



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 147 OF 2019

BETWEEN

ANTI-COUNTERFEIT AUTHORITY.....APPLICANT

AND

FRANCIS JOHN WANYANGE.....1ST ...RESPONDENT

ROBERT PAUL GACHOKA WANYANGE2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE OCS INDUSTRIAL AREA POLICE STATION.....5TH RESPONDENT

(An application for extension of time to serve Notice of Appeal out of time against the Judgment of the High Court of Kenya at Nairobi (D.S. Majanja, J.) dated 23rd November, 2018 in Petition No. 320 of 2015)

RULING

Background

1. This Notice of Motion dated 13th May, 2019 is brought under **Section 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 4** of the **Court of Appeal Rules** by **Anti-Counterfeit Authority** (the applicant) seeking the following orders:

“a) That the time limited for the Applicant to serve the respondents with the Notice of Appeal be enlarged or extended to allow the serving of the same within such time as the court shall deem fit.

b) that the costs of this application be provided for.”

Francis John Wanyange is the 1st respondent, **Robert Paul Gachoka Wanyange** is the 2nd respondent, **The Director of Public Prosecutions** is the 3rd respondent, **The Inspector General of Police** is the 4th respondent and **The OCS Industrial Area Police Station** is the 4th respondent.

2. The application is premised on *inter alia* on the grounds that the 1st and 2nd respondents filed a Petition before the High Court at Nairobi (**Majanja, J.**) challenging the seizure of assorted gas cylinders by the applicant for the alleged violation of constitutional rights, seeking release of the said goods and compensation for the alleged violation; that the judgment of the High Court was delivered on 23rd November, 2018 while the notice of appeal was filed on 27th November, 2018 but was not served on the respondents within the stipulated period; that the failure to serve the notice of appeal on the respondents was inadvertent and arose as a result of an honest mistake and is regretted; that the applicant seeks to remedy the oversight and has therefore filed the instant application; that the oversight should not be visited upon the applicant which is desirous of pursuing an appeal against the impugned judgment; that the respondents will not suffer any prejudice if the orders sought are granted; and that the intended appeal raises serious arguable issues and it is therefore in the interest of justice that the instant application is allowed.

3. From the record, the respondents had not filed any replying affidavits or written submissions by the date of the hearing of this application, despite service.

Submissions

4. The application was disposed of by way of written submissions. The applicant's counsel reiterated the grounds in the notice of motion and submitted: that the notice of appeal was filed timeously; that the applicant filed a notice of motion in the High Court on 29th November, 2018 for *inter alia*, stay of execution pending the hearing and determination of the intended appeal; that one of the documents attached to the application for stay of execution was a notice of appeal and the same was served on the respondents; that the High Court declined to grant the orders sought vide a ruling delivered on 14th March, 2019; that on 18th April, 2019, the applicant filed a notice of motion in this Court seeking stay of execution of the impugned judgment, pending the hearing and determination of the intended appeal; that the supporting affidavit accompanying the notice of motion included the notice of appeal which was served on the respondents; and that this Court in a ruling delivered on 27th September, 2019 granted a stay of execution of the impugned judgment.

5. The applicant further submitted that the notice of motion which was served on the respondents on 29th November, 2018 included the notice of appeal filed on 27th November, 2018 and the respondents therefore had constructive and sufficient service of the notice of appeal; that due to an inadvertent oversight, omission and mistake on the part of the applicant's counsel, the notice of appeal was not served as a single document upon the respondents within 7 days of filing; that out of an abundance of caution, the applicant has filed the instant application for enlargement of time within which to serve the notice of appeal as a single document upon the respondents.

6. It is the applicant's further submission that the delay in serving the notice of appeal on the respondents is excusable. Counsel for the applicant cited *Godfrey Kinuu Maingi & 4 Others v Nthimbiri Farmers Co-op. Society Ltd & another [2008] eKLR* and *Kenya Bankers Co-operative & another v George Arunga Sino [2010] eKLR* in support of the instant application; that the applicant has been honest and candid with this Court on the reason for the delay which is that there was honest oversight, honest omission and an inadvertent mistake on the part of the applicant; that there is no prejudice to the respondents as they have been aware and in possession of a copy of the notice of appeal from 29th November, 2018 when the applicant filed and served an application for stay of execution before the High Court with the notice of appeal as an annex; that this Court has granted stay of execution of the impugned judgment which is pending hearing and determination; that the applicant will suffer prejudice if the orders sought are denied as it will lose the opportunity to have its appeal determined on its merits; and that this Court in its ruling dated 27th September, 2019 in Civil Application No. 127 of 2019 (*Anti-Counterfeit Authority v Francis John Wanyange & 4 Others [2019] eKLR*) this Court found that the intended appeal is arguable and granted a stay of execution of the judgment and decree, pending the hearing and determination of the appeal.

Determination

7. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. **Rule 77** of the **Court of Appeal Rules** provides that an intending appellant shall, before or within seven (7) days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal.

8. 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.”

9. **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 a ‘just’ 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].

10. The issues 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.”

11. 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.”

12. 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.

13. 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. Accordingly, a notice of appeal should be lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7 days after lodging. In the instant application, the applicant filed the notice of appeal timeously on 27th November, 2018 and attached the same to the notice of motion filed in the High Court on 29th November, 2018 and in the notice of motion filed in this Court on 18th April, 2019. The instant application was filed on 14th May, 2019. In the circumstances of this case, I find that the period of delay in serving the notice of appeal as a single document is not inordinate and is well explained.

15. The applicants contend that they have an arguable appeal. As held by this Court in its ruling dated 27th September, 2019, the appeal is arguable and therefore merited the grant of orders of stay of execution pending the hearing and determination of the appeal. In **Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No. NAI. 356 of 1996**, this Court had the following to say as regards this

Court’s discretion under **Rule 4**:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and 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 that his opponent was prejudiced by it.” (Emphasis supplied).

16. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondents in granting an extension. The applicant is aggrieved by the judgment of the High Court and has already obtained a stay of execution from this Court and has filed an appeal (**Civil Appeal No. 127 of 2019**) which is pending the hearing and determination of this Court.

17. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). The upshot is that the notice of motion dated 13th May, 2019 is allowed.

18. Accordingly, I make the following orders:

- a. That the time within which to serve the respondents with the notice of appeal be enlarged;
- b. That the notice of appeal dated and filed on 27th November, 2018 be served on the respondents within 7 (seven) days from the date hereof.
- c. Costs of this application to abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR