



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU JA (IN CHAMBERS))

CIVIL APPLICATION NO. 259 OF 2018 (UR 205/2018)

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

GERALD JUMA GICHOHI

HUMPREY KALAMA SHUME

PETER MWANGI KARIUKI

JAMES GITAU THANDI

DAVID GIKUNJU MWANGI

FRANCIS NGURE KUWONA

OBADIAH MAZA MWAMBONU

PLACIDE MWAKISACHI D'EDWARD

JOHN PHINEHAZ THAIRU

LAWRENCE KEARIE WARUKIRA.....RESPONDENTS

(An application for extension of time to file a notice of appeal and stay of execution of the Judgment of the High Court of Kenya at Nairobi (Isaac Lenaola, J) dated 29th May 2015

in

Petition No. 587 of 2012)

RULING

[1] By a petition dated 21st December 2012, filed in the Constitutional and Human Rights division of the High Court, **Gerald Juma Gichohi** and nine others (all ex-service officers of the Kenya Air Force) (herein the respondents), sought declarations that their fundamental rights and freedoms under section 70(a) and 74 of the former Constitution had been violated as they were subjected to cruel, inhuman and degrading treatment, and torture by the officers of the Kenya Army and Prisons; and that they were held in detention in military police and police custody and their rights to fair trial was violated contrary to sections 70, 72, 74 and 77 of the former Constitution. The respondents sought general, exemplary, aggravated and punitive damages,

[2] The respondent in the petition was the Attorney General who is now the applicant before this Court. On 29th May, 2015, the High Court, (**Lenaola, J**) delivered a judgment in favour of the respondents and awarded each of the respondents general damages for the violation of their constitutional rights.

[3] By a notice of motion dated 11th September, 2018, the applicant moved this Court under rule 4, 5(b) and 47 of the Court of Appeal Rules, 2010 seeking extension of time to lodge a notice of appeal and a record of appeal out of time against the judgment of the High Court delivered on 29th May, 2015. The applicant also sought orders for stay of execution of the said judgment.

[4] The application was supported by grounds stated on the motion and an affidavit sworn by **Alice Mate**, an advocate who is a special State Counsel for the Attorney General. The applicant contends that the reason for the delay in filing the notice and record of appeal was inadvertence on the part of **Mr. D. S. Wamotsa**, a State counsel who was handling the petition, who failed to inform the Ministry of Defence of the judgment and the Ministry only learnt of the judgment when it received a letter on 6th April, 2017 from the respondent's counsel, demanding payment of the decretal sum. As result the applicant had to appoint special counsel to take over the matter.

[5] Learned counsel **Mr. Philips Kioko** who appeared for the applicant urged the Court to extend time to enable the applicant file a notice of appeal as the applicant's intended appeal involves public interest and has high chances of success. Counsel relied on **George Kagima Kariuki & 2 others vs George M. Gichimu & 2 others [2014] eKLR**, in which the Court extended time holding that it had unfettered discretion. Counsel also relied on **Rose Waruimu Muthema vs Kentazunga Hardware Limited [1998] eKLR**.

[6] The respondents relied on a replying affidavit sworn by **Peter Mwangi Kariuki**, who is one of the respondents. In the affidavit, it was deponed that the applicant was aware of the judgment as it participated in the taxation proceedings. In addition, the Ministry of Defence had prior to the filing of the motion participated in the proceedings for enforcement of the judgment, and that the application was therefore devoid of any merit but was a scheme intended to delay and scuttle the respondents' attempts to reap the fruits of their judgment.

[7] **Mr. Muriithi** learned counsel for the respondents strongly opposed the application, contending that the delay of more than three years is inordinate and has not been explained. Mr. Muriithi pointed out that the applicant was the Chief Legal Adviser of the government, and therefore, the one to advise the Ministry of Defence. He noted that there was no affidavit from Mr. Wamotsa. On the issue of public interest, Mr. Muriithi stated that this was in favour of the respondents as it was in public interest that parties access the fruits of their judgment.

[8] I have considered the motion, the submissions made before me and the authorities cited. It is clear that under Rule 4 of the Court rules, this Court has unfettered discretion to extend time limited by the rules for the doing of any act required under the rules to be done. That is to say, that this Court has the discretion to extend time for the doing of any act required under the Court rules. However, that discretion must be exercised judiciously, which means that the Court must take into account relevant considerations.

[9] In this case, the act that was required to be done was the filing of a notice of appeal, which was required under rule 75(2) of the Court rules, to be filed within 14 days of the date of the decision against which it is desired to appeal, and the filing of a memorandum of appeal and a record of appeal, which was required to be done within 60 days from the date of lodging the notice of appeal. As noted above, the date of the decision sought to be appealed against was 29th May, 2015. This means that the applicant ought to have filed the notice of appeal by 13th June, 2015 and the record of appeal and memorandum of appeal within 60 days from that date. Therefore, as at 11th September 2018, when the applicant filed the motion seeking extension of time, there was a delay of more than 3 years. No explanation has been given by the applicant or his officers as to why no action was taken. Instead, the applicant is relying on the explanation from the Ministry of Defence who claimed to have been unaware of the judgment until 6th April, 2017. Even if I am to accept this explanation, no reason has been given for the subsequent delay of more than 1 year from 6th April, 2017 to 11th September, 2018. In addition, the respondents have demonstrated that the applicant participated in taxation proceedings after the judgment by filing written submissions on 20th February 2017 and a replying affidavit sworn on 16th August 2018. This confirms that the applicant was indeed aware of the judgment but deliberately took no action, giving credence to the respondents' contention that there were indications that the judgment would be settled.

[10] Although the applicant contends that it is in public interest that the application be granted, public interest does not arise merely because the decretal sum is to be paid from the public coffers. The applicant is a litigant who must be treated just like any other litigant. It is apparent that the respondents who have already waited for more than 3 years to have their judgment satisfied, will be greatly prejudiced if this matter is to be delayed further.

[11] I come to the conclusion that there has been inordinate delay in the filing of the notice of appeal and the record of appeal; and that the applicant has failed to provide any satisfactory explanation for the delay. In the circumstances, there is no justification for this Court to exercise its discretion in the applicant's favour. Accordingly, the applicant's motion is dismissed.

Dated and delivered at Nairobi this 6th day of March, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR