



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 91 OF 2019

BETWEEN

SHELLY BEACH HOTEL.....1ST APPLICANT

KENSINGTON INTERNATIONAL LIMITED2ND APPLICANT

AND

KENYA REVENUE AUTHORITY..... RESPONDENT

(Being an application for extension of time to file and serve a memorandum and record of appeal from the judgment of the High Court of Kenya at Mombasa (P.J. Otieno, J.) dated 24th January, 2019

in

HCCC No. 306 of 2001)

RULING

1. Aggrieved by the whole judgement of the High Court in Mombasa H.C.C. No. 306 of 2001 delivered on 24 January 2019, the applicants intend to challenge it on appeal to this Court. By their application dated 8 October 2019, principally under Rule 4 of the Court of Appeal Rules, they seek leave to appeal out of time against that judgment. Their suit against the respondent was for loss of income; value of trucks; expenses and aggravated damages arising from alleged wrongful seizure of their trucks.
2. Urging the application before me, learned counsel **Mr. A. Hayanga** referred to the grounds in support of the application appearing on the face of the application and his supporting affidavit and submitted that upon delivery of the judgment by the High Court on 24th January 2019, the applicants filed a notice of appeal on 6th February 2019 and served the same on respondents; that the notice of appeal was filed and served within the time prescribed under Rule 75 of the Rules; that applicants applied for typed proceedings by a letter dated 31st January 2019 and subsequent reminders sent on 6th February 2019, 26th April 2019, 20th May 2019 and 18th July 2019.
3. It was submitted that the delay in instituting the appeal in accordance with Rule 82 of the Rules is attributable to the delay by the registry in the signing of the certificate of delay which was issued on 16th September 2019 certifying that the period from 31st January 2019 to 27th August 2019 was required for the preparation and delivery of the proceedings. Counsel referred to numerous decisions of this Court in support of the contention that this is a proper case for the Court to exercise its discretion by extending time.
4. Opposing the application learned counsel **Mr. P. Wairire** holding brief for **Mr. Chabala** for the respondent referred to the affidavit in reply sworn on 14th November 2019 by Victor Andambi Chabala who deposes that the application is premature because by the time the applicants presented the application for extension of time on 15th October 2019, time for instituting the appeal had not lapsed.
5. I have considered the application, the affidavits and the submissions. The grant or refusal of an application for extension of time involves exercise of judicial discretion. The legal principles upon which the court should exercise its discretion in such application were enunciated in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, SC Application No. 16 of 2014 [2014] eKLR**, where the Supreme Court of Kenya expressed:

“We derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

6. *Waki, JA* had earlier in *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR* expressed 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.”

7. Based on those principles, I am satisfied that this is a proper case for the exercise of the court’s discretion in favour of the applicants. The notice of appeal was filed and served within the prescribed timelines. The delay involved in instituting the appeal in accordance with Rule 82 of the Rules of the Court is not inordinate. Indeed, counsel for the respondent takes the view, if I understood him correctly, that the application was unnecessary as the applicants obtained a certificate of delay and were within time to institute the memorandum and record of appeal when the present application was filed. There is no suggestion that the respondent will suffer any prejudice if time for instituting the appeal is extended.

7. In the result, I allow prayer 1 of the application dated 8th October 2019. The applicants shall file and serve the memorandum and record of appeal within 45 days from the date of delivery of this Ruling. The costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 3rd day of April, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR