



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J.A. IN CHAMBERS]

MOMBASA CIVIL APPLICATION NO. 45 OF 2020

BETWEEN

CHARO KARISA NGULU.....APPLICANT

AND

KIHUBA HOLDINGS LIMITED.....RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal and record of appeal

against the ruling and orders of the Environment and Land Court at Mombasa

(Lady Justice Omollo, J) dated March, 2019

in

ELC No. 171 of 2015)

RULING OF THE COURT

By a Notice of Motion dated **15th June, 2020**, the applicant, **Charo Karisa Ngulu** seeks *inter alia*, the following order under **Rule 4** of this Court's Rules.

“That this Honourable Court be pleased to extend time for filing and service of the Notice of Appeal and record of Appeal and deem the notice of Appeal lodged on the 25th March, 2019 and served on the 26th March, 2019 and the record of appeal filed and lodged on the 2nd June, 2020 and served on the 4th of June, 2020 as properly filed and served”.

The grounds in support of the application as detailed on the face of the motion and in the supporting affidavit of the applicant similarly dated are that: the applicant was dissatisfied with the Court's decision delivered on **7th March, 2019** allowing amendment of pleadings; that he instructed his advocates to lodge a notice of appeal on **25th March, 2019** but he faced financial constraints in raising funds for typing of proceedings until **November, 2019** when he was able to instruct his advocates to do so; that having applied for the certified copies of the typed proceedings on **20th November, 2019**, it was not until **28th May, 2020** that they received the same as well as a certificate of delay; that the delay was due to reasons beyond the applicant's control including the Covid 19 pandemic and the transfer of the trial judge, and that the intended appeal raises weighty and arguable issues of law with a high probability of success.

In a replying affidavit dated **10th October, 2020**, the respondent opposed the motion and stated that the delay of more than a year had not been sufficiently explained; that it had not been served with the letter bespeaking the type proceedings and it would suffer great prejudice if the orders sought were granted.

I have considered the application, the replying affidavit and submissions by counsel. The law on the principles to be considered in an application under **Rule 4** is now well settled. They include the delay, the reason for the delay, whether the intended appeal is arguable and the prejudice to be occasioned to the respondent should the application be allowed. (See **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**).

In the instant matter, under **Rule 74 (2)** of this Court’s Rules, the applicant was required to lodge a Notice of Appeal within fourteen (14) days of the ruling.

However they filed their Notice of Appeal on **25th March, 2019**, 4 days outside the stipulated period. The applicant applied for typed proceedings on **20th November, 2019**, which is after about 240 days. The certificate of delay was issued on **28th May, 2020** and according to the applicant, the record of appeal was filed on **4th June, 2020** following which, this application was filed on **15th June, 2020**.

The reason for the delay in filing the Notice of Appeal, applying for typed proceedings and filing the record of appeal has been attributed to lack of funds.

In **Francis Mwai Karani vs. Robert Mwai Karani [2007] eKLR**, this Court held that:

“Lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts”.

Firstly, this Court was not told how much money the applicant could not raise for the typing of proceedings. In my view, this non-disclosure may be indicative of lack of candour.

Secondly, it was not explained how a transfer of a trial judge impacted on the delay. Thirdly, it is idle to blame the delay on the Covid 19 Pandemic. The ruling intended to be challenged was delivered on **7th March, 2019**; a Notice of Appeal was filed on **25th March, 2019**; and that **“... around November, 2019 ...”** the applicant received some funds and he was able to pay for the proceedings. In my view, the period from **7th March, 2019** to **November, 2019** when the applicant applied for proceedings has not been sufficiently explained.

I find no merit in the motion. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 29th day of January, 2020.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR