



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. MOHAMMED (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 125 OF 2019

BETWEEN

NYORO CONSTRUCTION CO LTD.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(An application for extension of time to file an appeal out of time

against the Judgment of the High Court of Kenya at Nairobi (G. L. Nzioka,

J.) delivered on 23rd November 2018 in Nairobi Misc Appl. No. 491 of 2017)

RULING

Background

- 1) This application is brought under **Rule 4** of the Court of Appeal Rules (this Court's Rules). **Nyoro Construction Co. Ltd** (the applicant) seeks extension of time to file a Notice of Appeal and a record of appeal against the ruling and orders of the High Court (**G.L. Nzioka, J.**) dated 23rd November, 2018, and that the costs of this application do abide by the outcome of the intended appeal. **The Hon. Attorney General** is the respondent herein.
- 2) The application is premised on the grounds set out on the face of the application and supported by the affidavit of **Josiah Njuguna (Mr. Njuguna)**, a Director of the applicant. **Mr Njuguna** depones that he has been indisposed and was not in a position to give instructions to his advocates to file an appeal; and that the delay in filing the appeal is not deliberate but has been occasioned by his ill health as evidenced by a copy of a letter from his doctor dated 19th March, 2019.
- 3) **Mr. Njuguna** averred that the applicant became aware of the impugned ruling after the lapse of 60 days from the date of delivery of the ruling; that the applicant appointed a different firm of advocates who advised that the instant application be filed for enlargement of time; and that the respondent will not be prejudiced if the orders sought are granted.
- 4) The respondent opposed the application and submitted that the cause of action being a breach of contract arose 18 years ago; that the applicant being a limited liability company with more than one director, **Mr. Njuguna's** indisposition is not a plausible explanation for the delay in instructing counsel to file the notice of appeal and the record of appeal; and that **Mr. Njuguna** did not adduce any evidence in support of his contention that he was indisposed.
- 5) It was the respondent's further submission that the applicant has not annexed a draft memorandum of appeal to the instant application to prove that it has an arguable appeal with a probability of success and the intended appeal should therefore fail; that the respondent is entitled to expeditious justice and if an extension of time is granted to the applicant to file the notice of appeal and the record of appeal, the respondent will suffer prejudice; and that the Court's discretion should not be used to assist parties who have deliberately sought to obstruct or delay the course of justice. Counsel urged the Court to dismiss the application.

Determination

- 6) I have considered the application, the grounds in support thereof, the submissions filed and the law. The issue for determination is whether the application is deserving of the orders sought. **Rule 75** of the **Court of Appeal Rules** provides that a notice of appeal should be filed within fourteen (14) days of the date of the decision against which it is desired to appeal.

7) The discretion that the applicant is urging this Court to exercise is provided for under **Rule 4** of the **Court of Appeal Rules**:

“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.”

8) The principles guiding this Court in the exercise of the discretion are set out in **Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997**:

“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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.” [Emphasis supplied].

9) 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. This Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** stated as follows:

“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.”

10) In the instant case, the applicant has not filed a notice of appeal. **Rule 75** of this Court’s Rules provides that a notice of appeal

should be filed within fourteen (14) days from the date of delivery of the impugned decision. The impugned ruling was delivered on 23rd November, 2018 and the instant application was filed on 18th April, 2019. The applicant cited **Mr. Njuguna’s** illness as the cause for the delay in filing the notice of appeal and record of appeal. I am inclined to agree with counsel for the respondent, that in view of the fact that the applicant is a limited liability company, the fact that one director was indisposed is not a plausible reason for the delay in filing a notice of appeal and record of appeal.

11) 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...” [Emphasis supplied].

12) When considering the possible chances of the appeal succeeding, caution should be exercised by the Court not to delve into the merits of the intended appeal, as aptly stated in **Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR**:

“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”.

13) On the question of prejudice, the respondent contends that it is entitled to expeditious justice and will suffer prejudice if the orders sought are granted.

14) 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). The upshot is that I decline to grant the prayer to extend time. The Notice of Motion dated 17th April, 2019 is accordingly dismissed with costs.

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