



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 107 OF 2020

BETWEEN

OMAR SHURIE APPLICANT

AND

MARIAN RASHE YAFAR RESPONDENT

(An application for extension of time to file a Notice of Appeal from the decision of the Environment and Land Court at Garissa (E. C. Cheron, J.) dated 28th February, 2020

in

ELC CASE NO. 11 OF 2018)

RULING

This is a notice of motion application dated 6th May, 2020 in which the applicant prays for extension of time for filing a Notice of Appeal to enable him challenge the Environment and Land Court’s Judgment (E. C. Cheron, J.) delivered on 28th February, 2020.

The application is brought under Rules 4 and 75 of the Court of Appeal Rules and is premised on the grounds that; the applicant instructed his then advocates on record, Messrs Kibera & Associates to lodge an appeal against the impugned judgment on 5th March, 2020. However, upon inquiry as to the progress of the intended appeal on 12th March, 2020 he was informed that the Notice of Appeal had not been filed since the advocate handling the matter had been out of the office. The applicant then instructed his current advocates to handle the matter on 13th March, 2020. That though the Notice of Appeal should have been filed by the 13th March, 2020 he was not able to do so and the situation was not made easier by the confirmation of the first case of covid-19 which scaled down court activities. That the failure to file the Notice of appeal on time was the mistake of his previous advocate which has robbed him of his right of appeal and that the mistake of counsel should not be visited upon him. That the pandemic led to the closure of his advocate’s offices, a circumstance that was beyond his control. He has since filed a Notice of Appeal dated 21st April, 2020. That the intended appeal has overwhelming chances of success and the respondent will suffer no prejudice should the application be allowed.

The application was supported by the applicant’s affidavit of the same date in which he reiterated and expounded on the grounds aforesated.

The application was dispensed with by way of written submissions. In his written submissions filed by his advocates on record, the applicant submitted that the delay in filing the Notice of Appeal was due to the mistake and indolence of his previous advocate who failed to file the said notice on time because he was out of office. Being apprehensive of right of appeal being defeated, the applicant sought alternative legal representation. The applicant further submitted that the outbreak of covid-19 forced his newly appointed advocates to close their offices in line with social distancing directives a situation which further delayed the process of filing the notice of appeal as courts operation were scaled down. He reiterated that the appeal had high chances of success and urged the court to exercise its overriding objective in his favour. Lastly, the applicant urged the court to exercise its unfettered discretion and extend time as was the case in **Wardrobe Collections v L.A. Group (pty) Ltd [2020] eKLR** and **National Land Commission v Salome Munubi & 4 Others [2020] eKLR**.

The application was not opposed as there was no response from the respondent; either by way of a replying affidavit or written submission despite being served with the application as well as the hearing notice.

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 deserving.

Rule 4 of the Court of Appeal Rules does not provide for factors that the court ought to consider in an application for extension of time but this Court has over the years 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** is the *locus classicus* which 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.”

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** in which it was stated 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 leave. Likewise, the reason or reasons for the delay must be plausible. In **Andrew Kiplagat Chemarango 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 90 days. The applicant cited the mistake of his then advocates on record for failing to file the notice of appeal within time and the outbreak of covid-19 pandemic as the reasons for delay. In the case of **Bains Construction Co. Ltd v John Mzare Ogowe [2011] eKLR** the court observed as follows:

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.

Similarly, in **Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR**, the Court stated thus:

“The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003, a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest.

The applicant’s then advocate had instructions to file a Notice of Appeal especially given that he advised the applicant to appeal against the whole judgment of the trial court. The delay is wholly attributable to the acts and omissions of applicant’s previous counsel. I thereafter find this to be a plausible reason for delay.

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 and wishes to appeal albeit out of time. The respondent did not respond to the application. From the circumstances of this case, it is without doubt that the applicant is desirous of prosecuting his intended appeal.

The applicant has thus satisfied the parameters set out in Leo Sila Mutiso (supra) and other decisions of this Court. Accordingly, I allow the application and deem the Notice of Appeal filed on 28th April, 2020 as having been filed in time. I further direct the applicant to file and serve the record of appeal within the next thirty (30) days from the date hereof.

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