



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MURGOR, J.A.

MISCELLANEOUS APPLICATION NO. 77 OF 2019

BETWEEN

EVANS MUTHEMBA CHEGE.....APPLICANT

AND

TWIGA LODGE LIMITED.....1ST RESPONDENT

GRACE GACHEKE MWAI.....2ND RESPONDENT

CATHFINE WANGUI NGENGI MUIGAI (sued as administrator of the estate of

ISAIAH MWANGI MATHENGE.....3RD RESPONDENT

(Being an application for extension of time to file and serve a record of Appeal from the judgment of the High Court at Mombasa, (Omollo, J) delivered on 22nd November 2018

in

ELC No. 607 of 2011)

RULING

By a Notice of Motion dated 30th July 2019 premised on **rule 4** of the *Court of Appeal Rules*, the applicant, **Evans Muthemba Chege** has sought orders for extension of time within which to lodge and serve a record of appeal and for the record already filed to be deemed as properly filed and admitted on time. The application was brought on the grounds that the record of appeal was to have been filed on 11th June 2019, but due to counsel's inadvertence it was not filed until 21st June 2019, some 10 days later.

In an affidavit in support of the motion, **Benedict Wambua Kenzi**, an Advocate who had the conduct of the application, deponed that after the judgment was delivered on 22nd November 2018, a Notice of appeal was lodged on 30th November 2018; that he immediately thereafter applied for and was supplied with the certified copies of the proceedings, and the Certificate of Delay. It was deponed that he prepared a draft Memorandum of appeal dated 3rd June 2019, after which he handed over the file to his court clerk to finalise the record of appeal; that it was not until 21st June 2019 when the record was returned to him that he realized that the period to file the record of appeal had since lapsed on 11th June 2019; that this lapse was an oversight, and a genuine mistake on the part of the advocate which it was contended should not be visited on the applicant, and that if the court was to extend the period within which to file the record of appeal, no prejudice would be occasioned to the respondent. The written submissions that were filed reiterated the averments in the affidavit in support.

On their part despite having been served with the hearing notice on 25th June 2020, the respondents did not file any replying affidavits or written submissions.

The principles that guide a court in considering an application for leave to file an appeal out of time **under rule 4** of this Court's rules were laid down by this Court in the case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited [2015] eKLR** thus;

***“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.*”**

As indicated the period of delay in filing the record of appeal was 10 days. The applicant has explained that the delay was caused by the inadvertence of the advocate, who had prepared the record of appeal, but had overlooked filing it in court, only to realize 10 days later that the period for filing the record of appeal had since lapsed. This was clearly a mistake on the part of counsel.

In the case of in the case of ***Belinda Murai & 9 others vs Amos Wainaina, Civil Application No. Nai. 9 of 1978*** .B Madan JA stated that;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

The explanation that he overlooked lodging the record of appeal in this Court once it was finalized is a genuine and honest error, which I am prepared to accept. In addition, the 10 days delay is not an inordinate period of delay. And since counsel has taken responsibility for the error, my view is that the applicant should not have to suffer on account of counsel’s mistake.

Regarding the chances of success of the intended appeal, I am satisfied there is a fair chance that it could succeed, and therefore the applicant should be accorded an opportunity to ventilate it before us. That said, given that the period of delay was not extensive the respondents, will not suffer any prejudice should the period for filing the record of appeal be extended.

Accordingly, I hereby exercise my discretion to grant an extension of time to file and serve the record of appeal, and in so doing deem the already filed record as properly filed. The costs of this application shall be in the intended appeal.

It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR