



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE JA: (IN CHAMBERS)]

CIVIL APPLICATION NO. E344 OF 2020

JTK.....APPLICANT

VERSUS

MWK.....RESPONDENT

(Being an Application for leave to file Record of Appeal dated 24th September 2020,

out of time against the Judgment of the High Court of Kenya at Nairobi (Amin, J)

dated 28th June, 2019 in (HCCC No.14 of 2014 (O.S))

RULING OF THE COURT

By a motion dated 28th September 2020 and brought pursuant to the provisions of **Rule 4, 42 and 43 of the Court of Appeal Rules 2010**, **JTK (the applicant)** herein seeks the following orders:

“1. THAT this Honourable Court be pleased to grant the Applicant leave to file a Record of Appeal out of time, against the judgment irregularly and un procedurally delivered in High Court Civil Case No. 14 of 2014 (O.S).

2. THAT the Applicant’s Record of Appeal dated 24th September 2020 be deemed by this Honourable Court as duly filed and properly on record.

3. THAT costs of this Application be provided for.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **JTK** who deponed *inter alia* that he was the applicant in **HCC No. 14 of 2014 (O.S)**, which he had filed against the respondent under Section 7 of the Married Women’s Property Act (1882), now repealed seeking orders that joint ownership in respect of property Land Reference Number 13739 situate in Karen be severed and a declaration issue that he was entitled to 95% or such higher proportion of the said property pursuant to which the respondent’s advocates filed an Amended Notice of Preliminary Objection dated 13th April 2017 against his suit on the grounds that the suit offended the mandatory provisions of Section 7 of the Matrimonial Property Act 2013, as the marriage between himself and the respondent was still subsisting.

That, both the respondent’s advocates and his advocates were directed to file submissions on the respondent’s Notice of Preliminary Objection and the court slated it’s ruling for 26th April 2018, whereupon they were later notified that the same would be delivered on 28th June 2019. That, when his advocates attended court on 28th June 2019, the ruling that was delivered by Onger J on behalf of Amin J was a judgment on the entire suit instead of a ruling in line with directions that had been issued by Amin J on 25th January 2018 and that being dissatisfied with the same, he instructed his advocates on record to appeal the same as it was highly irregular and prejudicial to him for the judge to enter final judgment on the suit without giving him an opportunity to be heard.

He further deponed that his advocates on record then wrote a letter to the Deputy Registrar requesting for a certified copy of the ruling and certified copies of the proceedings on **1st July and 9th July 2019** respectively, and filed a Notice of Appeal on **12th July 2019**, which was within 14 days of the ruling and that his advocates were thereafter served with a letter from the court on **5th December 2019**, notifying them that the typed proceedings were ready and that they were collected on **20th January 2020** and subsequently a certificate of delay dated **4th March 2020**, was issued to them.

That, going by the certificate of delay, the record of appeal ought to have been filed within 60 days from **4th March 2020** and that following the outbreak of Covid-19 pandemic, the courts were closed from **16th March 2020** up to around **21st April 2020** and that further his advocates closed offices from **16th March 2020** and reopened their offices in the month of **July 2020** and that further failure to file the Record of Appeal once Practice Notes were issued and soon after partial reopening of his advocates offices was due to mistake of his advocates which should not be visited upon him. He further deponed that the intended appeal was not frivolous and had high chances of success and that the respondent would not be prejudiced as the record of appeal had already been filed and served and that as such, the hearing of the appeal could be fast tracked.

The motion was opposed by a replying affidavit sworn by the respondent on **24th March 2021**, who deponed *inter alia* that the applicant did not serve the Notice of Appeal within 7 days as stipulated in the law, as the notice was filed on **12th July 2019** but only served on **25th July 2019** and that the letter requesting the typed proceedings was never served upon her advocates and that the applicant could not therefore rely on the certificate of delay. She further deponed that there had been unexplained, inordinate and inexcusable delay in seeking the courts intervention to the intended appeal and that she would suffer great prejudice if the orders sought were issued as they would pro- long the litigation.

The applicant basically reiterated the contents of his supporting affidavit to the motion and submitted that the respondent would not suffer prejudice if time for filing the Record of Appeal was extended since the record of appeal had already been filed and served and that further, it was in the interests of justice for the motion to be allowed so that he could exercise his right of appeal against the aforesaid irregular judgment.

On the other hand it was submitted for the respondent, that it was well settled that the power to determine whether or not to extend time to lodge an appeal pursuant to Rule 4 of the Court of Appeal Rules was discretionary and an applicant had to satisfy the court on the following: that the delay was not inordinate, that the delay had been sufficiently explained and that there would be no prejudice to the respondent if the application was granted and that from the circumstances of this case, the applicant had not satisfied the required threshold and the courts discretion should not therefore be exercised in his favour.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the submissions by the parties, the cited authorities and the law.

The applicant's motion is brought *inter alia* under **Rule 4** of this Court's Rules. The said Rule provides:

"4.

Extension of time

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."

The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

In the instant case, the impugned judgment that is sought to be appealed against was delivered on **28th June 2019** whereas the instant motion was filed sometimes in **September 2020**. The applicant contends that subsequent thereafter, they filed a notice of appeal on **12th July 2019** and that on **1st and 9th July 2019** respectively, they wrote a letter to the Deputy Registrar requesting for a certified copy of the judgment and certified copies of the proceedings and that they were thereafter served with a letter from the court on **5th December 2019**, notifying them that typed proceedings were ready and a certificate of delay was subsequently issued to them on **4th March 2020** and that as such, the record of appeal ought to have been filed within 60 days from **4th March 2020**.

He further contended that following the outbreak of the Covid-19 pandemic, the courts were closed from **16th March 2020** up to **21st April 2020**, when Practice Notes were issued by the President of the Court of Appeal on the manner in which filling of documents would be done and that his advocates closed offices from **16th March 2020 until July 2020** and that failure to file the record of appeal once practice notice had been issued and soon after partial reopening of his advocates offices was a mistake which should not be visited upon him.

I have considered the length of the delay herein and in my considered opinion, I do not consider the same to be inordinate. Similarly, I find that the reasons for the delay have been reasonably and sufficiently explained to the satisfaction of this Court. Indeed, this court is aware and takes judicial notice of the fact that sometimes from **16th March 2020** up to around **21st April 2020**, courts had been closed due to Covid-19 pandemic and thereafter there have been court disruptions owing to the pandemic. As to the possibility of the intended appeal succeeding, I have looked at the memorandum of appeal and I am satisfied that the applicant has an arguable appeal. With regard to prejudice, I am of the considered opinion that since the record of appeal has already been filed and served, there will be no prejudice occasioned to the parties save

for a little prejudice on part of the respondent who will have to await a little longer before the matter is concluded and that the applicant would suffer more prejudice if the instant application is not allowed as he will not be able to exercise his right of appeal.

Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration by the Court, in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case** (*supra*), for extension of time.

Accordingly, I find the applicant's motion dated **28th September 2020**, to be merited and I allow the same as prayed. The applicant shall have the appeal listed down for hearing within 60 days from the date of this ruling failure to which these orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR