



IN THE COURT OF APPEAL

AT NYERI

(CORAM: J. MOHAMMED, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 151 OF 2018

BETWEEN

ELPHAS MWITI.....APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(An application to file the record of appeal out of time from the decision of the High Court of Kenya at Nyeri (Ngaah Jairus, J.) dated 20th April, 2016)

in

HCCA No. 49 OF 2016)

RULING

Background

1) Before me is an application dated 13th December, 2018 by **Elphas Mwititi** (the applicant) seeking leave to file the record of appeal out of time against the judgment of the High Court, (**Ngaah Jairus, J.**) delivered on 20th April, 2016.

2) The application under Rule 4 of this Court's Rules seeks leave to appeal out of time and is premised on the grounds that; the applicant has delayed in lodging an appeal due to lack of funds to instruct an advocate and also pay court fees and other legal expenses; that the applicant is unrepresented; that he is desirous of appealing and his appeal has merit; that **Kenya Power and Lighting Company Limited** (the 1st respondent) and **the Attorney General** (the 2nd respondent) will suffer no prejudice should the instant application be allowed; and that the delay is not inordinate and it is in the interest of justice that leave be granted.

The application was further supported by the applicant's affidavit of the same date in which he reiterated the grounds on the face of the application.

3) The applicant's written submissions dated 27th June, 2020 refer to a replying affidavit filed by the respondents and which opposes the grant of the orders sought for lack of merit and for having been made in bad faith and urges the Court to dismiss the application with costs. The replying affidavit is however not on record.

4) In his written submissions, the applicant took cognizance of the court's unfettered discretion under **Rule 4** of the **Court of Appeal Rules**. He reiterated that he had on numerous occasions travelled to Nyeri Law Courts to pursue the appeal but was unable to do so due to financial constraints; and that this is an indication that he is vigilant and interested in pursuing the intended appeal.

5) The applicant further submitted that he has an arguable appeal with high chances of success as outlined in the draft memorandum of appeal. He contended that he had disclosed sufficient reasons for the delay and relied on the case of **Daphne Parry v Murray Alexander Carson [1963] EA 545**. The applicant further contended that he was able to get money from third parties which he used to obtain typed proceedings and has already compiled the record of appeal awaiting the outcome of this application. The appellant urged the court to grant

the orders sought.

6) I have considered the application, grounds in support thereof, submissions and the law. The discretion that I am called upon to exercise in this application is provided under **Rule 4** of the Court of Appeal Rules which provides:

“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.”

7) **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 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.”[Emphasis supplied].

8) The issues that I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the 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.”

9) 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.”

10) There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

11) In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was 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.”

12) The impugned judgment was delivered on 20th April, 2016 while the instant application was filed on 18th December, 2018. The delay in filing the instant application is over 2 years. This is an inordinately long time. The applicant has cited the financial constraints as the reason for delay. I am guided by this Court’s decision in **Joseph Maina Njoroge & 2 others v Paul Chege Muhahi [2007] eKLR** where this Court rendered itself thus:

“Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why Omolo JA stated categorically in the case of Francis Mwai Karani vs. Robert Mwai Karani (Civil Application No. NAI. 246 of 2006) that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”

13) Guided by the above authority, I find that the applicant’s impecuniosity cannot be reason enough for me to exercise my discretion in his favour. In any event the applicant should have invoked **Rule 115(1) of this Court’s Rules** which allows a party who has demonstrated lack of the means to pay the required fees to lodge the appeal without payment of the requisite fees.

14) Regarding the issue whether there is merit in the appeal, the draft memorandum of appeal raises the following grounds *inter alia*, whether the respondent instituted the criminal case against the applicant maliciously, and whether the applicant was entitled to damages.

15) 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.”

16) On the degree of prejudice to the respondent, 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 trial court and is desirous of appealing against the said judgment. However, the time for him to exercise his right of appeal has since lapsed. From the circumstances of the instant application the applicant has failed to demonstrate the existence of the parameters set out in Leo Sila Mutiso (supra).

17) From the foregoing, from the circumstances of the application before me, I find that the delay was inordinate. Without expressing definitive conclusions, the applicant has also failed to demonstrate the likelihood of the intended appeal succeeding. In the result, I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 13th December, 2018 with no order as to costs.

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

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR