



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 238 OF 2019**

**BETWEEN**

**FRANK WAFULA .....APPLICANT**

**AND**

**MANSUKHALAL JESANG MARU.....RESPONDENT**

*(An application for leave /extension of time to file and serve a record of appeal out of time from the Ruling of the High Court of Kenya at Kitale, (M. Njoroge, J.) dated 30<sup>th</sup> April, 2019)*

in

**ELC Case NO. 103 OF 2008)**

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**RULING**

Before me is a motion on notice dated 31<sup>st</sup> October, 2019 seeking prayers inter alia, the present appeal which was filed on 30<sup>th</sup> September, 2019 be deemed to have been filed on time. The application is filed pursuant to Rule 4 of the Court of Appeal Rules. The grounds in support of the application are that; the applicant was dissatisfied with the ruling by the trial court and preferred an appeal against the same by lodging a notice of appeal on 10<sup>th</sup> May, 2019. He then applied for certified copies of the proceedings and ruling on 8<sup>th</sup> May, 2019. On 16<sup>th</sup> July, 2019, he was informed that the proceedings were ready. The registry informed him that preparation of certified copies of the proceedings had taken more than 60 days hence he required a certificate of delay. He applied for the certificate of delay on 16<sup>th</sup> July, 2019. The certificate of delay was ready for collection on 12<sup>th</sup> September, 2019 way after time to lodge the appeal had lapsed on 26<sup>th</sup> August, 2019. He deposed further that this Court had unfettered discretion to grant the relief sought, that the application had been made in good faith and that the appeal had high chances of success. He explained further that though there was a delay of 35 days, the same was not inordinate or inexcusable and was caused by the delay in obtaining a certificate of delay. He also deposed that he had difficulties raising money to cover legal fees and disbursements for binding the record of appeal and court fees. He deposed further that if the order sought is not granted the respondent may proceed to strike out his record of appeal, which will cause him to suffer irreparable loss. On the other hand the respondent will suffer no loss or prejudice at all, if the application is allowed.

As would be expected, the application was opposed. The respondent in his Replying Affidavit deposed that; the application was devoid of merit and that this Court should not exercise its discretion in favour of the applicant. That the certificate of delay indicates that the proceedings and ruling were ready for collection by 27<sup>th</sup> June, 2019 from which date the applicant had until 26<sup>th</sup> August, 2019 to file the record of appeal but did not do so. That he had enough time between 16<sup>th</sup> July, 2019 and 26<sup>th</sup> August, 2019 to prepare and file the appeal on time. That the 66 days delay from 26<sup>th</sup> August, 2019 to 31<sup>st</sup> October, 2019 was inordinate and had not been explained and in the absence of an acceptable explanation for the delay this Court would not have jurisdiction to extend time. That the 18

days delay from 12th September, 2019 to 30th September, 2019 has also not been explained either. That it took the applicant a further 31 days to file the present application. That the appeal is against an order for payment of adjournment costs which adjournment was occasioned by the applicant. Finally the respondent deposed that he will be prejudiced if the application was allowed as he is exposed to expenses and unnecessary anxiety.

When the application came up for hearing, the applicant was present in person while **Mr. Nyamu**, learned counsel appeared for the respondent. The applicant relied on his supporting affidavit and urged that the application be allowed.

Mr. Nyamu, similarly relied on the respondent's replying affidavit and further orally submitted that the applicant had not been desirous to prosecute his defence before the trial court and had been the cause of all adjournments in the suit that is at the defence stage in the trial court. He reiterated that the 66 days delay in filing the appeal had not been sufficiently explained and that the intended appeal is not arguable as it relates to court adjournment costs which was sufficiently explained by the trial court in its ruling. Counsel further submitted that the costs were not a precondition for the suit in the trial court to proceed for further hearing and that no prejudice will be caused to the applicant should the application be denied. That the suit in the trial court has been pending since 2008 hence this application should be dismissed with costs.

In a brief rejoinder, the applicant submitted that he has always been ready to proceed with his defence save that he has been denied the opportunity by the trial court. He insisted that the delay was 35 days and not 66 days as claimed by the respondent. He contended that the KShs. 20,000/- in costs awarded against him was unmerited because he sought an adjournment to enable his advocate peruse the court file and prepare for the hearing. He insisted that his understanding of the ruling was that unless and until he paid the said costs, he could not proceed with his defence.

I have carefully considered the motion, affidavits and submissions by parties and the law. The main issue for determination is whether the applicant is deserving of the relief sought. I am called upon by the applicant to exercise my unfettered discretion under Rule 4 of this Court's Rules to extend the time within which he can file his appeal and in so doing deem the record of appeal lodged on 30th September, 2019 as filed within set timelines.

The principles that guide extension of time are contained in Rule 4 and it is indeed an exercise of discretion. Rule 4 of the Court of Appeal Rules provides inter alia:

**“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 doing 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.”**

In Mwangi v Kenya Airways Ltd [2003] KLR 48, this Court in setting out matters which a single Judge should take into account when exercising the discretion under Rule 4, held that:

**“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered...it is now well settled that the decision whether or not to extend the time for appealing is discretionary.”**

The factors to be considered in exercise of such discretion were once again set out in the case of Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR thus:-

**“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 delay, (possible) 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.”**

The law does not prescribe a minimum or maximum period of delay. All it states is that the delay should be satisfactorily explained. There has to be clear, concise and valid reasons upon which discretion can be favourably exercised. The applicant contends that the delay was not inordinate for the reason that it was caused by failure to obtain a certificate of delay from court in time and financial constraints.

It is common ground that there was about 18 days delay in filing the appeal upon issuance of the certificate of delay. I would not consider the 18 days inordinate delay in the circumstances of this case. Be that as it may, the record of appeal was filed on 30<sup>th</sup> September, 2019 a period of less than 30 days thereafter. That is not a long period of delay and to my mind the delay is well explained and is not unreasonable or

inordinate.

With regard to whether or not the applicant has an arguable appeal, it must be borne in mind that it is not really the role of a single Judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. This Court in **Athuman Nusura Juma v Afwa Mohamed Ramadhan, Civil Application No. 227 of 2015** stated thus:

*“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single Judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.*

It is possible that the appeal may succeed. I will go no further.

Under Rule 4, a party may apply for extension of time either before or after taking the action in respect of the extension of time sought. In the instant application, the applicant has already filed his record of appeal and seeks to have the appeal be deemed to have been filed on time. Taking into account all the foregoing, I am persuaded that this is a case deserving the exercise of my discretion in favour of the applicant. Accordingly, I extend time and order that the record of appeal filed on 30<sup>th</sup> September, 2019 be and is hereby deemed to have been filed on time. Costs shall abide the outcome of the appeal.

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**