, the applicant wrote a letter dated 3rd April, 2018 requesting for proceedings but this letter was never served on the respondents. The applicant is therefore not entitled to the benefits of the *proviso* to **Rule 82** of the Court of Appeal Rules, which provides that the period satisfied as necessary for preparation of the proceedings should be excluded.

[8] In effect at the time the applicant filed his motion on 4th July, 2019 there was a delay of about 15 months in filing the record of appeal. To date no record of appeal has been filed and therefore, there is further delay and the total period of delay is more than 2 years, and this delay has not been explained.

[9] The principles upon which a court can grant extensions of time are now clear, having been well summarised by the Supreme Court in Nicholas Kiptoo Arap Salat -vs IEBC [2014] eKLR S. C. Application No. 16 of 2014:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

[10] In this case, the applicant has not laid any proper basis for this Court exercising its discretion in his favour. The delay of more than 2 years is inordinate and the applicant has not satisfactorily explained the delay. In the circumstances, I find no merit in this application. It is dismissed with costs.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR