



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 130 OF 2020

BETWEEN

JOHN SEMBE NAMATSI.....APPLICANT

AND

MARIA WAKHANU.....1ST RESPONDENT

AGGREY SIMA LUNAO.....2<sup>ND</sup> RESPONDENT

*(An application for leave to file and serve the Record of appeal out of time*

*from the judgment of the High Court of Kenya at Kakamega*

*(Said Chitembwe, J.) dated 18th June, 2015) in*

HCCC NO. 41 OF 2001)

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RULING

1. This is an application dated 27th October, 2020 by **John Sembe Namatsi** (the applicant) seeking an extension of time within which to file and serve the record of appeal against the judgment of the High Court, (**Chitembwe, J.**) delivered on 18th June, 2015. **Maria Wakhanu** and **Aggrey Sima Lunao** are the respondents herein.

2. The application is brought under **Rule 4 (1)** of the **Court of Appeal Rules** and is premised on the grounds that; the applicant filed the notice of appeal on time but was unable to file the record of appeal in time as he was not supplied with the court proceedings in time since the court file could not be traced for a long time.

3. The applicant avers that on **10<sup>th</sup> November, 2017** he filed an application seeking leave to file the appeal out of time and which application was dismissed for non-attendance. He contends failure to attend court for hearing of the application was due to an inadvertent mistake occasioned by his former Advocates. He proceeded to file an application to reinstate the dismissed application but withdrew the application when the same came up for hearing.

4. The applicant contends that the reasons for delay are excusable and that the appeal has overwhelming chances of success. The application was further supported by the supporting affidavit of the applicant deponed on 27th October, 2020 in which he reiterated the aforesaid grounds and further stated that the mistakes of his former advocates should not be visited upon him.

5. There was no affidavit in reply when I considered the motion virtually due to the Global COVID-19 pandemic.

Determination

6. I have considered the application, grounds in support thereof, the applicant's submissions, the authorities cited and the law. **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters to be considered in an application under Rule 4 of the Rules of this Court 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].

7. The matters to be considered while deciding an application of this nature are not exhaustive. In *Mwangi V Kenya Airways Ltd KLR 486*, this Court having set out matters which a single judge should take into account when exercising the discretion under *Rule 4*, held:

***“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”***

8. There is no maximum or minimum period of delay set out under the law. Further, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR* as was cited by the applicant, this Court 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.”***

9. The impugned judgement was delivered on 18th June, 2015 whereas the instant application was filed on 5th November, 2020. The delay in filing the instant application and record of appeal is approximately five years and four months.

10. The applicant’s explanation for the delay is that the court file was missing for a long time and he was therefore unable to obtain the typed proceedings and judgment in good time. The applicant has annexed a letter dated 30th July, 2015 addressed to the Deputy Registrar seeking assistance in tracing the Court file. There is no indication that the applicant made any follow up to the letter dated 30<sup>th</sup> July, 2015 or took any further steps to trace the missing Court file.

11. I note that the applicant has not annexed a certificate of delay from the registrar of the High Court or any other supporting evidence. In *Hamendra Mansukhalal Shah v Alnoor Kara & Another [2000] eKLR* the Court stated as follows:

***“I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.”***

12. The applicant seems to lay blame on his former advocate for failing to file the appeal within the stipulated period. In *Bi- Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR* this Court held *inter alia* that:

***“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”***

13. Similarly, in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR* the Court stated thus:

***“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.***

14. I find that in the circumstances of this case, the delay in filing the record of appeal is inordinate and the reasons for the delay advanced by the applicant are not plausible or satisfactory.

15. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015* where this Court stated as follows:

***“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”***

16. From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso* (supra). In the circumstances, I find no merit in the application and dismiss it. I make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY, 2021.

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**