



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 93 OF 2018

BETWEEN

RICHARD NAFWIKI MAKANDA.....APPLICANT

AND

JOB WEKESA.....RESPONDENT

(A reference to a full Bench of this Court from a ruling delivered by a single Judge (J. Mohammed, JA) dated 7th February, 2019 declining an application for extension of time to file notice and record of appeal from the judgment of the High Court

in

HCC NO. 31 OF 2011

RULING OF THE COURT

[1] Before us is a reference under **Rule 55(1)(b)** of the **Court of Appeal Rules** from the decision of a single judge of this Court (**J. Mohammed, JA**) rejecting the motion of **Richard Nafwiki Makanda (applicant)**, for extension of time to file a Notice and Record of Appeal against the judgment and decree of the High court of Kenya at Bungoma, (Mukunya, J) dated 22nd February 2018.

[2] The motion was listed before us for hearing by way of written submissions without the appearance of any of the parties or their counsel. Through his letter dated 12th February 2019, the applicant invited the Court to interfere with the exercise of discretion by the single judge under **Rule 4** of the Court Rules. Neither the applicant nor the respondent has filed any written submissions in support or in opposition to the motion.

[3] The central premise upon which the application is anchored is that the applicant was unaware of the Judgment by the High Court as the Judgment was delivered in his absence, and that his advocate on record never informed him of the date for delivery of the Judgment which he later learnt had been scheduled for 18th September 2017. The applicant contends that he only learnt of the judgment in September 2018, when he went to follow up with his Advocate. As a result he did not lodge a Notice of Appeal within the stipulated time. He attributed his delay to lack of information from his previous advocates and urged that the mistake of his advocates should not to be visited upon him.

[4] We note that in her ruling the single judge carefully considered the applicants motion, and referred to Njuguna –vs-Magichu & 73 Others, 2003 KLR 507; and **Wasike V. Swala (1984) 591**, in the latter this court identified the factors that ought to be considered in a case for extension of time. These were: that there is merit in his appeal; that the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; that the delay has not been inordinate.

[5] The single Judge found that contrary to **Rule 75** of the Court Rules that provides that a notice of appeal should be filed within 14 days of delivery of the judgment, the applicant delayed for 226 days before filing the appeal, and that this delay was inordinate and inexcusable as there was nothing to confirm the applicants allegation that the erstwhile advocates failed to inform him of the delivery of the impugned judgment.

[6] In **Nicholas Kiptoo Arap Salat -vs- IEBC [2014] eKLR**, the Supreme Court identified the following as the underlining principles that a Court should consider in exercising discretion to extend time:

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.

[7] In a reference, the obligation of this Court is not to reconsider the application but to consider whether the single Judge properly exercised her discretion. The question is whether the learned Judge in light of the circumstances before her, properly exercised her discretion in declining to extend time for applicant to file his appeal.

[8] In our view, although the learned Judge referred to fairly old decisions, we have no doubt that she was alive to the applicable principles in considering an application for extension of time. The learned Judge considered the circumstances of the delay including the explanation given but was not persuaded that the explanation was satisfactory. The delay of 226 days was certainly inordinate. The applicant ought to have been more vigilant in pursuing his case. It is not enough for him to shift blame to his advocate without demonstrating what he himself did.

[9] In the circumstances, we are satisfied that the learned Judge properly exercised her discretion and we have no reason to fault her. Accordingly, we dismiss the reference.

DATED AND DELIVERED AT KISUMU 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

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR