



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**HCCRC NO. 8 OF 2007 AT HIGH COURT BUNGOMA**

**CRIMINAL APPLICATION NO. 3 OF 2020**

**TIMOTHY BARASA MAJENGO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By a notice of motion dated 10<sup>th</sup> June 2021 made under rule 113 of the Court of Appeal Rules and a supporting affidavit thereto, the applicant (**TIMOTHY BARASA MAJENGO**) seeks orders that the time to lodge the appeal be extended, and/or the notice of appeal filed out of time be deemed as properly filed with leave of the court. The background to this prayer is that the applicant was charged in **HCCRC No.08 OF 2007** at the High Court sitting in Bungoma with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was tried, convicted and sentenced to death on 25<sup>th</sup> October, 2010 by F.N.Muchemi (J). Subsequently the death sentence was commuted to life in the year 2016.

Being dissatisfied with the decision, the applicant filed a Notice of Appeal dated 22/06/2020. He however did not pursue the appeal which he says has high chances of success. He explains that the delay in filing the notice of appeal was occasioned by his transfer from **Bungoma Main Prison to Kibos Maximum Security Prison**. In addition, his family had promised to hire an advocate to pursue his appeal but they failed.

The parties had been directed to canvass this application but only the respondent filed submissions. I have considered the application, the affidavits on record and the submissions by the respondent.

In opposing the prayer, the DPP on behalf of the respondent points out that Applicant was convicted on 25/10/2010 and did not take steps to apply for the record or in any way file a notice until Ten (10) years later which is out of the Appeal window provided for by section 349 of Criminal Procedure Code of Fourteen (14) Days

The respondent echoes the Supreme Court's pronouncement in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others Supreme Court Application No. 16 of 2014[2014]** eKLR to submit that in considering an application for extension the court should be alive to several key issues in exercise of its discretion namely:

- Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- Whether there will be any prejudice suffered by the respondents if the extension is granted;
- Whether the application has been brought without undue delay

It is argued that the Appellant herein has not offered satisfactory reasons for this undue delay and this application should be dismissed.

Extension of time is provided for under Rule 4 of the Court of appeal Rules which provides inter alia:

**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.**

I draw from the statement by Waki, J.A in **Fakir Mohamed vs. Joseph Mugambi & 2 others** [2005] eKLR while addressing the principles applicable in an application for extension of time under Rule 4 of the Court of Appeal Rules that:

*“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997(UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”*

The court therefore has the ultimate discretion in allowing or disallowing an application for extension of time as long as it deems the terms thereof as just.

In the present case, judgment was delivered on 25th October, 2010 and the appellant did not take any further steps after delivery of the judgment. The explanation given by the applicant does not clarify how the transfer from one prison to another affected his ability to file the appeal, and what is evident is that the applicant simply folded his arms, sat back and did nothing. Whereas Rule 4 gives this court unfettered discretion on whether to extend time or not, in the present instance, the applicant has not even exhibited a draft memorandum of appeal, which would assist in deciphering whether the intended appeal is an arguable one with any chance of success. In my considered view, ten years is an inordinately long time and does not warrant a favourable discretion.

I hold the view that the delay is inordinate and no satisfactory explanation has been given.

Consequently, the application fails and is dismissed with costs to the respondent.

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

**H.A. OMONDI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**