



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE-MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. 71 OF 2020

BETWEEN

DR. SARAH GICHUKI NYAGA..... APPLICANT

AND

SEKUNDU MURIIRA IBAYA..... 1ST RESPONDENT

PS MINISTRY OF MEDICAL SERVICES..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

DR. JUSTUS NGATIA..... 4TH RESPONDENT

Application under Section 3, 3A,3B of the Appellant jurisdiction Act Rule 4, 41 & 42 of the CAR, 2010 seeking extension of time within which to file appeal from the decision of the High Court of Kenya at Meru (Hon. S. Chitembwe) dated 14th April 2020.

RULING

Before me is a Notice of Motion dated 24th July 2020 brought under the Provisions of Section 3,3A & 3B of the Appellate Jurisdiction Act, Rules 4 and 47 of the Court Of Appeal Rules. The applicant seeks for enlargement of time within which to file and serve the notice of appeal from the judgment and decree of the High Court at Meru delivered by **Chitembwe, J.** on 14th April 2020. The application is premised on the grounds that judgment was entered against the applicant in which she was found liable for the death of the 1st Respondents' deceased wife due to medical negligence and ordered to pay damages in the total sum of Kshs 6, 958,000 by the chief Magistrate's Court at Meru. The applicant then lodged an appeal in the High Court, at Meru. By the judgment the subject matter of the intended appeal, **Chitembwe, J** dismissed the appeal. That the prevailing Covid-19 pandemic situation made it difficult for her to not only access the judgment but equally to appoint a new advocate to represent her in her intended appeal who was then based in Nairobi. That unless the prayer for extension of time is granted, the applicant's, right to fair hearing as provided for by the constitution shall have been curtailed. That the intended appeal is meritorious with overwhelming chances of success as can be discerned from the draft memorandum of appeal.

The application is supported by the affidavit of **Ms. Elizabeth Ochieng** learned counsel for the applicant which affidavit merely reiterates the grounds in support of the motion which I need not to reproduce here.

The respondent did not file a replying affidavit to the motion but only filed submissions. Equally the applicant filed written submissions. The applicant submits that the application has been brought without unreasonable delay as the judgment was delivered on 14th April 2020 and the application was filed on 5th August 2020 and that the court should take judicial notice that courts had been temporarily closed due to the Covid-19 pandemic.

On substantial loss, the applicant submits that the 1st Respondent has threatened execution, thus unless the matter is certified urgent and the orders sought granted, execution will follow and the applicant's intended appeal will be rendered nugatory. That the intended appeal is an arguable and placed reliance on the case of ***Kenya Revenue Authority vs. Sidney Keitany Changole and 3 Others [2015] eKLR*** for this proposition.

The 1st Respondent opposes the submission by the applicant by stating that the reason for delay was due to the Covid-19 Pandemic is a mere excuse as the applicant is a medical doctor and by virtue of her job she was exempt as an essential service provider from restrictions of travel and as such she could move freely from one place to the other. Accordingly he prayed that the application be dismissed.

The others respondents did not file any papers in opposition to the application nor written submissions.

Rule 4 of the Court Of Appeal Rules which is the major Rule for accessing the relief sought 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 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 guiding the exercise of this jurisdiction under Rule 4 of the Court Of Appeal Rules are now well settled although the said Rule does not provide the factors that the court should consider in an application of this nature. However this Court has over the years devised appropriate principles. 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.”

In Hon. John Njoroge Michuki & Another v Kentazuga Hardware Limited [1998] eKLR, G.S. Pall JA (as he then was) stated further that an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the Court Of Appeal Rules; that such an order should be granted liberally unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable appeal; that the discretion granted under rule 4 of the Court Of Appeal Rules to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just and lastly that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.

Further, in the case of Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019 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 favor 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.”

It is not in dispute that the judgment, the subject of the intended appeal was delivered on 14th April 2020 and the applicant filed the instant application on 24th July 2020. It is common knowledge that from mid-March 2020 the Covid-19 pandemic interfered with normal operations in all spheres in this country; including the operations of the court. The applicant’s explanation that she could not be able to get an advocate on time as travelling to Nairobi was an issue due to the Covid-19 pandemic is therefore not mere excuse. The fact that she is a doctor is no guarantee that at the start of the pandemic she was exempted from not moving around as claimed by the respondent.

Whereas the appeal could have been filed through e-portal in July 2020 as the said portal had been lodged, this court cannot ignore the fact that the technology was new to most advocates and parties, indeed even the court staff experienced problems in using it. I have also noted that the applicant has annexed the notice of appeal and the memorandum of appeal and I am satisfied that the memorandum of appeal raises issues that require resolution by the court. As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 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.”

It is thus possible that the intended appeal may succeed.

On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension of time, against the prejudice to the respondents in granting an extension and the tilt in my view turns in favor of the applicant.

From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in Leo Sila Mutiso v Hellen Wangari Mwangi (Supra). The upshot is that I allow the application as prayed and grant the applicant 30 days within which to file and serve Notice as well as Record of Appeal, failing which this order shall automatically lapse. Costs of the application shall abide the outcome of the intended appeal.

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

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR