



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CIVIL APPLICATION NO. 107 OF 2020**

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

**BETWEEN**

**KENYA RAILWAYS CORPORATION.....APPLICANT**

**AND**

**HARJOT SINGH DHANJAL.....RESPONDENT**

*(An application for extension of time to file an appeal out of time against the Judgment of the Environment and Land Court at Kisumu (A. O. Ombwayo, J.) delivered on 29th April 2020*

*in*

*Petition No. 19 of 2019)*

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**RULING**

**Background**

1. Before me is an application dated 1st September, 2020 by **Kenya Railways Corporation** (the applicant) which seeks orders that the time within which to file a notice of appeal be extended and that the notice of appeal filed on 27th July, 2020 be deemed to have been filed within time. **Harjot Singh Dhanjal** is the respondent herein.
2. The application is premised on the grounds that at the time of the delivery of the impugned judgment, the whole country was under lockdown due to the Covid-19 pandemic; that as a result of the lockdown, the applicant was not in a position to issue instructions to its advocates to file the notice of appeal; that in the circumstances of the prevailing Covid-19 pandemic, a period of 2 months delay is not inordinate to justify the denial of the orders sought; that the respondent will not suffer any prejudice if the orders sought are granted; and that it is in the interest of justice that the intended appeal is determined on its merits.
3. The applicant filed an affidavit in support of the motion, sworn by **Stanley Gitari (Mr. Gitari)**, the applicant's Assistant Manager, Litigation who reiterated the grounds on the face of the application. **Mr. Gitari** deposed that the hardships, restrictive and safety measures put in place by the applicant as a result of the Covid-19 pandemic caused the delay in meeting their advocates to instruct them to file an appeal against the impugned judgment; and that the delay in filing the notice of appeal is excusable as it occurred due to circumstances beyond the applicant's control.
4. The application was opposed by the respondent vide his replying affidavit dated 26th February, 2021 on the ground *inter alia* that the notice of appeal was filed out of time; that the applicant is guilty of laches and only took action after they were served with the respondent's Party and Party Bill of Costs and the respondent's notice of motion dated 10th August, 2020 seeking to strike out the impugned notice of appeal; that the applicant has not demonstrated that it has approached its quest to file an appeal with alacrity as no evidence of a record of appeal having been filed has been exhibited; that the applicant has not served the respondent with the letter bespeaking proceedings; that no good reasons have been advanced by the applicant to address procedural lapses; and that the intervening circumstances outlined by **Mr. Gitari** on behalf of the applicant do not warrant the exercise of discretion by this Court as the applicant has not demonstrated diligence and timeliness in filing an appeal against the impugned judgment.

**Submissions by Counsel**

5. The application was heard by way of written submissions with no appearance by counsel. The applicant's counsel, **M/S Cheptum and Co. Advocates**, submitted that the onset of the Covid-19 pandemic caused great upheaval and disrupted the operations of many offices in Kenya and globally; that direct human interaction was limited to a great extent which resulted in the delay in the filing of the notice of appeal as the applicant's counsel was unable to meet the applicant's representative and obtain full instructions; and that in the circumstances, the technicalities occasioned by the pandemic should not deny the applicant an opportunity to argue the merits of its appeal on costs.

6. Counsel for the applicant further submitted that upon receipt of instructions to file an appeal on 16th July, 2020, they expeditiously filed the notice of appeal; that restricted access to the court registry and the challenges that arose from the recently introduced Judiciary e-filing system hindered the immediate filing of the same; and that the crux of the intended appeal is the issue of costs and the respondent will not be prejudiced in the event that the orders sought are granted. Counsel urged the Court to allow the application.

7. The respondent's counsel, **M/S L.G. Menezes & Company Advocates** opposed the application and reiterated the grounds raised in the respondent's replying affidavit. Counsel urged the Court to dismiss the application with costs.

### **Determination**

8. I have considered the application, grounds in support thereof and the law. The issue for determination is whether the application is deserving of the orders sought. In the instant application the impugned judgment was delivered on 29th April, 2020, the notice of appeal was filed on 27th July, 2020 and served on counsel for the respondent on 29th July, 2020. **Rule 75 of the Court of Appeal Rules, 2020** stipulates that the notice of appeal should be filed within fourteen (14) days from the delivery of the impugned decision.

9. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** which provides as follows:

***“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.”***

10. **Rule 4 of the Court of Appeal Rules** does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters 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].

11. The issues that I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

***“The exercise of this Court's discretion under Rule***

***4. has followed a well-beaten path..... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”***

12. This was reiterated further in the case of **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019** where it was explained that:

***“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”***

13. There is no maximum or minimum period of delay set out under the law. However, 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.***

14. The delay in filing the notice of appeal was approximately three months. The applicant's explanation for the delay in filing the notice of appeal is that the Covid-19 pandemic impeded the applicant's advocate from informing the applicant of the delivery of the impugned

judgment which was delivered virtually. Counsel for the applicant did not provide evidence of his attempts to file the notice of appeal upon receiving instructions.

15. The applicant has not sufficiently explained the delay in filing the notice of appeal. In ***Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR*** the Court held *inter alia* that:

***“The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and principles...”***

16. As regards the chances of success of the intended appeal, the applicant contends that it has an arguable appeal. The Draft Memorandum of Appeal was however not availed and I therefore find that in the circumstances of this application the applicant has not placed sufficient material before me to determine whether the intended appeal is arguable. 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.”***

17. Bearing in mind the aforementioned parameters, from the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in ***Leo Sila Mutiso*** (supra). Without expressing definitive conclusions, the applicant has failed to explain the delay in filing the notice of appeal or the prejudice that it will suffer if the orders sought are not granted. In the result, I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 1st September, 2020 with costs.

**Dated and delivered at Nairobi this 4th day of June, 2021.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**