



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPLICATION NO. 7 OF 2019

BETWEEN

MARY NGECHI.....APPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

(Being an application for extension of time to lodge and serve the Notice of Appeal against the

Judgment of the High Court of Kenya at Nairobi (Onyiego, J.) delivered on 9th August 2019

in

Anti-Corruption & Economic Crimes Petition No. 30 of 2018)

RULING

1. By her application dated 25th September 2019 filed in Court on 1st October 2019, the applicant, Mary Ngechi seeks an order, under Rule 4 of the Court of Appeal Rules, for extension of time within which to file and serve a notice of appeal, and for the notice of appeal dated 11th September 2019 to be deemed duly filed and served. She intends to appeal against a judgment of the High Court at Nairobi, Anti-corruption and Economic Crimes Division delivered on 9th August 2019 dismissing her petition to stop her prosecution in Anti-Corruption Criminal Case No. 19 of 2010.

2. **Mr. Njagi Wanjeru**, learned counsel for the applicant in urging the application before me referred to the grounds in support of the application and the supporting affidavit and submitted that the 16 days delay in filing the notice of is attributable to the fact that the advocates who were acting for the applicant in the High Court did not promptly inform her of the delivery of the judgment on 9th August 2019; that the applicant became aware that judgment had been delivered when attending court on a different matter; that she immediately telephoned her lawyer, Mr. Mogikoyo, on learning of delivery of the judgment and instructed him appeal; that the said advocate applied for typed proceedings and judgment by a letter dated 30th August 2019 but when the applicant followed up with him, he withdrew from acting for the applicant whereupon she filed the notice of appeal dated 11th September 2019 and thereafter filed the present application through her current advocates. Counsel urged that in those circumstances, the Court should exercise its discretion in favour of the applicant and allow the application.

3. Opposing the application, learned counsel **Ms. Grace Maina** appearing for The Ethics and Anti-Corruption Commission, the 1st respondent referred to a replying affidavit sworn by Francis Wafula, an investigator with the 1st respondent and submitted that; that the applicant had 14 days from the date of delivery of the judgment to file the notice of appeal; that the notice of appeal in this case was served on the 1st respondent “*over two weeks after lapse of the notice period*”; that the applicant has not established sufficient reason for failing to file the notice of appeal within the stipulated period. Counsel cited the decision of the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** with regard to the principles that should guide the Court in considering an application of this nature.

4. It was also submitted that the application is defective having been filed as a criminal application when it should have been a civil application.

5. The application was also opposed by **Ms. Matiru**, learned Senior Principal Prosecution Counsel, who appeared for the 2nd respondent, the Director of Public Prosecutions and who identified fully with the submissions by counsel for the 1st respondent.

6. I have considered the application, the affidavits on record and the submissions. The principles applicable in an application for extension of time under Rule 4 of the Court of Appeal Rules were stated by **Waki, J.A** in **Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR** as follows:

“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. In the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others** (above) to which counsel for the 1st respondent referred, the Supreme Court of Kenya 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. In the present case, the applicant states that judgment of the lower court was initially scheduled for delivery on 5th June 2019 after which notification was given that it would be delivered on notice; that on 28th August 2019 is when, per chance, she learnt from her co-accused in a different matter, that judgment had been delivered on 9th August 2019; that she immediately got in touch with her advocates and instructed them to lodge an appeal but those advocates did not take further steps to do so after applying for typed proceedings on 30th August 2019.

9. The applicant exhibited to her supporting affidavit a letter dated 9th September 2019 that she wrote to her former advocates, Osoro Mogikoyo & Co Advocates, complaining that she had noticed that the said advocates did “not lodge the notice of appeal as agreed” and demanded an urgent answer, whereupon the said advocates, in a letter dated 10th September 2019 addressed to the applicant communicated that they were “unable to follow up” on the matter and suggested that the applicant should engage another advocate to do so. The following day, the 11th September 2019, the applicant herself, filed the notice of appeal now sought to be regularized.

10. Judgment having been delivered on 9th August 2019, the notice of appeal should have been filed on or before 23rd August 2019. It was filed on 11th September 2019 which is 19 days later. The explanation given by the applicant is, in my view, credible and satisfactory. It is evident that the applicant did not sit back and do nothing upon learning on 28th August 2019 that the judgment had been delivered on 9th August 2019. In the circumstances, I do not think the delay is inordinate. The respondents have not suggested that they will suffer any prejudice if the time for filing and serving the notice of appeal is extended.

11. I accept, as pointed out by counsel for the 1st respondent, that a civil application, as opposed to a criminal application, is what should have been made. I do not however think that I should decline the request for extension of time on that basis alone.

12. In conclusion therefore, I allow the application dated 25th September 2019 and filed on 1st October 2019 in terms of prayers 1 and 2 thereof with the result that the notice of appeal dated 11th September 2019 is deemed as having been duly lodged and served. The costs of the application shall be in the appeal.

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