



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 389 OF 2019

BETWEEN

DAVID MUNGAI KINYANJUI.....1ST APPLICANT

TERESIA NJERI MUNGAI.....2ND APPLICANT

DORCAS WAMBUI KANG'ETHE.....3RD APPLICANT

AND

THE HON. ATTORNEY GENERALRESPONDENT

(Being an application to enlarge time to file an appeal against the Judgment of the High Court (Odunga, J.) dated 9th October, 2012 in H.C.C.C. No. 318 of 2009)

RULING

Although on the face of it, this application shows it has been brought by three applicants, the truth, from the 1st applicant's own affidavit, is that the parties named as the 2nd and 3rd applicants are deceased. The one named 2nd applicant was the 1st applicant's wife and the third one his sister. It is therefore proper, in the absence of any substitution of the two, to assume that this application has only been brought by the 1st applicant. The three went to the High Court by a plaint in June 2009 seeking Kshs. 180,000.00 in general and exemplary damages for wrongful arrest and malicious prosecution. They claimed that on or about 8th October, 2007, they were maliciously and without any reason or probable cause arrested by police officers from Kibichoi Police Station in Kiambu and kept in police custody until 15th October, 2007 when they were arraigned in court and charged with the murder of one Abel Momanyi in Nairobi

High Court Criminal Case No.77 of 2007 (**Republic vs. David Mungai Kinyanjui, Teresia Njeri Mungai and Dorcas Wambui Kangethe**). They contended further that they were remanded in custody for a period of 9 months, tried and in the end acquitted under **Section 210** of the Criminal Procedure Code. Based on that, they prayed to court to find that their arrest, confinement, arraignment in court and prosecution was unlawful and malicious; that as a consequence, their businesses collapsed and their properties dissipated or were damaged, in addition to their families disintegrating as a result of which they suffered loss and damage.

The respondent denied the allegations in the suit, specifically that the arrest, confinement and prosecution was malicious and without any basis.

In dismissing the action, the High Court (Odunga, J.) expressed satisfaction that the police had reasonable and probable cause for taking the action which they took under the prevailing circumstances. In the result, the applicants' case failed and was dismissed with costs to the respondent on 9th day of October, 2012.

Within the time stipulated in the rules, the applicants lodged the notice of appeal on 18th October, 2012. In terms of **Rule 82** of the Court of Appeal Rules, they had 60 days, from the date when the notice of appeal was lodged, to institute the appeal, meaning they were expected to do that by around 19th December, 2012. They did not do so and instead have now approached the Court with a motion filed on the 17th December, 2019 for enlargement of time pursuant to **Rule 4** of the Court of Appeal Rules. The main grounds proffered in explaining the delay in bringing the appeal are that the High Court did not supply to them certified copies of the proceedings and judgment in good time; that the 2nd and 3rd applicants passed away; that the 1st applicant also fell seriously ill; and that he spent his resources to take his son to a college.

The respondent, although served with the hearing notice, did not attend court when the application came up for hearing. It was nonetheless

incumbent on the 1st applicant to satisfy the Court that he was prevented from lodging the appeal by sufficient cause.

Some of the considerations to be borne in mind, and which are certainly not exhaustive of the catalogue, according to judicial decisions, including **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (1999) 2 EA 231, are the length of the delay, the reason(s) for the delay, the prejudice to any of the parties; and whether, *prima facie*, the intended appeal has any chances of success. In considering the last ground, it must be remembered that it is not really the role of the single judge to determine definitively the merits of the intended appeal. It is only the full court when the appeal is ultimately presented that the merit of the appeal can be examined. See **Athuman Nusura Juma vs. Afwa Mohamed Ramadhan**, CA No 227 of 2015.

There cannot be any doubt that the period between 19th December, 2012 when the applicant was required to lodge the record of appeal and 17th December, 2019, when the instant motion was taken out, is prolonged. It is a period of nearly seven (7) years. The applicant has explained away the delay by stating that the High Court failed to supply him with certified copies of the proceedings and judgment. Apart from a single letter written on 1st November, 2017 by the applicant's advocates to the Deputy Registrar bespeaking uncertified copies of proceedings, there is no other proof that the applicant made any earlier effort to obtain the proceedings. The letter of 1st November, 2017 was written nearly five (5) years late. There is no basis upon which the court below can be blamed for the delay. Apart from the notice of appeal, there was nothing else upon which the court would have acted to further the applicants' intention to appeal.

The second reason advanced by applicant is the death of his wife. Again, this unfortunate occurrence was on 14th October, 2016, way outside the period for lodging the appeal by four (4) years. Regarding the applicant's illness, according to a medical document from a dispensary dated 28th October, 2019, he was diagnosed, for the first time in 2015, to be hypertensive.

It is enough to stop there and state, in respect of the reasons presented for the delay, that none of them sufficiently explains the delay which was by all standards inordinate.

In view of that delay, it is my considered view that to extend time will be highly prejudicial to the respondent.

The application has no merit and is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR