



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 23 OF 2020

BETWEEN

GERALD KITHU MUCHANJE.....APPLICANT

AND

CATHERINE MUTHONI NGARE.....1ST RESPONDENT

GIBSON NYAGA NGARI.....2ND RESPONDENT

(An application for extension of time to file and serve record of appeal from the decision of the Environment and Land Court at Embu (Y. M. Angima, J.) dated 28th March, 2019)

in

ELC CASE NO. 1 OF 2018 (O.S)

RULING

What is before me is a notice of motion application dated 4th February, 2020 in which the applicant prays for leave to file a fresh Notice of Appeal out of time to enable him lodge an appeal against the Environment and Land Court’s Judgment and decree (Y. M. Angima, J.) delivered on 28th March 2019. The application is brought under Rules 4 and 75 of the Court of Appeal Rules. The application is premised on the grounds that; upon delivery of the judgment by the trial court as aforesaid the applicant opted to seek a review of the impugned judgment. The application for review was dismissed as the court found that the grounds raised therein were good grounds for an appeal and not review. On the basis of these observations by the trial court, the applicant filed the present application. The applicant avers that the intended appeal is arguable and has high chances of success and it would only be fair and just that the extension of time is granted.

The application was further supported by the applicant’s supporting affidavit of the same date in which he reiterated the aforesaid grounds and further stated that the reasons for his delay in filing the appeal were beyond his control having changed his advocates upon delivery of judgment and also because due to his old age. He went on to depose that on filing the Notice of appeal it was found to be defective as time for lodging the same had lapsed.

The application was dispensed with by way of written submissions. In the written submissions filed by his advocates on record, Messers Gachie Mwanza & Co. Advocates, the applicant pointed out that to make an assumption that a party who unsuccessfully tries to review an order cannot exercise its right of appeal would be akin to shutting the door of justice in the face of a deserving litigant. That there was no substantive law stating that once a party sought review, he could not appeal later on as the only provision is for review application to be dispensed with before an appeal is filed. He claimed that his actions were not deliberate but rather a mistaken legal point of view. Relying on the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231, the applicant invoked this Court’s discretionary jurisdiction to grant the order sought in line with the guidelines therein. He maintained that the delay was occasioned by the application for review in which ruling was delivered on 28th November, 2019. Lastly, the applicant was of the view that the contested issue was a weighty matter which greatly touched on the subject matter of the suit and would amount to prejudice to all the parties if not justly resolved.

The application was not opposed as there was no response from the respondents.

I have considered the application, grounds in support thereof, the submissions as well as the law. The issue for determination is whether the

application is merited.

Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but the court has generally devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. **Leo Sila Mutiso vs Rose Hellen Wangari (supra)** which is the *locus classicus*, laid down the parameters as follows:

“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.”(Emphasis provided)

Be that as it may, the issues to consider as a single Judge are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where it was held that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path..... As it 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, (possible) 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 factor.”

This was reiterated further in the case of **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019** where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

The delay in filing the present application and intended appeal was approximately 11 months. The applicant cited the then pending application for review as the reason for delay. This is not a plausible reason, the filing of the notice of appeal was not dependent on the outcome of the review.

As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension of time, against the prejudice to the respondents in granting an extension.

The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of **Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR**, the court stated that *“From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”* See also the case of **Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others (2020) eKLR**. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.

In the end the applicant has not demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra) and other decisions of this

Court. I therefore decline to exercise my discretion to grant the application and accordingly dismiss it with no order as to costs.

Dated and delivered at Nairobi this 24th day of July, 2020.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR