



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. 14 OF 2020

BETWEEN

BENSON KINUTHIA MWAURA

(suing as the Legal representative of the Estate of

JONH MWAURA KINUTHIA (Deceased).....1ST APPLICANT

FELISTA NJOKI MWAURA.....2ND APPLICANT

AND

DIAMOND TRUST BANK LIMITED.....1ST RESPONDENT

STEPHEN KARANJA KANG'ETHE

T/A DALALI TRADERS.....2ND RESPONDENT

(An application for extension of time within which the applicants can file and serve the Notice and Record of Appeal upon the respondents from a Ruling of the Environment and Land Court at Thika (L. Gacheru, J.) delivered on 24th May, 2019

in

ELC NO. 629 OF 2017)

RULING

1. By a Notice of Motion dated 22nd January, 2020 brought under Rule 4 Court of Appeal Rules, the applicants seek two main orders from the Court as hereunder:-

(1) THAT the Court be pleased to extend the time within which the applicants can file and serve the Notice of Appeal.

(2) THAT this Court be pleased to extend the time within which the applicants can file and serve the Record of Appeal.

2. The application is premised on five grounds on its face which state, *inter alia*, that the notice of appeal was filed on time, but not served within the prescribed time; that the respondents have started executing the impugned judgment, that the applicants stand to suffer substantial loss if their property is sold and lastly that the respondents will not suffer prejudice should time to serve the documents be extended.

3. The application is supported by the affidavit of Antony Maina Macharia counsel for the applicants, dated 22nd January, 2020. In the said affidavit, counsel explains that his clerk forgot to "file and serve" the said notice within time. He deposes that the applicants have a good appeal and further that the respondents will not suffer any prejudice should the application be allowed. He has annexed the said notice of appeal which was lodged in court on 18th June, 2019, judgment having been delivered on 24th May, 2019.

4. The application is opposed by the 1st respondent (Diamond Trust Bank Limited) through the affidavit of Francis Kariuki, its legal officer

sworn on 29th June, 2020. Mr. Kariuki deposes that it is not correct for the applicants to state they filed the notice of appeal on time it having been filed 21 days after delivery of the Ruling in question. Further, that the said notice of appeal was served on the 1st respondent on 8th August 2019 which was 55 days out of time. Mr. Kariuki posits that the application is an abuse of the court process and that the applicants are not candid in not disclosing the proper circumstances surrounding the matter. The respondent deposes further that the applicants did not even serve them with the letter bespeaking proceedings and their appeal therefore abated automatically upon expiry of 60 days of filing the notice of appeal as provided for under **Rules 82 and 83 of the Rules of this court.**

5. The respondent says that the delay of seven months which is inordinate has not been explained and urges the court to find no merit in this application and dismiss it accordingly with costs to them.

6. The application proceeded by way of written submissions. In their submissions date 26th June, 2020; the applicants have concentrated on the issue of the probable success of their appeal. They maintain that they have a good appeal with high chances of success. Other than saying that an unnamed clerk in their office forgot to serve the notice of appeal on time, they have not explained the delay, or reasons why the notice of appeal was not filed on time in the first place.

7. In its submissions, the 1st respondent reiterates the contents of the replying affidavit and maintains that contrary to the appellants' averments, the notice of appeal was filed outside the prescribed time and served on them 55 days out of time, yet no attempt has been made to explain the inordinate delay. According to the 1st respondent, the clerk who is blamed for "forgetting" to serve the notice of appeal has not sworn an affidavit to that effect and that assertion remains hearsay.

8. Both parties filed lists of authorities and cited several relevant authorities.

9. I have considered the application, the rival affidavits and the submissions along with the cited authorities. As a starting point, I wish to correct the wrong impression created by the applicants to the effect that they filed the notice of appeal on time. From their own annexure, it is evident that the notice of appeal was lodged in court on 18th June 2019. The Ruling sought to be appealed against was delivered on 24th May, 2019. This is evidently outside the time frame provided for under Rule 75 of the Rules. The said notice was also served 55 days out of time without leave of Court.

10. Having put the record straight, I now move to consider the law applicable in applications such as this one in order to determine whether the application passes muster. **Rule 4** of the Court of Appeal Rules does not provide for factors a court ought to consider in an application for enlargement of time, but the courts have devised appropriate principles to be applied in achieving a just decision in the circumstances of each case. These principles were succinctly set out in the locus classicus case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** (1999) 2 EA 231, 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 supplied)

The above parameters are nonetheless 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.”

See also: **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees**, Civil Application No. 190 of 2019.

11. On the first issue on the length and reason for the delay, 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 reasonable and plausible. See: **Andrew Kiplagat Chemarigo v. Paul Kipkorir Kibet [2018] eKLR.**

In this case, the applicants do not even concede having filed the notice of appeal out of time although this is plainly evident from the documents on record. The notice of appeal was also served 55 days late. Even as we appreciate that the delay in filing the notice of appeal cannot be said to be inordinate, there is absolutely no reason given for the delay. In my view, “forgetting to file” the notice of appeal by an unnamed clerk is not sufficient or plausible reason to extend time. I also note that the application for extension of time was filed almost 7 months after the impugned notice of appeal was filed.

12. On whether the intended appeal has good chances of success, this consideration comes after the first two have been satisfied; that is the length of delay and whether the explanation given is plausible or not. This application has failed both tests. Moreover, it is not the role of the single judge 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 thus, on that issue:-

“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”.

13. Lastly, in considering the issue of prejudice, the Court balances the competing interests of the parties, that is, the injustice to the applicant, in denying him/her an extension, against the prejudice to the respondent in granting an extension. I note that the intended appeal is against an interlocutory ruling and the main suit is yet to be heard. The rights of the parties will be determined in the main suit and not in the intended appeal. I do not see any prejudice that is likely to be occasioned to either party if the extension sought is not granted.

14. From the foregoing analysis, my conclusion is that the application before me does not meet the parameters set out in the Leo Sila Mutiso case (*supra*). The applicant has failed to satisfy the Court that he deserves the extension of time sought. Accordingly, I find this application devoid of merit and dismiss it accordingly with no order as to costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR