



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE J.A IN CHAMBERS]

CIVIL APPLICATION NO. 244 OF 2019

BETWEEN

WARDROBE COLLECTIONS.....APPLICANT

AND

L.A GROUP (PTY) LTD.....RESPONDENT

(An application for extension of time to file the Notice of Appeal and Record of Appeal

in an intended appeal against the judgment of the High Court at Nairobi (Tuiyott J.)

dated 28th June, 2019

IN

CIVIL APPLICATION NO. 225 OF 2017)

RULING OF THE COURT

The applicant, **Wardrobe Collections**, has filed a Notice of Motion application dated **28th July 2019** under **Rule 4, 41 and 42** of this Court's Rules, Section **3A** and **3B** of the Appellate Jurisdiction Act and **Article 159** of the Constitution seeking the following orders:

“1. Spent.

2. This Honourable Court be pleased to order and hereby orders that the time be extended for filing Notice of Appeal for the period of 14 days.

3. This Honourable Court be pleased to order and hereby orders extension of time for filing a record of appeal for a further period of sixty days or such period as may be certified by the registrar of the superior court as necessary for preparing certified copies of the proceedings of the superior court.

4. Any other or further orders that this Honourable Court may deem fit and just to order.

5. The costs of the application be provided for”.

The motion was supported by the affidavit of **Rajesh Jethwa**, a director of the applicant sworn on **28th June 2019** who deponed that:

On **28th June, 2019** judgment was entered in Milimani High Court

Miscellaneous Application No. 225 of 2017 against the applicant,

On **2nd July, 2019**, their former advocates filed a notice of appeal but cited the wrong date of delivery of judgment as **28th July**,

2019,

On 15th July, 2019, its former advocates filed another Notice of Appeal with the correct date and served it on the respondent's Advocates on 16th July, 2019 who received it under protest,

The applicant's former advocates failed to apply for certified copies of the proceedings and nearly 30 days had lapsed since the Notice of Appeal was lodged,

The intended appeal raises substantial questions of law of general public importance,

The respondent will not suffer any prejudice if the *application* is allowed as prayed.

On 4th March, 2020, the motion came up before me for hearing. **Mr. Mwangi**, learned counsel appeared for the applicant while **Mr. Wafula**, learned counsel held brief for **Mr. Karunga** for the respondent. **Mr. Mwangi** submitted that when they took over the conduct of the matter from the applicant's former Advocates- Okatch & Partners Advocates, they noted the irregularity of the judgment date in the filed notice of appeal and later realized the former advocates lodged another notice in an attempt to regularize the notice by correcting the date. In addition, the proceedings were not requested for timeously. According to counsel, they became aware of the irregularities after 16th July, 2019, and they filed the motion in less than 14 days which cannot be termed as inordinate. He confirmed that no action was taken under **Rule 84** to expunge the original notice.

In opposing the motion, **Mr. Wafula** submitted that the notice of appeal was filed on 2nd July 2019 - barely 4 days after delivery of judgment but they were served on 16th July 2019, 14 days later. Citing **Rule 77(1)** of the Court of Appeal Rules, he emphasized that service was to be effected within 7 days and that the applicant had not given any reasonable or acceptable explanation for the delay warranting the exercise of the courts discretion in its favour. Reliance was placed on the case of **County Executive of Kisumu V County Government of Kisumu & 8 Others [2017] eKLR** for the foregoing submission. In Counsel's opinion, the motion was superfluous as the error on the notice of appeal was simply typographical. He urged the Court to dismiss the application.

I have considered the application, the applicant's supporting affidavit and the rival submissions made by the parties. **Rule 4** of this Court's rules empowers this Court to exercise its unfettered discretion in extending the time prescribed by the rules for the doing of any act. The case of **Fakir Mohamed vs. Joseph Mugambi & two others, Civil Application No. Nai. 332 of 2004 (unreported)** outlines the general principles for determining such an application as follows:

“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, (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 the 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 exhaustively factors.....”

The applicant is now before me, asking that I apply the above principles in the instant case. The application has two prayers on its face; one is the prayer to extend the time to file a notice of appeal; and the second is a prayer to extend the time for filing the record of appeal by 60 days. The reason for delay has been attributed to mistakes made by the applicant's former Advocates.

Rule 75(2) of the rules of the Court obligates the applicant as the aggrieved party, to lodge a Notice of Appeal within fourteen (14) days of the date of the Judgment and also under Rule 82 to lodge with the Registrar of the superior Court a letter requesting for the proceedings within thirty(30) days of the Judgment. These two documents must be served on the respondent. Specifically, the Notice of Appeal must be served within seven (7) days of it being lodged in terms of Rule 77(1) of the Rules and thereafter the record of appeal must be lodged within sixty days of the lodging of the Notice of Appeal (see Rule 82).

It is not in dispute that the Court delivered its Judgment on 28th June, 2019 and that a notice of appeal was timeously filed by the applicant's former Advocates on 2nd July, 2019 albeit with the erroneous date of 28th July, 2019. In an attempt to correct this error, the said advocates filed a second notice of appeal dated 15th July, 2019 with the correct judgment date. As admitted by the applicant's advocates the initial notice is still on record and the respondent's counsel views the error as 'typographical'. In my view, the said notice is on record and it has not been struck out or withdrawn. This notice was filed within time. The applicant may wish to seek to amend this notice of appeal, (see **William Ngare & 4 Others vs. Public Trustee & 10 Others [2012] eKLR**). Consequently, prayer 2 seeking extension of time to file a new notice of appeal out of time is superfluous. This Court cannot extend time to file a fresh notice of appeal where there is a notice of appeal on record.

As for the prayer to extend the time for filing the record of appeal, **Mr, Mwangi** placed blame on the applicant's former advocates for failing to apply for certified copies of the proceedings. He also submitted that they discovered the irregularities after 16th July, 2019 and wasted no time to file this current application on 26th July, 2019.

With regards to filing the Record of Appeal, **Rule 82(1)** of the Court of Appeal Rules provides as follows:

“(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- (i) a memorandum of appeal, in quadruplicate
- (ii) the record of appeal, in quadruplicate
- (iii) the prescribed fee, and
- (iv) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.” (emphasis mine)

The applicant did not comply with the provisions of Rule 82(1) of this Court’s Rules. It is for this reason that he now seeks to enlarge time within which to file an appeal. In the supporting affidavit, blame was placed on the applicant’s former advocate, namely Okatch & Partners Advocates for failing to apply for proceedings so as to bring themselves under the ambit of Rule 115 of this Court’s Rules. The respondent did not file a replying affidavit and during the hearing before me, counsel for the applicant did inform me that the averments in the supporting affidavit were not contested. If indeed, the applicant’s former counsel is to blame for failure to comply with Rule 82 of this Court’s Rules and noting that the applicant has moved the Court with due dispatch, I am inclined to allow prayer 3 of the motion, which I hereby do. The applicant is to file the record of appeal within sixty (60) days of today’s date. I also direct that the applicant has leave to apply, given that there is a partial lock-down of the courts due to Covid-19 pandemic, in the event that the applicant is unable to obtain proceedings necessary for the compilation of the record of appeal.

Costs shall be in the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 24th Day of April, 2020.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR