



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 97 OF 2020

BETWEEN

JAYESH VIJAY PATEL.....APPLICANT

AND

SAMUEL WATUKA MUINDI.....RESPONDENT

(An application for extension of time to file and serve record of appeal from the decision of the High Court of Kenya at Machakos (G. V. Odunga, J.) dated 9th March, 2020)

in

HCCA NO. 5 OF 2018)

RULING

This is an application dated 6th April, 2020 by the applicant seeking leave to file his Notice of Appeal out of time against the judgment of the High Court, (**G. V. Odunga, J.**) delivered on 9th March 2020. The application is brought under Rule 4 of the Court of Appeal Rules, Article 159(2) (d) of the constitution and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. The application is premised on the grounds that; following delivery of judgment by the trial court on 9th March, 2020 there was an outbreak of Corona Virus and directions were issued by the Chief Justice limiting access to courts, registries and court operations on 15th March, 2020. That further directions were issued on 23rd and 26th March, 2020 respectively directing judicial staff to work from home with a limited number of appointed personnel in the registries to handle urgent matters. That due to the government directive that citizens should work from home, the applicant's advocate's office was closed save for urgent matters. He acknowledged that he should have filed the Notice of Appeal by 23rd March, 2020 which was within 14 days of delivery of judgment. He averred nonetheless that the directives issued on court operations were unprecedented and beyond his control hence the reason for the delay in filing the Notice of Appeal. That the applicant's intended appeal is meritorious, and the application has been brought without delay. The application was further supported by the applicant's supporting affidavit of the same date in which he reiterated the grounds on the face of the application aforesaid.

The application was opposed. In his replying affidavit, the respondent stated that he was not served with a copy of the letter requesting for certified copies of the proceedings, judgment and decree dated 18th March, 2020 contrary to Rule 82(1) and (2) of the Court of Appeal Rules. That the corona virus pandemic cannot be used as an excuse to not effect service. That the learned Judge was right to hold that the applicant failed to prove that the criminal proceedings by the respondent were actuated by malice. Thus the intended appeal will have no merit.

The application was dispensed with by way of written submissions. In the written submissions filed by his advocates on record, Messrs **Wagara, Koyyoko & Co. Advocates**, the applicant submitted that the application had indeed been filed without inordinate delay. He reiterated that the reason for the delay in not filing the Notice of appeal on time was due to the outbreak of corona virus which led to restricted access to court operations. On whether the intended appeal was meritorious, the applicant raised the issue as to whether or not malicious prosecution was proved. Lastly, he submitted that the respondent would suffer no prejudice should leave be granted as he was not awarded monetary or any tangible positive benefit before the lower court.

In his written submissions filed by his advocates on record, **Messrs M. Mutinda & Associates Advocates**, the respondent restated that the applicant did not meet the requirements regarding institution of appeals as set out in this Court's rules which was a fatal mistake and that he should have been served through electronic mail. He pointed out that the application should be struck out under Rule 84 of this Court's rules as an essential step in the proceedings had not been taken. (See: **Total Kenya Limited v Reuben Mulwa Kioko Civil Appeal (Application)**)

No. 35 of 2017). Lastly, the applicant maintained that the intended appeal has no merit and that the learned Judge was justified in reaching the decision he made and urged that the application be struck out.

I have considered the application, grounds in support thereof, the respondent's replying affidavit, the submissions as well as the law. The issue for determination is whether the application has met the threshold for enlargement of time.

Rule 4 of the Court of Appeal Rules does not provide the factors that the court should consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** 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.”

In the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** this Court rendered itself thus:

“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 under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant such leave. Likewise, the reason or reasons for the delay must be plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** cited by the applicant, 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 instant application and intended appeal was approximately 14 days. I would not consider the 14 days inordinate delay in the circumstances of this case given that the applicant has taken steps such as applying for proceedings within the required time frame and seems desirous of prosecuting the intended appeal. The applicant cited the restrictions put in place by the judiciary and the government in an effort to curb the spread of corona virus as the reason for delay. I take cognizance of the directives by the Chief Justice and the Governor and more particularly recommendation which urged courts to ***“consider granting extension of time for filing any time bound pleadings that may not have been filed during this period.”***

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.”

It is thus possible that intended appeal may succeed.

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, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the judgment of the High Court and is desirous of appealing against the said judgment. However, the time for him to exercise his right of appeal has since lapsed hence the present application while the respondent contends that the applicant failed to comply with Rule 82 and therefore his application should be struck out under Rule 84 of the Court of Appeal Rules. The respondent ought to move the court at the appropriate time as Rule 84 applies to striking out the Notice of Appeal.

From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra) and other decisions of this Court. The upshot is that I allow the application and grant the applicant 30 days within which to

file and serve Notice as well as Record of Appeal. The application is accordingly allowed. Costs to abide the outcome of the intended appeal.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR