



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: DR. K. I. LAIBUTA, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. E018 OF 2021**

**BETWEEN**

**SILAS MURIITHI NGUCHU.....APPLICANT**

**AND**

**JOSEPH KINYANJUI WANJIRU.....RESPONDENT**

*(Being an application for extension of time to file the Record of Appeal out of time, from the Judgment and Decree of Justice B. M. Eboso, dated 9th July 2020*

**in**

***Nairobi Environment and Land Court Case No. 292 of 2015)***

\*\*\*\*\*

**RULING**

**Background**

Before me is a Notice of Motion dated 6<sup>th</sup> January 2021 made under Rule 4 of the Court of Appeal Rules, and in which the Applicant, Silas Muriithi Nguchu, seeks extension of time pursuant to Rule 4 to file and serve a Record of Appeal from the judgment and decree of Hon. Justice B. M. Eboso delivered on 9<sup>th</sup> July 2020 in Nairobi Environment and Land Court Case No. 292 of 2015. The application has been duly served on the Respondent and is opposed as appears from the replying affidavit of Joseph Kinyanjui Wanjiru, the Respondent, sworn on 24<sup>th</sup> February 2021.

The application is made on 7 grounds set out on the face of the Motion. The relevant among them is that failure to lodge the record of appeal within the prescribed period was caused by the fact that the Applicant received typed proceedings outside the period allowed to .

The Applicant's Notice of Motion is supported by his annexed affidavit sworn on 26<sup>th</sup> January 2021. In his supporting affidavit, the Applicant explains that –

- (a) he lodged his Notice of Appeal on 16<sup>th</sup> July 2020, seven days after delivery of the judgment, and served it on 17<sup>th</sup> July 2020;
- (b) he applied for typed proceedings, decree and certified copies of the judgment on 16<sup>th</sup> July 2020;
- (b) he was notified of the availability of the typed proceedings on 14<sup>th</sup> January 2021;
- (c) his counsel paid for and collected the typed proceedings on 15<sup>th</sup> January 2021;
- (d) he applied for a Certificate of Delay on 18<sup>th</sup> January 2021, and the same is yet to be issued;
- (e) he collected the typed proceedings on 15 January 2021 after expiry of the time within which he was required to file the record of appeal;

(f) delay in lodging his record of appeal was occasioned by delay in obtaining the typed proceedings, which was beyond his control;

(g) as appears from his draft Memorandum of Appeal dated 26<sup>th</sup> January 2021, his intended appeal is arguable with the possibility of success.

In his replying affidavit, the Respondent contends, among other things, that –

(a) the Applicant has not transmitted the Notice of Appeal as required under Rule 76 of the Court of Appeal Rules;

(b) the Applicant has not filed a substantive appeal and, therefore, the application for extension of time to file his record of appeal is inconsequential;

(c) the Applicant has not lodged the requisite Certificate of Delay to demonstrate the reasons for delay.

He urges me to dismiss the application.

In his further affidavit sworn on 17<sup>th</sup> June 2021, the Applicant explains that he obtained the Certificate of Delay on 3<sup>rd</sup> February 2021. The same is annexed to his affidavit.

### **Submissions by Counsel**

In their written submissions dated 12<sup>th</sup> February 2021 and made in support of the Applicant's application, counsel for the Applicant rely on the authority of *LSG Lufthansa Service Europa/Africa GMBH and another v Eliab Muturi Mwangi*, Nairobi Civil Appeal Application No. 274 of 2016 and urge me to grant the application. In reply, counsel for the Respondent has filed written submissions March 2021 in which they request me to dismiss the Applicant's

### **Determination**

Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.

The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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."

The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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, 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."

In addition to the foregoing, I have considered the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

"As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

(a) that there is merit in his appeal;

(b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and

(c) that the delay has not been inordinate."

With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am satisfied that the grounds set out in the Applicant's draft Memorandum of Appeal dated 26<sup>th</sup> January 2021 are arguable with the possibility of success. The application before me turns on the authority of *Joseph Wanjohi Njau v Benson Maina Kabau*, Civil Application No. 97 of 2012 (Unreported), where the Hon. Mr. Justice Kathurima M'Noti held that "the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court."

In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

“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.”

I have carefully considered the contents of the Applicant’s Notice of Motion and the supporting affidavit to which the draft Memorandum of Appeal is annexed. The grounds set out in its draft Memorandum of Appeal point to the fact that the intended appeal is arguable and has a possibility of success. Whether or not the intended appeal will succeed in whole or in part is not for me to judge, but remains to be seen on scrutiny by the Court of the entire record of appeal once filed, and on consideration of the relevant law relating to the matters in contention. Furthermore, it is not within my jurisdiction to consider the merits of the intended appeal with finality at this stage in the proceedings.

By so determining, I am guided by this Court’s decision in *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 (Unreported), where the Court had this to say:

“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”.”

As regards the issue as to whether the extension of time to file and serve a notice of appeal and lodge the intended appeal will cause undue prejudice to the respondent, I find that no such prejudice would be suffered. Indeed, it would, in my considered view, be in the interest of the parties that the issues in contention relating to the transfer and proprietorship of the suit property be determined with finality.

With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that “... 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.”

The applicant has explained the cause for the delay in filing its record of appeal within the time prescribed under the Rules. I am satisfied that the reasons advanced in his supporting and further affidavits are plausible. The Certificate of Delay issued on 3<sup>rd</sup> February 2021 satisfactorily sets out the sequence of events and reasons for the delayed proceedings, which took 181 days to prepare. This was done in the backdrop of the Applicant having lodged its Notice of Appeal on 16<sup>th</sup> July 2020, only 7 days after delivery of judgment. Accordingly, I do not agree with the Respondent that the Applicant has been indolent. Neither has he persuaded me that the Respondent stands to suffer undue prejudice by extension of time for the Applicant to lodge his intended appeal. In my considered view, it would be wrong to shut the 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 its opponent was prejudiced by it. I would not say so.

The Respondent has also faulted the Applicant for failure to transmit the Notice of Appeal to this Court. I do not agree with him. The mandate to transmit the Notice falls on the Registrar of the superior court under and by virtue of Rule 76 of the Court of Appeal Rules. Neither do I agree with him that an appeal is instituted by filing a Memorandum of Appeal. Rule 82(1) requires the Memorandum to be lodged together with the record of appeal within the period therein specified, the extension of which is sought in the Applicant’s Motion.

Having considered the Applicant’s Notice of Motion, the Applicant’s supporting and further affidavits, the Respondent’s replying affidavit, the written submissions of counsel for the Applicant and counsel for the Respondent, and the authorities cited by counsel for the Applicant, I find that the Applicants Notice of Motion dated 26<sup>th</sup> January 2021 merits the orders sought. Accordingly, I hereby order and direct that –

- (a) time be extended for the Applicant to file and serve its Record of Appeal within 14 days from the date hereof; and
- (b) the costs of this application be costs in the intended appeal.

**Dated and Delivered at Nairobi this 9<sup>th</sup> day of July 2021**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**