



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 240 OF 2019

BETWEEN

DOMITILA KATILA.....APPLICANT

AND

G4S SECURITY SERVICES (KENYA) LTD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(An Application for extension of time to file and serve Memorandum of Appeal and Record of

Appeal out of time against the Judgment and Decree of the High Court of Kenya

at Nairobi (L. Njuguna, J.) delivered on 22nd November, 2017

in

HCCA No. 112 of 2013)

RULING

Domitila Katila (the applicant) seeks the favourable exercise of this Court's discretion under **Rule 4** of the Court of Appeal Rules (the rules) to be granted leave to file a Memorandum of Appeal and or a Record of Appeal out of time. The application is predicated on four grounds on its face and supported by her affidavit sworn on 22nd July, 2019. She states in her grounds that the Notice of Appeal was filed within the prescribed period; but the proceedings before the High Court were signed and or certified on 27th June, 2019 and a certificate of delay was issued on 9th July, 2019. This was however, outside the 60 days prescribed under the Court of Appeal Rules hence the application for extension of time. She gives a chronology of events from the date the impugned judgment was delivered to the date the certificate of delay was issued. She has also attached several annexures to the affidavit in support of her depositions. All these are not contested.

The bone of contention however is whether annexure DK12, which is the letter to the Deputy Registrar of the High Court bespeaking the proceedings was served on the firm of Hamilton Harrison and Mathews, the advocates on record for the respondent. The applicant deposes that she has an appeal with high chances of success and entreats the Court to allow the application.

The application is opposed by the respondent vide the replying affidavit sworn by Michi Kirimi on 27th February, 2020. Michi Kirimi deposes that the letter bespeaking proceedings, though indicating on its face that it was copied to her office was indeed never served on them. For that reason, the applicant cannot seek refuge under the proviso to **Rule 82(1) of the Court of Appeal Rules**.

On the other hand, according to Ms. Kirimi if the Court deems the certificate of delay to be valid, the last day to file the record of Appeal was 23rd August, 2019. This application was filed on 22nd July, 2019 (see paragraph 10 of respondent's replying affidavit) which would mean that the application was filed within time.

In his oral address to Court, Mr. Musili learned counsel for the applicant reiterated the contents of the supporting affidavit but was at pains to explain why it was necessary to file the application for extension of time if indeed they served the letter bespeaking proceedings on the respondent as he claims.

On his part, Mr Owiti learned counsel for the respondent amplified the contents of Michi Kirimi's affidavit and strongly denied that the contentious letter was ever served on their office. To demonstrate this, he told the Court that the copy of the Notice of Appeal displayed by the applicant bore the stamp from the respondent's advocates but the letter bespeaking proceedings had not been acknowledged with such a stamp. He contended therefore that the applicants having not served the letter bespeaking proceedings should have filed the record of appeal within 60 days of 29th November, 2017 which they did not do. He submitted that there was a delay of 2 years which has not been explained. Further, counsel submitted that the applicant had failed to demonstrate that they had a good appeal with chances of success.

On the issue of prejudice, counsel stated that the respondent will suffer by having a suit hanging over its head and there was no guarantee that litigation expenses will be recovered in the event the appeal fails. He urged for the dismissal of the application.

I have considered the application, the grounds on its face, rival affidavits and submissions of counsel along with the relevant law, particularly as espoused in the cited authorities. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** – Civil Application No. Nai 251 of 1997 where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 the delay, secondly the reasons for the 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.”

These principles have not changed and in the recent past, they have been expounded in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others** . See also **Alfred Aduvagwa Savatia V Nandi Tea Estate & Another 2018 (eKLR)** by the Supreme Court of Kenya as follows:-

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 extension of time had 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents, if extension is granted;**
- 6. whether the application has been brought without undue delay.”**

While appreciating that this Court's discretion to enlarge time is unfettered, the discretion must be exercised within the parameters enumerated in the Salat case (*supra*) and many other cases. Even as the Court is guided by the principles enumerated above, each case must be considered within its own peculiar circumstances.

The first point of call is the question of delay: the length of the delay and the reasons given for the delay.

As stated earlier, if the letter bespeaking the proceedings was served on the respondent's counsel, then in view of the certificate of delay and the proviso to Rule 82 (1) of the Rules, the appellant was still within the prescribed timelines and this application was therefore unnecessary.

Counsel for the respondent insisted that the letter bespeaking the proceedings was never served on them and that was the reason the applicants filed this application. Put to task by the Court to explain why this application was necessary if indeed the said letter was served as required, Mr Musili was at a loss to offer any plausible explanation. The only logical explanation therefore is that the letter in question was not served on counsel for the respondent.

That being the case, there is a delay of almost 2 years in filing the record of appeal. Has the delay been explained? There is no explanation whatsoever given for the delay either on the face of the motion or in the supporting affidavit. The first and second requirements have not therefore been satisfied. As submitted by counsel for the respondent, and rightly so in my view, what comes to light here is a comedy of errors which counsel for the respondent neither admits nor cares to explain. I am sorry to say I detected here counsel who was being less than candid and who did not want to accept responsibility for the situation the applicant finds herself in. I have agonised as to whether we should visit this comedy of errors on the applicant.

As stated earlier the principles enunciated in the cited cases must be juxtaposed to the peculiar circumstances of each case. In this case, the

applicant had judgment in her favour from the subordinate court. She lost on appeal and instructed counsel on time to file the notice of appeal. The same was filed on time and a letter bespeaking proceedings appears to have been written but not served on counsel for the respondent as required. It seems to me that counsel for the applicant must have been labouring under the wrong impression that the letter bespeaking proceedings was served as required. Unfortunately, counsel who represented the applicant in this application did not seem to understand what the issues were that he needed to explain to the court.

Having read the two judgments on record and the draft memorandum of appeal, I am convinced that there are important pertinent issues arising from this matter that need to be addressed and resolved by this Court. I am also not persuaded that the respondent stands to suffer any prejudice if the appeal is heard and determined on merit, other than litigation expenses which can be recovered from the applicant in the event she loses the appeal.

Accordingly, I exercise my discretion in favour of the applicant and allow the application with orders that costs of the application abide by the outcome of the appeal. The applicant is granted 14 days from the date hereof to file and serve the record of appeal.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR