



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 25 OF 2020

BETWEEN

JOSEPH PATRICK WANG'ANG'A.....APPLICANT

AND

PATRICK KIMETHU.....RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal out of time against the judgment of the Environment & Land Court at Thika (L. Gacheru, J) delivered on 29th November, 2019

in

ELC No. 20 of 2019)

RULING

[1] By a notice of motion dated 6th February, 2020, lodged in Court on 7th February 2020, the applicant **Joseph Patrick Wang'ang'a** seeks to have time extended to enable him file and serve a notice of appeal out of time. In the alternative, the applicant seeks to have the notice of appeal that he had filed on 19th December, 2019 deemed as properly filed and duly served.

[2] The applicant explains that although judgment was entered against him on 29th November, 2019 he only became aware of it on 18th December, 2019 when he was served with a copy of the judgment and a letter seeking vacant possession of the suit property. Upon consulting his advocates, he learnt that they were unaware of the judgment as an associate who had attended court had forgotten to diarize the date for the judgment.

[3] The applicant instructed his advocates to file an appeal and seek stay orders, and the notice of appeal was filed on 19th December 2019, which was seven (7) days out of time. The applicant also filed an application for stay of execution but the ELC Court declined to hear his application for stay and directed him to file an application in this Court within 30 days. The applicant blames his advocate for the delay in filing his appeal and urges the Court to rule in his favour and not to visit the mistake of his advocate upon him by dismissing his motion. In addition, the applicant contends that the respondent will not suffer any prejudice if the application is allowed.

[4] **Mr. Manyara** learned counsel who appeared for the applicant sought the Court's indulgence pointing out that the delay was not inordinate and that it was purely due to a mistake of the counsel.

[5] Although the respondent did not file any reply to the motion, **Mr. Nimrod Mbae** learned counsel appeared for him during the hearing and strenuously opposed the motion. Counsel submitted that the explanation given by the applicant for the delay amounted to dereliction of responsibility and complacency on the part of a counsel who was paid to protect the interest of a client. He urged the Court not to condone such failure. He pointed out that the applicant was represented by a firm of advocates and not an individual and that the applicant as the principal must bear the consequences of having hired a negligent agent.

[6] The motion before me being one brought under Rule 4 of the Court Rules, the guidelines under which the single Judge operates were set out in **Thuita Mwangi vs Kenya Airways Ltd** [2003] eKLR as follows:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an

application for extension of time under rule 4 of the Rules. For instance, in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

‘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 the delay: secondly, the reason 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, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.’

[7] It is evident that the power to extend time under Rule 4 of the Court Rules is a discretionary power and the only fetter to the exercise of that discretion is that the power has to be exercised judicially, each case being considered on its own circumstances. Of course the first issue that becomes relevant in considering such an application is the period of the delay and the reason for such delay. In this case it is not disputed that the notice of appeal was filed 7 days after the 14 days within which it ought to have been filed. The delay was therefore for only 7 days which by any standards cannot be considered inordinate.

[8] The applicant has explained that the delay arose because of a mistake on the part of his counsel in failing to attend court on the day the judgment was delivered, and therefore being unaware of the delivery and outcome of the judgment. Both Mr Oyugi Stephens Okero an advocate in the firm which was appearing for the applicant, and Ms Winfred Moraa Nyakundi the advocate who forgot to diarize the judgment date, have sworn affidavits admitting and explaining the mistake. It is clear to me that this was an inadvertent and honest mistake on the part of counsel, and not a deliberate attempt to obstruct or delay the cause of justice. It would neither be fair nor just to penalize the applicant, particularly when the respondent is not likely to suffer any prejudice if time is extended. I am satisfied that it is in the interest of justice for me to exercise my discretion in the applicant’s favour.

Accordingly, I allow the applicant’s motion dated 6th February 2020 and deem the notice of appeal filed on 19th December 2019 duly filed and served. The applicant shall file and serve the record of appeal within 45 days from the date hereof.

The applicant shall pay costs of the motion to the respondent.

Dated and delivered at Nairobi this 5th day of June, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR