



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 77 OF 2020

BETWEEN

CNG.....APPLICANT

AND

TNK.....RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal out of time

in an intended appeal from the judgment of the High Court of Kenya at Nairobi

(Asenath Ongeri, J.) dated 4th October, 2019

in

H.C.C.A. No. 136 of 2018)

RULING

[1] The Notice of Motion dated 10th March, 2020 is taken out by **C NG** (the applicant). He seeks leave to file a Notice of Appeal out of time or to deem the Notice of Appeal filed on 4th November, 2019 duly filed. The application is supported by the grounds stated therein and matters deposed to in the applicant's affidavit sworn on 10th March, 2020. According to the applicant, the judgment he intends to appeal against was delivered on 4th October, 2019. He was not aware that he had to file a Notice of Appeal within fourteen (14) days as he was under the mistaken belief that the Notice of Appeal was to be filed within thirty (30) days. The applicant was late by sixteen (16) days as he blames the court registry staff who advised him that he needed to file an appeal after thirty (30) days.

[2] The applicant further states that he intends to appeal against the orders issued in the said judgment where the Judge upheld the decision of the trial court granting the legal custody of two minor children to be shared between the applicant and respondent. Actual custody care and control was given to the respondent and the applicant was to have access to the children during the weekends as stated in the said order and to pay school fees and monthly support of Ksh. 7,000 per month.

[3] The application was not opposed although there is evidence on record that the respondent was duly served. Nonetheless this does not lessen the duty placed upon me when dealing with this kind of application which falls within the realm of **Rule 4** of the Court of Appeal Rules. That is to say, the orders sought are discretionary but the discretion, as always must be exercised on reason and not caprice. There is no uniform manner in which such applications shall be considered as each case is always different from the other. For that reason, the factors relevant for consideration are never closed. **Rule 4** on which the motion is principally premised provides as follows:

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

See also **Fakir Mohamed vs. Joseph Mugambi & 2 Others** Civil Appl. 332/04 (UR), thus: -

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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, (possibly) 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 the 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 factors.”

In this regard, I may also mention the duty imposed on the Court under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

[4] That said, I will now examine this application against the background of those principles. As regards the arguability of the intended appeal, my edit is circumscribed as the merit thereto is not within my province. However, a cursory look at the orders issued, custody of the two minor children was given to both parties which means they both have the rights to exercise parental responsibility. Perhaps the issue of child support may or may not be an arguable point, but I will leave the matter at that.

[5] On issue of delay, the applicant was late to file the Notice of Appeal for sixteen (16) days and he gives a cogent reason that he was mistaken that it ought to have been filed within thirty (30) days and not fourteen (14) days. Although ignorance of the law is never an excuse, this seems to have been compounded by the fact that the applicant was misled by the information he received from the court registry. Whether that is true or not I will give the applicant a benefit of doubt and exercise my discretion in favour of giving liberty to the applicant to exhaust himself before this Court on his grievances with the impugned judgment.

[6] Accordingly, I allow the application as prayed. The Notice of Appeal filed on 4th October, 2019 is deemed to have been filed within time. Since the application was not defended, I make no order as to costs. I so order.

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

M. K. KOOME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR