



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPLICATION NO. 129 OF 2018**

**BETWEEN**

**HANNAH MUTHII KIBINDU suing as the administrator of the Estate of**

**MUTHII KIBINDU KARUME.....APPLICANT**

**AND**

**STEPHEN NJINE KIBINDU.....1<sup>ST</sup> RESPONDENT**

**ANTHONY KINYUA GACHOKI.....2<sup>ND</sup> RESPONDENT**

(An application for extension of time to file and serve a notice of appeal and record of appeal

out of time from the decision of the Environment & Land Court at Kerugoya

(B.N. Olao, J.) dated 27th July, 2017) in **ELC Cause No. 319 OF 2013**)

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**RULING**

**Background**

1. This is an application dated 19th September, 2018 by **Hannah Muthii Kibindu** suing as the administrator of the **Estate of Muthii Kibindu Karume** (the applicant) seeking extension of time to file and serve a notice of appeal and record of appeal against the judgment of the Environment & Land Court, **(B.N. Olao, J.)** delivered on 27th July, 2017.
2. The application seeks extension of time within which to file the notice of appeal and record of appeal outside time. The application is brought under **Rule 4** of the **Court of Appeal Rules** and is premised on the grounds that; the applicant was dissatisfied with the impugned judgment which required her to vacate the suit premises within three months of the Decree ; that she learnt that the judgment had been delivered in July, 2018 after obtaining a copy from the court registry upon being summoned by the OCS Baricho on 13th July, 2018; and that the applicant was not in court when judgment was delivered and her advocates did not inform her of the same and by the time she became aware of the judgment, the time within which to lodge a notice of appeal had lapsed.
3. It was the applicant's further contention that she filed the instant application without unreasonable delay and has an arguable appeal with high chances of success; that the instant application was further supported by the applicant's affidavit sworn on the same date in which she reiterated the grounds on the face of the application save that upon learning of the outcome of the judgment, she filed an application to set aside the said judgment on 18th July, 2018 which application is pending ruling; that due to the pending ruling, the letter requesting for typed proceedings has not been filed; and that the delay in filing this application and the intended appeal was due to the failure by her erstwhile advocates to inform her that the judgment had been delivered. The applicant urged that she should not be punished for the mistakes of her erstwhile advocates. The applicant contended that the respondents will suffer no prejudice should the instant application be allowed.
4. In her written submissions filed by the firm of **Ann Thungu & Co. Advocates**, the applicant invoked this Court's discretion by relying on the case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231**. As regards the length of delay, the applicant stated that the length of delay was three months after she learnt of the judgment which delay was not inordinate. The applicant relied on her supporting affidavit for reasons for delay being that her erstwhile advocates did not notify her of the delivery of the judgment. She contended that she has never

been served with a Decree and that her erstwhile advocates did not attend court on the date of hearing and were also not served with a notification of judgment which was read in their absence.

5. The applicant relied on the case of **Kenya Red Cross Society v Mbondo Katheke Mwanja [2019] eKLR** for her proposition that there was sufficient reason for her failure to file a notice of appeal on time as neither she nor her erstwhile advocates were notified of the date of delivery of the judgment which was delivered in their absence. She further stated that her current advocates could not proceed to file the instant application without leave of court and had to await the outcome of the application seeking to set aside the judgment.

6. The applicant relied on the persuasive authority of **Richard Velji Shah & 3 Others v Victor Maina Ngunjiri [2014] eKLR** for the proposition that where it was expressed that delay was caused by administrative lapses in the process of change of advocates is sufficient explanation of delay. The applicant urged the court to exercise its discretion and allow the instant application. On the chances of success of the appeal, the applicant submitted that she has an arguable appeal with high chances of success and relied on her draft memorandum of appeal. That the respondents do not stand to suffer any prejudice should the application be allowed since they can be awarded damages. The applicant contended that the respondents do not currently occupy the suit property and have not evicted the applicant. That the applicant undertakes to prosecute the intended appeal expeditiously and is ready to abide by any conditions issued by the Court.

7. In response, the respondents through their advocates, **Wangeci Munene & Co. Advocates** filed written submissions in which they also relied on the case of **Leo Sila Mutiso** (supra) in contending that the delay of 1 year 2 months since delivery of judgment has not been explained. They contend that the present application is an abuse of the court process and the applicant has only filed this application in order for her to later apply for orders of stay of execution which had been denied by the trial court in the application which is pending. That they served the applicant with the Decree on 5th September, 2017 and it was only after the matter was referred to the OCS Baricho that the applicant took action. That had the applicant intended to appeal, she would have done so on 18th July, 2018 when the application before the trial court was filed. Counsel maintained that the delay was inordinate. That the intended appeal has no chances of success since the suit premises was clan land which the deceased held in trust for his brothers as was upheld by the trial court. Finally, the respondents stated that they were evicted from the family land in 1975 and no award of damages can compensate them should the application be allowed. Counsel urged that the application be dismissed.

8. I have considered the application, the grounds in support thereof, submissions by counsel and the law. The decision 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.”**

9. **Rule 4 of the Court of Appeal Rules** does not provide for factors 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** (supra) 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.]

10. The issues 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.”**

11. 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.”**

12. 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.

13. 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.”**

14. The delay in filing the present application and notice of appeal was approximately 1 year three months. The applicant stated that the delay was occasioned by her erstwhile advocates who did not inform her of the judgment and she learnt that the judgment had been delivered a year later.

15. In **Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR** the court held *inter alia* that:

**“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”**

16. The applicant further stated that the reason for the delay was that she and her erstwhile advocates were not notified of the date of delivery of judgment by the trial court. It was the applicant’s claim that upon learning of the judgment, there was delay arising from her instructing new counsel who had to come on record with leave of court since judgment had been delivered. This Court in the case of **Njeri Njoroge v Joseph Maina Gichuhi & Another [2018] eKLR** rendered itself thus:

**“It is a constitutional imperative and a rule of natural justice that each person has a right to legal representation and counsel of his/her choice. Founded on this constitutional underpinning, I find the explanation by the applicant that the delay of 45 days was due to her instructing another counsel a sufficient explanation. I am persuaded by dicta in Richard Velji Shah & 3Others, (supra) where it was expressed delay caused by administrative lapses in the process of change of advocates is a sufficient explanation of delay. In this matter, I note there is no affidavit by the new advocate on record explaining the delay between 14th April 2018 and 11th May 2018 when the instant application was filed. However, given the sufficient explanation and taking into account the period of delay is about 45 days, I find the delay is not inordinate.”**

17. From the foregoing, the applicant had a responsibility to follow up on her case but failed to do so with the result that she only became aware of judgment a year after its delivery. This alone would not have been a good reason but the applicant further stated that she was not notified of the date of delivery of the judgment and that she was not present when judgment was delivered. Further, that there were some administrative lapses in instructing new counsel resulting in delay in filing the notice of appeal and the record of appeal. I find these to be plausible reasons for delay.

18. As regards the chances of success of the intended appeal, the applicant contends that the intended appeal is arguable as it raises issues for determination *inter alia* whether Muthii Kibindu (the deceased) was holding the suit property in trust for the respondents and whether the applicant was in occupation of the suit property.

19. 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.”**

20. 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 her an extension, against the prejudice to the respondents 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 her to exercise her right of appeal has since lapsed. On the other hand, the respondents contend that they have been out of the suit premises for over 45 years and are desirous of occupying the same.

21. Bearing in mind the aforementioned parameters, I have to either allow or reject the application for enlargement of time depending on the circumstances of this case. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). I find that the delay in filing the notice of appeal and the record of appeal has been satisfactorily explained.

22. The upshot is that I find merit in this application and allow it. I make the following orders:

i. That the applicant shall file and serve a notice of appeal within 14 days from the date hereof;

ii. That the applicant shall file and serve a record of appeal within 60 days from the date hereof;

iii. Failure to comply with the time lines stipulated herein above, the notice of motion dated 19th September, 2018 shall stand dismissed with costs;

iv. Costs of this application to abide by the outcome of the intended appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> 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**