



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 4 OF 2020

BETWEEN

KENYA NATIONAL HIGHWAY AUTHORITY..... APPLICANT

AND

JOSEPH NDOLO MUTUARESPONDENT

(An application for extension of time for filing a notice of appeal out of time from the judgment of the High Court of Kenya at Mombasa (E.K.Ogola, J.) dated 4th April, 2019)

in

Constitutional Petition No. 173 of 2018

RULING

BACKGROUND

1) This is an application dated 8th January, 2020 by **Kenya National Highway Authority** (the applicant) seeking an extension of time within which to file and serve a Notice of Appeal against the judgment of the High Court, **(E.K.Ogola, J.)** delivered on 4th April, 2019. The application seeks extension of time within which to file the said Notice of Appeal and is expressed to be brought under **Rule 4 of the Court of Appeal Rules, Article 159(2) of the Constitution and Section 3A of the Appellate**

Jurisdiction Act.

2) A brief background to the application is that the application arises from the notice of appeal lodged on 30th May, 2019 against the impugned judgment in which the applicant was found liable for having unlawfully detained the respondent's motor vehicle.

The learned Judge ordered the applicant to compensate the respondent damages for loss of profits in the sum of Kshs. 160,000/- per month effective 19th September, 2016 until payment in full.

3) Aggrieved, the applicant filed the notice of appeal together with a letter requesting for typed proceedings and served the same upon the respondent's advocates. The notice of appeal should have been filed within 14 days from the date of the impugned judgment, in accordance with Rule 75(1) & (2) of the Court of Appeal Rules. The notice of appeal should therefore have been filed on or before 18th April, 2019 and served upon the respondent within seven days (on or before 25th April, 2019) in accordance with Rule 77(1) of the Court of Appeal Rules.

4) The applicant contended that: the delay in lodging the record of appeal was due to the delay in receiving typed proceedings; that the delay in filing the notice of appeal and letter requesting for typed proceedings arose from the mistake of the applicant's previous advocate whose employment contract expired about the time of delivery of the impugned judgment failed to hand over the file and details thereof to the management on time; that the applicant learnt of the delivery of the impugned judgment when they went through the previous advocate's files and immediately instructed their current advocates to take up the appeal but time within which to file the notice of appeal had already lapsed; that the delay is inadvertent and was neither deliberate nor intended to obstruct the course of justice; that the applicant has exercised due diligence at all stages in pursuing the intended appeal; that the applicant is a public utility corporation holding funds in trust for the State and all Kenyans and has already been threatened with execution as at the date of the instant application; that the draft memorandum of

appeal raises substantial issues for determination and the intended appeal is not frivolous; that there is imminent risk of execution; that the respondent does not stand to suffer any loss or inconvenience which would not be adequately compensated by costs; that this Court has unfettered discretion to extend time and deem the subsisting notice of appeal as properly filed with an appropriate order of costs in favour of the respondent. The application was further supported by the affidavit of **Norah Beatrice Adhiambo Odingo**, the applicant's Head of Legal Services in which she reiterated the grounds in support of the application.

5) In response to the application, the respondent in his replying affidavit sworn on 9th March, 2020 stated that the instant application is fatally defective, incompetent and untenable in law for reasons that: the notice of appeal was filed out of time without leave of court; that the orders to extend time to file a notice of appeal out of time can only be granted once the defective notice of appeal has been formally withdrawn; that the applicant has not met the time-tested threshold set by law for grant of the orders sought; that the instant application is an afterthought as it was filed over eight months since the notice of appeal was filed and the applicant's advocates have on numerous occasions indicated their willingness to comply with the impugned judgment; and that the applicant has not approached this court with clean hands as it has not obeyed the orders of the High Court and are still withholding the number plates to the respondent's motor vehicle despite the order for the motor vehicle to be released unconditionally. It is the respondent's further contention that the notice of appeal was lodged 54 days after delivery of the impugned judgment without leave of court and the applicant has not given an explanation why it did not file the instant application until 10th January, 2020 having appointed their advocates on 17th May, 2019; that in the circumstances, the delay in filing the instant application is inordinate.

6) It was the respondent's further contention that the applicant having been represented by an in-house counsel cannot now turn and say that there was delay in releasing the file; and that the said advocate was under direct supervision from the Head of the applicant's Legal Department hence his actions were approved by her and she cannot feign ignorance over matters that were well within their knowledge. It was the respondent's further claim that the applicant has no arguable appeal and that through an email dated 11th November, 2019 the applicant, through their advocates, indicated their intention to settle the decretal sum and the instant application is therefore an afterthought; and that the respondent remains heavily prejudiced as the applicant is still withholding his motor vehicle registration plates and he continues to suffer loss.

7) I have considered the application, grounds in support thereof, the respondent's replying affidavit, submissions by counsel and the law. **Rule 4 of the Court of Appeal Rules** does not provide the 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.

8) 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."

9. 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."

10. 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."

11. There is no maximum or minimum period of delay set out under the law. Further, the reason or reasons for the delay must be reasonable and plausible. 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 delay in filing the instant application and notice of appeal was approximately eight months. The applicant cited the delay in obtaining typed proceedings and instructing new counsel as the reasons for delay. The applicant has however not explained the steps and

difficulties they have encountered in their quest to obtain the said proceedings.

13. In **Hamendra Mansukhalal Shah v Alnoor Kara & Another** [2000] eKLR the Court stated as follows:

“I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.”

14. The applicant has also not sufficiently explained the eight months delay after instructing counsel in filing the instant application. 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.”

15. Similarly, in **Habo Agencies Limited v Wilfred Odhiambo Musingo** [2015] eKLR the court stated thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.

16. From the foregoing, the applicant had a duty to obtain evidence from the court registry to show that there was a delay in typing of proceedings. The applicant also had the responsibility to follow up on their case even though they were represented by counsel.

17. On the chances of success of the intended appeal, without going into the merits of the intended appeal as this will be determined by the full bench which will be seized of the appeal, I am guided by the sentiments of this Court in **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** where 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.”

18. 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 them 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 albeit out of time hence the instant application. On the other hand, the respondent contends that the applicant has failed to clearly explain the reason for delay in filing the notice of appeal or the instant application and that the instant application is an afterthought. The respondent further contends that he continues to suffer loss due to the failure by the applicant to obey court orders and return his motor vehicle registration plates.

19. As was stated by this Court in **Bi-Mach Engineers Limited v James Kahoro Mwangi** [2011] eKLR filing a notice of appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment.

20. Bearing in mind the aforementioned parameters, from the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in **Leo Sila Mutiso** (supra). In the circumstances of this application, I find that the delay was inordinate. Without expressing definitive conclusions, the applicant has 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 8th January, 2020 with costs to the respondent.

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

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR