



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, (P) (IN CHAMBERS)**

**CIVIL APPLICATION NO. E281 OF 2020**

**BETWEEN**

**S.O. OWINO & ASSOCIATES.....APPLICANT**

**AND**

**NIC BANK LTD.....1<sup>ST</sup> RESPONDENT**

**NATIONAL INTELLIGENCE SERVICE**

**STAFF SUPERANNUATION SCHEME.....2<sup>ND</sup> RESPONDENT**

**(Being an application for extension of time to file and serve the**

**Record of Appeal out of time in an intended appeal against the**

**Judgment of the High Court of Kenya at Nairobi (Kasango, J.)**

**delivered on 30th day of October 2018 in *Nairobi Civil Suit No. 354 of 2013 (O.S.)***

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**RULING**

1. Before me is a Notice of Motion dated 16th September 2020 brought under *section 3, 3A and 3B* of the *Appellate Jurisdiction Act, rule 4* of the *Court of Appeal Rules, 2010* and all other enabling provisions of the law, substantively seeking leave for the applicant to file and serve the record of appeal out of time in an intended against the judgment of *Kasango, J.* delivered on 30th October 2018.

2. The application is supported by the grounds appearing on its body and a supporting affidavit sworn by *Stephen Owino*, an advocate, practicing with the applicant. The application is opposed by the two respondents by way of replying affidavits sworn by *Jackson Nyaga* on behalf of the 1st respondent and *Benard Lutomia* on behalf of the 2nd respondent. The two replying affidavits are dated 4th December 2020 and 22nd April 2021 respectively. The application was canvassed by way of written submissions without oral highlighting. The applicant's and the 1st respondent's submissions are both dated 4th December 2020 while those of the 2nd respondent are dated 22nd April 2021.

3. In summary, the applicant's averments and submissions are, *inter alia*, that the applicant, being dissatisfied with the judgment of the trial court timeously filed *notice of appeal* on *7th November 2018*; that within thirty (30) days from the date of judgment, the applicant applied for certified copies of proceedings and judgment which letter was received by the trial court registry on 7th November 2018. The applicant avers that it made follow up with the Deputy Registrar of the trial court on several occasions to be issued with the certified copies of proceedings and judgment. In this regard the applicant has produced copy of letter dated 27th January 2020 which it sent to the Deputy Registrar of the trial court.

4. The certified copies of proceedings were eventually supplied on 6th February 2020 and collected by the applicant on 7th February 2020 and the applicant embarked on preparing the record of appeal. However, the applicant while preparing the record of appeal realized that the copy of judgment availed to it was unsigned. The applicant wrote a letter to the Deputy Registrar of the trial court requesting to be supplied with a certified copy of the judgment and decree. The letter was received by the registry on 20th February 2020. A certified copy of the decree was issued to the applicant on 26th February 2020.

5. The applicant also applied for a certificate of delay which was issued on 11th March 2020. According to the certificate of delay, the certified copies of proceedings were ready for collection on 6th February 2020. The time taken to prepare and supply the proceedings was said to be from 5th November 2018 to 6th February 2020, that is, 489 days.

6. The applicant argues that when it made the request to be supplied with a certified copy of judgment, the business of the court was scaled down owing to covid-19 pandemic. The applicant was also forced to close down its offices and by the time it resumed office, the 60 days' period within which it was required to file the record of appeal had lapsed.

7. The applicant argues that upon resuming office, it made constant follow up with the court registry and was eventually issued with certified copy of the judgment on 14th September 2020 and made this application two (2) days thereafter.

8. The applicant argues that the delay in filing the record of appeal was not inordinate and that it was due to factors beyond its control. The applicant argues that their advocate was under the false impression that a signed copy of the judgment was required to be included in the record of appeal and that that is the reason the applicant took a lot time pursuing the signed copy of the same. The applicant urged this Court to pardon their advocate and exercise its unfettered discretion in favour of the applicant.

9. The applicant's plea was that it deserved an opportunity to ventilate its case, which according to the attached draft memorandum of appeal is arguable.

10. The two respondents on their part argued that the applicant after filing the notice of appeal and after requesting for certified copies of proceedings and judgment went into deep slumber. According to the respondents, there is no sufficient reason advanced by the applicant to explain why there was inaction or follow up by the applicant between 7th November 2018 and 27th January 2020 when the applicant wrote to the Deputy Registrar to find the status of the certified copies of proceedings and judgment. According to the respondents, the applicant sat on its right and is guilty of laches. The 1st respondent argues that there were no good reasons why the applicant did not pursue a signed copy of the judgment after the same was delivered and before the certified copies of proceedings were made ready.

11. The 2nd respondent further submitted that even the notice of appeal filed by the applicant on 7th November 2018 was incompetent, having been served on it on 26th November 2018 which was approximately twenty (20) days out of time.

12. The respondents further argue that the intended appeal has no chances of success and that it is an abuse of the court process and a waste of the Court's time.

13. I have considered the application, grounds in support thereof, the submissions as well as the law. The principles upon which this Court determines an application for extension of time under **rule 4** are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231***; ***Fakir Mohammed v Joseph Mugambi & 2 Other [2005] eKLR***; and ***Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019***.

14. In ***Njuguna v Magichu & 73 Others [2003] KLR 507***, **Waki, JA** expressed himself thus:

***“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”***

15. Bearing the above precepts in mind, the applicant made a request for certified copies of proceedings and judgment on 7th November 2018. The applicant wrote a reminder to the court on 27th January 2020. Eventually, the certified copies of proceedings were supplied to the applicant on 6th February 2020. The record of appeal was therefore supposed to be prepared and lodged before this Court by 6th April 2020.

16. The applicant argues that the delay was because it received an unsigned copy of judgment from the trial court; that it made a request for a signed copy of the judgment which was not availed to it in good time because the court had scaled down its business owing to covid-19 pandemic. I do not find this reason plausible. To begin with, the applicant has not given reasons why it failed to obtain a copy of the judgment between the date of judgment and the date it was supplied with certified copies of proceedings. Secondly, the conduct of the applicant reflects an applicant who is not keen on pursuing an appeal. I say this because the applicant after applying for certified copies of proceedings on 7th November 2018 went to deep slumber for about 1 year and two months, only to resurface on 27th January 2020 when it sent a reminder to the Deputy Registrar of the trial court. Where was the applicant all this time and what efforts did it make as an aggrieved and/or dissatisfied litigant to obtain copies of the certified proceedings?

17. Thirdly, after obtaining the unsigned copy of proceedings from the trial court on 7th February 2020, the applicant applied for a certified copy of the judgment and decree on 20th February 2020. There was a delay of about 13 days which has not been explained. Thereafter, the applicant does not appear to have made any follow up until 26th May, 2020 when the applicant wrote an email to the court. The argument that the delay was occasioned by covid-19 does not suffice. I take judicial notice that the first covid-19 case in Kenya was announced on 15th March 2020. It is after this announcement that the business of the court was scaled down. The applicant had a period of more than one month from 6th February 2020 to pursue issuance of a certified copy of judgment.

18. The above notwithstanding, and although a copy of judgment is one of the documents contemplated under **rule 87 (1)** of this **Court’s Rules**, **rule 88** provides for the filing a supplementary record of appeal. It reads as follows:

***“88. Where documents are omitted from the record of appeal***

***Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of***

***lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application.”***

19. The applicant therefore could have filed its record of appeal within time and thereafter file a supplementary record of appeal to include a copy of the signed judgment with leave of this of this Court.

20. There is definitely inordinate delay which is not excusable. The applicant has slept on its rights, while the respondents have moved on after there was no appeal filed within the period set by the law. There is no justification for the applicant to suddenly wake up and wish to drag the respondents on with litigation.

21. On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. See **Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR**.

22. Turning to whether the respondents would suffer any prejudice if the orders sought are granted, the intended appeal is concerned with the accrued interest earned from the deposit in a sale of land transaction. The vendor, on whose instructions the applicant was acting, declined to receive the accrued interest based on his religious faith. The 1st respondent has explained that it transferred the accrued interest to the 2nd respondent (purchaser) and has already closed the escrow account. When the peculiar circumstances of the case are viewed against the inordinate delay in filing the appeal, I have no hesitation in finding that the respondents would suffer prejudice.

23. In the end the applicant has not demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). I therefore decline to exercise my discretion to grant the application and accordingly dismiss it with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021.**

**D.K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

Signed

**DEPUTY REGISTRAR**