



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 39 OF 2020

BETWEEN

JOYCE ARUS OWITI.....APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

(Being an application for extension of time limited for filing

of the applicant's record of appeal in the intended appeal from the

judgment and decree of the Employment and Labour Relations Court by

the (Hon. Mathews N. Nduma, J.) dated 7th March 2019 in Kisumu ELRC No. 21 of 2018)

RULING

Before me is a Notice of Motion dated 4th March 2020, brought under Rule 4 of the Court of Appeal Rules, substantively seeking leave to file a record of appeal out of time, together with an attendant order for provision of costs. It is supported by grounds on its body and a supporting affidavit of **Joyce Arus Owiti**. It has been opposed by a replying affidavit deposed by **Joseph V. Onyango** on behalf of the respondent, on 1st July 2020. The application was canvassed by written submissions without oral highlighting. Those for the applicant together with the digest of cases are both dated 29th June 2020, while those for the respondent are dated 1st July 2020.

In summary, it is the applicant's averments and submissions that the impugned judgment was delivered on 7th March 2019. She instructed her advocates to file an appeal against the said judgment. The advocate timeously filed the notice of appeal on 18th March 2019 and caused it to be lodged on 20th March 2019. She reasonably believed that the firm of **M/s Oguttu, Ochwang'i, Ochwal & Company Advocates** whom she had instructed to file the appeal on her behalf would timeously lodge the record of appeal. In February 2020, she visited the offices of the said firm of Advocates and inquired from them the progress of her appellate process, only to be informed that the appeal had not been filed for alleged lack of a certified copy of the proceedings. Upon inquiry from the court's registry, she learned that the proceedings were ready for collection as far back as 22nd March 2019. She, therefore, instructed another advocate to file the application under consideration. Further, that: the application under consideration has been presented without undue delay; the court has unfettered discretion to grant the orders sought, it is only fair and just that the application be allowed as prayed; the respondent stands to suffer no prejudice if the applicant were accorded an opportunity to regularize her already initiated appellate process to enable her exercise her undoubted constitutionally underpinned appellate right.

Relying on the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR**, on the principles that guide the court on the exercise of its mandate for extension of time as restated by the Supreme Court of Kenya, the applicant submitted that on the basis of the above assertions, she has brought herself within the ambit of **Rules 75 and 82** of the Rules of the court. She has therefore sufficiently demonstrated that the delay in filing the record of appeal timeously lay with her former advocates who failed to act prudently in conducting the intended appellate process, which mistake in her opinion is excusable especially when she has demonstrated by her conduct of changing advocates to the court's intervention promptly upon learning of her former advocates default which is also sufficient demonstration of her willingness to proceed expeditiously to progress her appellate process as soon as capacitated to do so. The respondent will also not be prejudiced in any way if the relief sought is granted in her favour.

Opposing the application, the respondent in its averments and submissions relied on the case of **James Waweru Muturi vs. Paul Thuo**

Njambi [2017]eKLR and conceded that judgment was delivered on 7th March 2019, dismissing the applicant's petition. The applicant filed a notice of appeal on 18th March 2019, and duly lodged it on 20th March 2019. Applicant's assertion that it was only in February 2020 when she learned that the record of appeal had not been filed is not sufficient basis to warrant granting the relief sought as she ought to have made a follow up with her advocates on the status of her appellate process from the date she filed her notice of appeal to ensure that her record of appeal was filed within the timelines stipulated for within the rules of the court. The applicant has not in the circumstances given any justification for the one-year delay in filing the record of appeal. It is unfair for her to blame her advocate when it is evident from her own pleadings and annexures thereto that she did not take due diligence to follow up with her advocate to file the record of appeal within the timelines set by the rules. They, therefore, contend that the unexplained delay which is also inordinate in their opinion disentitles the applicant to the relief sought.

My invitation to intervene on behalf of the Applicant's has been invoked under **Rule 4** of the Court of Appeal Rules, which provides as follows:

"4. 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 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."

The principles that guide the exercise of jurisdiction under Rule 4 of the CAR procedures are now well settled by numerous enunciations in case laws both binding and persuasive. I take it from the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231, Fakir Mohamed vs. Joseph Mugambi & 2 Others; [2005]eKLR; Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020]eKLR; Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and **Athuman Nusura Juma vs. Afwa Mohamed Ramathan CA No. 227 of 2015.**

See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR; Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR; Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited [1998] eKLR; Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board [2015] eKLR; Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR;** and **Richard Nchapi Leiyagu vs. IEBC & 2 Others Civil Appeal No.18 of 2013** among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows:

(i) *The mandate under Rule 4 is discretionary, unfettered, and does not require establishment of "sufficient reasons". Neither are the factors for the exercise of the Courts' unfettered discretion under the said rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.*

(ii) *Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.*

(iii) *The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered.*

(iv) *As the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant.*

(v) *The degree of prejudice to the respondent entails balancing 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.*

(vi) *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 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;*

(vii) *Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly";*

(viii) *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 a delay is the key that unlocks the Court's flow of discretionary power. There has to be valid and clear reason upon which discretion can be favourably exercised.*

(ix) *Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.*

(x) *An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court;*

(xi) *The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya (**M.K. Ibrahim & S.C. Wanjala SCJJ**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others** (supra) as follows:-

“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

I have given due consideration of the record in light of the rival pleadings, submissions, set out above, and the principles that guide the court in the exercise of jurisdiction under **Rule 4** of the CAR procedures. Only one issue falls for my determination namely, whether the applicant has satisfied the prerequisites in Rule 4 of the CAR to warrant granting the relief sought.

On the delay involved in seeking the Court's intervention, my findings are that **Rule 75** of the CAR makes provision for the filing of a Notice of Appeal within fourteen (14) days of the decision, while Rule 82 of the Court of Appeal Rules provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision, while the record of appeal is to be filed within sixty (60) days from the date of the lodging of the Notice of Appeal, unless if there is demonstration that the circumstances under consideration in an application of this nature fall within the proviso to the said Rule 82 which provides for exclusion from computation of the sixty days for filing of the record of appeal time taken by the registry for preparation and supply of a certified copy of the proceedings.

The notice of appeal herein was filed timeously. What was not filed within the timelines stipulated for in Rule 82 is the record of appeal. Non-compliance with the above procedural step has been blamed on the applicant's former advocates' inaction. Sixty days from 20th March 2019, fell on or about 20th May 2019. The application for capacitation was filed on 4th March 2020, being eleven (11) months and fourteen (14) days from the date of the judgment, and one month from the date applicant alleges she learnt of her former advocates' failure to lodge the record of appeal timeously.

In **Owino Ger vs Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR; CFC Stanbic Limited vs John Maina Githaiga & another [2013] eKLR; Lee G. Muthoga vs Habib Zurick Finance (K) Ltd & Another, Civil Applications No. NAI 236 of 2009; and Catherine Njoguini Kenya & 2 other vs Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, the COURT declined to visit the wrongs of an advocate against his client where there was sufficient demonstration that instructions for the defaulted process had been given timeously and that it was the advocate's fault that the procedural steps resulting in the application giving rise to the above decisions had not been followed.

It is evident from the record that no affidavit was sourced from the applicant's former advocate to confirm her assertions. The above default, notwithstanding, the record is explicit that there was indeed an advocate on record for the applicant who timeously filed the notice of appeal and who in my view was more conversant with the timelines within which to initiate the appellate process for the appellant. I, therefore, find no reason to pin responsibility on her notwithstanding that she should have been more diligent in making a follow up with the said advocate to know the progress made on her appellate process. The above finding notwithstanding I cannot ignore her assertion that upon learning of her former advocates' inaction in progressing her appellate process, she quickly instructed another advocate to seek Court's intervention. This explanation is plausible borne out by the fact that the period she asserts as the period she changed advocates fell within the period of time the application was filed. The reason for the delay is therefore reasonable and acceptable.

On the request to exercise the appellate right the position in law is as was crystalized by the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206**; and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003**; for the holding *inter alia* that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;

I have considered the applicant's request to be accorded an opportunity to exercise her appellate right in light of the totality of the above assessment and reasoning. It is, my finding that; first, the period of delay in this application as highlighted above falls far short of the period of delay that was subject of consideration in **George Mwendu Muthoni Vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)**, in which extension of time to comply with appellate rules was declined on account of the applicant's failure to explain a delay of twenty (20) months. Secondly, considering that the trial court's judgment resulted in the loss of the applicant's job and that the applicant indeed had an advocate on record who timeously filed a Notice of Appeal but failed to file the record of appeal, notwithstanding the timely availability of proceedings to capacitate him to do so, I find no justification in penalizing the applicant for that default. I find it prudent to

exercise the Courts discretion under Rule 4 CAR procedures to capacitate her to pursue her now undoubted constitutionally underpinned appellate right. Third, the respondent stands to suffer no prejudice if the applicant was to be accorded the opportunity to exercise her now undoubted constitutionally entrenched appellate right as none has been alluded to by the respondent in their supportive documents as well as their submissions in support of their opposition to the applicant's application. All that the respondent highlighted in their opposition was a lack of diligence on the part of the applicant in following up her appellate process with her former advocate of which she has been exonerated for reasons given above.

On the arguability of the intended appeal, the memorandum of appeal on the record indicates that issues applicant intends to raise on appeal are whether her petition before the trial court was meritorious, she was accorded fair hearing, the vetting process was a nullity *abinitio* and lastly whether the vetting board flouted constitutional, statutory and regulatory provisions governing the process, which in my view are all arguable notwithstanding that they may not ultimately succeed. In law, an arguable appeal is not one that must necessarily succeed but one that raises a bona fide issue for determination. In my view, those highlighted above are all bona fide issues.

In light of the above assessment and reasoning, I make orders as follows:

- (1) The applicant has thirty days of the date of the ruling to file and serve the record of appeal.**
- (2) Costs of the application to abide the outcome of the intended appeal.**
- (3) In default of item (1) above the leave granted to stand lapsed with costs to the respondent.**

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

R. N. NAMBUYE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR