



IN THE COURT OF APPEAL

AT NYERI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 67 OF 2019 (UR 49/2019)

BETWEEN

LOISE NYAMBURA KAHIHU.....APPLICANT

AND

PAUL MAINA NJOGU.....RESPONDENT

(An application for extension of time to file and serve the record of appeal from the Judgement and Decree of the High Court at Nyeri (Mumbua T. Matheka, J.) dated 28th September, 2018) in Succession Cause No. 1003 of 2014)

RULING

The applicant, **Loise Nyambura Kahihi** has filed a Notice of Motion dated 16th May 2019 seeking the following orders;

- 1. THAT the time for filing the record of appeal by the applicant may be extended.**
- 2. That a time-frame within which to file and serve the same may be specified.**
- 3. THAT the costs of this application may abide the result of the said appeal, or be dealt with as ends justice shall seem to require.**

I have contemplated the application, the grounds in support thereof, the replying affidavit filed by the respondent in opposition thereto, the rival submissions and the law. In exercise of my free and unfettered discretion to be exercised on sound principle, I find useful the holding in **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231**, in which this Court laid down some of the issues for a single judge's consideration on an application for extension of time;

“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.”

The applicant seeks this Court's intervention in order to prosecute her appeal. Her grounds on the face of the application seek to show that neither she nor her advocate was to blame for the delay.

From the record, the judgment was delivered on 28th September 2018 and the applicant's advocate filed a Notice of Appeal within time on 11th October 2018 and on the same day sought for typed proceedings through the Deputy Registrar of the High Court. A letter from the Deputy Registrar indicates that the typed proceedings were ready for collection on 24th January 2019. A certificate of delay was then issued by that court on 11th February 2019, which verified Counsel's assertion that the proceedings were certified on 7th February 2019.

Counsel complained that the further delay was occasioned when the confirmed grant was, at the behest of the respondent, taken back for re-

typing due to typographical errors. The same was subsequently issued on 22nd February 2019 and certified on 3rd April 2019. The final certification to be made was on the Decree that was issued by the court on 4th April 2019 and certified on 26th April 2019. Counsel contends that due to the delay occasioned by the court, he was unable to file and serve the record of appeal before 11th April 2019, which was the expiry of the 60 calendar days within which he ought to have done so. He urged that I grant the time extension as the delay was not inordinate.

This Court has been clear that there is no fixed minimum or maximum period of delay, the only issue is whether the same can be explained. I would add that the explanation ought to have some level of believability. I echo what was said in **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR;**

“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.”

I find that counsel’s explanation lacks candour as he tries to place the blame on the court for the delay yet that is clearly not the case. He claims that he was unable to file the record of appeal before the expiry of the **60 days** because the decree was certified on the 3rd of April 2019 yet it is clear that the certified judgment and typed proceedings were ready by 7th of February 2019. Moreover, Counsel did not need the certified decree in order to file the record. In any case, if the only document pending was the decree, how is it that the eight days he had at hand were not sufficient for him to insert it and complete the record? All in all, I am not persuaded by the explanations put forth.

Even were I minded to overlook those failures and omissions, I find staring at me yet another glaring and unexplained delay: it took the applicant another 35 days to file this application. The totality of this dilatory conduct makes me doubtful of his bona fides. It is also not lost to me that the applicant could have, indeed should have, filed the record of appeal at the earliest, albeit out of time, and then applied under **Rule 4** for validation of the same - as the said rule expressly anticipates.

Given what I have said, this application fails and is dismissed with costs.

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

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR