



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 123 OF 2019

BETWEEN

**PHILOMENA MWONGELI NICHOLAS .....APPLICANT**

AND

**NATIONAL POLICE SERVICE COMMISSION .....RESPONDENT**

(An application for extension of time to file and serve record of appeal from the decision of the Employment and Labour Relations Court at Kisumu, (Nduma Nderi, J.) dated 7<sup>th</sup> March, 2019) in **ELRC PETITION NO. 17 OF 2018**)

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**RULING**

What is before me is the application by way of notice of motion dated 4<sup>th</sup> October, 2019 filed pursuant to **Sections 1A, 1B, 3A, 66 & 95 of the Civil Procedure Act** and **Order 52 Rule 1 of the Civil Procedure Rules** as well as **Rules 4 & 82 of the Court of Appeal Rules**. The applicant in the main seeks enlargement of time within which to file and serve the record of Appeal on the grounds that; judgment was delivered in the trial court dismissing her petition with costs on 7<sup>th</sup> March, 2019; being dissatisfied with the outcome, she instructed her advocates on record on 16<sup>th</sup> March, 2019 to lodge an appeal but owing to dire financial constraints she was undergoing, only able to pay a paltry deposit to the advocate on account of fees; that a Notice of Appeal was lodged on 19<sup>th</sup> March, 2019 and certified copies of the judgment and proceedings obtained on 1<sup>st</sup> April, 2019; however, the decree was not extracted until 31<sup>st</sup> May, 2019 when the period to lodge the appeal had lapsed by two weeks; and that she stands to suffer grave injustice if time is not enlarged.

The application was further supported by the applicant's own affidavit of the same date in which she reiterated the grounds aforesaid.

The respondent countered the application through grounds of opposition to wit that; the application was an abuse of the court process since a similar application being Civil Application No. 67 of 2019 had been withdrawn on 23<sup>rd</sup> September, 2019; the application had not been brought in good faith as the applicant had not been candid with the court given the evident variance in the grounds as narrated in Civil Application No. 67 of 2019 and the present application; no reason had been tendered for the inordinate delay in filing the record of appeal and the applicant was thus undeserving of this Court's discretion.

At the hearing of the application, **Mr. Mwangela**, learned counsel appeared for the applicant whereas **Mr. Odunga**, learned counsel appeared for the respondent.

Mr. Mwangela submitted that the three (3) months delay in lodging the appeal was due to financial constraints on the applicant's part and the mistake by counsel who failed to extract a decree immediately upon receipt of the proceedings. He reiterated that Civil Application No. 67 of 2019 was withdrawn for being defective thus causing further delay. He submitted further that the applicant was now ready and willing to prosecute the appeal and that she was prepared to abide by any conditions that I may impose in allowing the application.

Opposing the application, Mr. Odunga submitted that the applicant had approached the court for an equitable remedy without being honest. That the reason for delay in Civil Application No. 67 of 2019 was stated to have been failure by the trial court to supply certified copies of proceedings and judgment on time and secondly, that the applicant's counsel required more time to peruse the court file. Counsel contended that those grounds had now been abandoned and fresh grounds advanced in the present application. That the application ought to fail for lack of candor on the part of the applicant.

I have considered the application, the submissions by the counsel and the law. The issue for our determination is whether the applicant is

deserving of the relief sought. To do so, I am called upon to exercise my unfettered discretion under Rule 4 of this Court's rules. Rule 4 of the Court of Appeal Rules on extension of time provides *interlia* 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 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.”**

The discretion of a single Judge under Rule 4 is wide and unfettered but it has to be exercised judiciously upon reason and not subjectively, impulsively, on whim or emotion. For the Court to exercise its discretion, the applicant must establish the foundation upon which the discretion should be exercised in its favour. This Court in **Leo Sila Mutiso v Rose Wangari Mwangi, Civil Application No. Nai.255 of 1997 (unreported)** took the view that:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of delay; secondly, the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”**

This position was reiterated in **Mwangi v Kenya Airways Ltd [2003] eKLR 48**, as follows:

**“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.”**

Recently, in the case of **Njeri Njoroge v Joseph Maina Gichuhi & Another [2018] eKLR** this Court took the view that there is no limit to the number of factors that a Court should consider in an application for extension of time, so long as they are relevant.

In the instant application, the delay was approximately 90 days. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. The applicant stated that the delay was occasioned by financial constraints. I am inclined to reject this explanation for the simple reason that it is not sufficient. In so doing I am guided by this Court's decision in the case of **Joseph Maina Njoroge & 2 others v Paul Chege Muhahi [2007] eKLR** where it was held that:

**“Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why Omolo JA stated categorically in the case of Francis Mwai Karani vs. Robert Mwai Karani (Civil Application No. NAI. 246 of 2006) 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. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants' explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”**

I therefore find that the applicant's impecuniosity cannot be reason enough for me to exercise my discretion in her favour. The applicant should have invoked Rule 115(1) of this Court's rules which allows a party who has demonstrated lack of means to pay the required fees to lodge the appeal without payment of the requisite fees.

Given the foregoing, I have come to the inevitable conclusion that the reason for the delay has not been sufficiently explained and the application must therefore fail. The application is dismissed with costs to the respondent.

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

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY**

**REGISTRAR**