



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GATEMBU, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 53 OF 2019**

**BETWEEN**

**COMMISSIONER OF CUSTOMS & EXCISE.....APPLICANT**

**AND**

**KAAYA ENTERPRISES LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**EVERGREEN SHIPPING LINE.....3<sup>RD</sup> RESPONDENT**

**UNICOM LIMITED.....4<sup>TH</sup> RESPONDENT**

**(Being an application for enlargement of time to file and serve Notice of Appeal against the Judgment of the High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 29<sup>th</sup> May 2019 in H.C.C.C. No. 193 of 2012)**

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**RULING**

1. In a judgement delivered by the High Court at Mombasa on 29<sup>th</sup> May 2019, the applicant, Commissioner of Customs and Excise, was adjudged to pay an amount of US dollars 40,000 to the 1<sup>st</sup> respondent. Intending to appeal against that judgement, it filed the present application dated 26<sup>th</sup> of June 2019. It is brought under Rule 4 of the Court of Appeal Rules and seeks orders that time be extended within which to file a notice of appeal and within which to file and serve the record of appeal.
2. The application was canvassed before me on 4<sup>th</sup> December 2019. The parties were represented by learned counsel. **Mr. Kirugi** appeared for the applicant. **Mr. Martin Tindi** for the 1<sup>st</sup> respondent and **Mr. Stephen Kyandili** for the 2<sup>nd</sup> respondent. Although **Mrs. Kisia** appeared for the 3<sup>rd</sup> respondent, she did not take a position on the application.
3. In support of the application, Mr. Kirugi swore an affidavit on 26<sup>th</sup> June 2019 explaining that the main reason for seeking extension of time is that the applicant was not given notice of delivery of the judgment and only learnt, fortuitously, that judgment had been delivered.
4. On behalf of the 1<sup>st</sup> respondent, Martin Tindi swore a replying affidavit stating that notice of delivery of pending judgment and rulings was given to the Chairman, Mombasa Law Society by the Deputy Registrar of the High Court, Mombasa on 23<sup>rd</sup> May 2019 who in turn relayed the notice to counsel by email; and that a text message was sent to the applicant's law firm on 28<sup>th</sup> May 2019.
5. I have considered the application, the affidavits, submissions and the authorities cited. Rule 4 of the Court of Appeal Rules, 2010 provides that:

**“The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

6. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

7. In Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, SC Application No. 16 of 2014 [2014] eKLR the Supreme Court pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

8. The same principles were captured by Waki, JA in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR, where he stated that:

**“The exercise of this Court’s discretion under Rule 4... 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 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: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”**

9. Having regard to those principles, is this a proper case for me to exercise my discretion in favour of the applicant? Based on the two affidavits filed, it is common ground that delivery of judgment, initially scheduled for 16<sup>th</sup> April 2018, was adjourned on a couple of occasions. Ultimately, on 29<sup>th</sup> June 2018, the Judge indicated that it would be delivered on notice. The notice of 23<sup>rd</sup> May 2019 to which counsel for the 1<sup>st</sup> respondent referred as having been given by the Deputy Registrar under which a list of pending overdue matters are listed is titled: “*List of Pending Judgment and ruling*” (sic) and is addressed to the Chairman, Mombasa Law Society. It is not addressed to the applicant’s advocates. The email from the Secretary General Mombasa Law Society transmitting the list of pending judgments to members is dated 29<sup>th</sup> May 2019 (the date on which the impugned judgment was delivered) and there is no indication that that email was sent to the applicant’s advocates. Neither is it clear to whom the text message exhibited to the replying affidavit was addressed.

10. In the foregoing circumstances I accept the explanation given by counsel for the applicant that he did not become aware of the fact that judgment had been delivered until 24<sup>th</sup> June 2019 when, by chance, they encountered a person from the 1<sup>st</sup> respondent’s advocates firm in the court registry in the process of commencing execution by extracting the decree.

11. Given that explanation and the fact that the applicant immediately thereafter, on the following day, the 25<sup>th</sup> June 2019 filed a notice of appeal, this is a proper case for me to exercise my discretion in favour of the applicant.

12. I accordingly allow the application in terms of prayers 2 and 3 of the application dated 26th June 2019. The notice of appeal dated 24<sup>th</sup> June 2019 is deemed as duly filed and served. The applicant shall file and serve its memorandum and record of appeal within 45 days from the date of delivery of this ruling. The costs of the application shall abide by the outcome of the appeal.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of April, 2020.**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**