



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 177 OF 2019 (UR 164/2019)

BETWEEN

JNM.....APPLICANT

AND

JNM.....RESPONDENT

(An Application for extension of time to file an appeal from the Ruling of the High Court of Kenya at Nairobi (L. Achode, J.) dated 9th July, 2015 *in HC civil Suit No. 1 of 2015*)

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RULING

1. JNM (the applicant) has moved this Court by way of the Notice of Motion dated 17th June, 2019 seeking in the main enlargement of time within which to file an appeal out of time.
2. Although the motion is pronounced to be premised on “Section 3(2) of the Court of Appeal Act, Rule 42 of the Court of Appeal Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act and Article 159(2) of the Constitution”, It appears to me to be simply an application under Rule 4 of the Court of Appeal Rules.
3. The applicant intends to file an appeal out of time against the ruling of Achode J dated 9th July, 2015 in Nairobi HCCC No. 1 of 2015. The application is predicated on some 13 grounds and supported by the applicant’s affidavit sworn on 17th June, 2019.
4. A brief background of the circumstances leading to the filing of this application is important to place this application in proper perspective. The applicant herein filed civil suit No. 4270 of 1991 against the respondent who was her husband. It would appear however that on 15th December, 1992 a consent order was recorded in that suit, but this is disputed by the applicant. We do not need to delve into the issue of the said consent order as the same is hotly contested. It suffices to say that the applicant after more than 20 years moved back to the High Court seeking orders to set aside the said order of 2nd December, 1992 together with all consequential orders thereto.
5. In response to the application, respondent herein raised a preliminary objection dated 19th January, 2015 on grounds, *inter alia*, that the applicant was guilty of laches or inordinate delay as her application was filed over two decades after the order she sought to set aside was issued. The application was heard by Achode J who ultimately upheld the preliminary objection after finding that the consent order had been entered into on 15th December, 1992 some 23 years earlier and since a consent judgment has the effect of a contract in law, the application had been caught up with by Section 4(1)(a) of the Limitation of Actions Act and it was therefore statutorily time barred. The application was consequently dismissed with costs being awarded to the respondent. The Ruling dismissing the application was delivered on 9th July, 2015, five years ago. That is the Ruling the applicant intends to appeal and in respect of which she now seeks extension of time.
6. From the grounds on the face of the application and the supporting affidavit, the applicant attributes the inordinate delay to “*inadvertent omission that was unavoidable circumstances* (sic)”. She also says in the grounds, that she was “devastated” by the Ruling in question and it took her time to compose herself and plan the next move; she also says that she was not represented and could not raise enough finances to “draft pleadings”. She deposes that her intended appeal has high chances of success and she should therefore be given another chance so that her suit can be determined on merit.
7. In his oral address to Court, Mr. Ogado, learned counsel for the applicant reiterated that the delay of over 4 years was on account of lack of

finances on the part of the applicant. He urged that the applicant has an arguable appeal as the alleged consent order did not exist.

8. The application is opposed by the respondent vide a lengthy affidavit sworn on 12th July, 2019. I find it necessary to state at this point that the application before Achode J was not heard on merit and the issues pertaining to matrimonial property were not canvassed before the Judge and they cannot be canvassed before me through this application. I say so because the respondent's replying affidavit is a narration of the divorce between the parties herein and other issues pertaining to distribution of matrimonial property which in my view are extraneous and have no bearing whatsoever to this application. It is also important that I clarify that the only relevant prayer before me is the one for enlargement of time as all the other prayers ought not to have been lumped up in a Rule 4 application for extension of time which is a single Judge application while the other prayers are for full bench.

9. In his oral submission before me, Mr. Muchigi, learned counsel for the respondent maintained that the delay of over 4 years was inordinate and the delay has not been explained. He relied on the cases of **Chairman of Kenya National Union of Teachers & Another v Henry Inyangala & 2 Others [2018] eKLR; Ruth Anyongo v Joseph Ndungu Njoroge [2018] eKLR** among others.

10. On the principles that guide the court in an application for extension of time, counsel cited the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others** and also in the case of **Alfred Aduvagwa Savatia V Nandi Tea Estate & Another 2018 (eKLR)**.

11. On the ground that the applicant was indigent and could not afford to pay legal fees Mr. Muchigi submitted that the applicant was not being candid as she had filed Nairobi HCCC No. 58 of 2014 and 2 applications which must have cost her money. She could not therefore lack fees to file a Notice of Appeal or consult counsel on this matter. He also contended that the Court had confirmed that there was a consent which had been adopted over twenty years before. He posited that the applicant had not established what prejudice she would suffer, urging that it was the respondent who would be prejudiced by being dragged back into litigation that was compromised 28 years ago. He urged for dismissal of the application.

12. I have considered the application, the grounds on its face, the rival affidavits and submissions by learned counsel. The principles that guide the court on whether to enlarge time or not are now old hat. In **Leo Sila Mutiso vs. Hellen Wangarir Mwangi, Civil Application No. Nai. 255 of 1997**, it was stated that in an application for extension of time, the relevant factors to be considered is the length of delay; the reason for delay; the chances of appeal succeeding and the degree of prejudice (if any) likely to be caused to the respondent if extension of time is granted.

13. These principles have not changed and in the recent past, they have been expounded in the Salat case (*supra*) by the Supreme Court 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.

14. Did the applicant explain adequately the reason for the delay? There is no doubt that the instant application was brought about 4 years after the Ruling sought to be appealed against. That delay is by any standard inordinate. Has it been explained to the satisfaction of the

Court? The applicant proffers two reasons for the delay. Firstly, that she was so shocked by the Ruling that she did not know what to do, and secondly that she could not raise money to file “pleadings”.

15. On the allegation of going into shock, we were not told that the applicant fell ill or was hospitalised and if so for how long. Yes, she may have been shocked but clearly, the shock did not last 4 years. In any event, no medical evidence was availed to support such an allegation.

16. On the second issue, filing a notice of appeal in person would not have required a lot of money. Besides, the Court Rules provide for filing of pleadings *in forma pauperis*. Had the applicant approached the Registrar of the Court with a request to be allowed to waive fees, such a matter would have been given due consideration. We have not been told that she did so. I am not satisfied that the applicant has laid proper basis to explain the delay as required in the cases cited above to prevail upon the Court to exercise its discretion in her favour. The delay involved in this matter is inordinate and in my view, it has not been adequately explained.

17. On whether the applicant has an appeal with chances of success, I have read the Ruling and I have also considered the annexures to the replying affidavit. I would be reluctant to state that the applicant has an appeal with high chances of success. On the issue of prejudice, the original matter giving rise to these proceedings was filed in 1992, almost three decades ago. Surely, these proceedings cannot continue hanging over the respondent’s head like the sword of Damocles. Litigation must come to an end at some point. Reviving this matter will be very prejudicial to the respondent given the lapse of time involved.

18. On the whole, I am not persuaded that this application meets the threshold set out in the guidelines I have cited above. In the result, I find the application devoid of merit and dismiss it with no order as to costs.

**Dated and delivered at Nairobi this 5th 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**