



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 108 OF 2018

BETWEEN

PETER MUTURI CHEGE.....APPLICANT

AND

GICHUKI NJAGI.....RESPONDENT

(An application for extension of time to file a record of appeal out of time from the decision of the Environment & Land Court at Murang'a (J. G. Kemei, J.) dated 10th May, 2018)

in

ELC Cause No. 272 OF 2017)

RULING

Background

1) Before me is an application dated 30th August, 2018 and filed on 3rd September, 2018 by **Peter Muturi Chege** (the applicant) who seeks leave to file the record of appeal out of time against the judgment of the Environment & Land Court, (**J. G. Kemei, J.**) which was delivered on 10th May, 2018.

2) The application seeks extension of time within which to file the said record of appeal outside time and is expressed to be brought under **Rules 4 & 41 of the Court of Appeal Rules** and all other enabling provisions of the law. The application is premised on the grounds that; the applicant was dissatisfied with the impugned judgment which was made in favour of **Gichuki Njagi** (the respondent) and lodged a notice of appeal on 11th May, 2018; that the applicant further applied for typed proceedings which were delivered to him after 26th June, 2018; that he instructed his erstwhile advocates to file an appeal; that upon perusal of the court file, his current advocates discovered that while a notice of appeal had been filed, a record of appeal had not been filed within time; that mistakes of counsel should not be visited upon an innocent litigant; and that the applicant stands to suffer irreparable loss if the orders sought are not granted.

3) The applicant further contends that he has an arguable appeal with reasonable chances of success. The application was further supported by the applicant's affidavit of the same date in which he reiterated the grounds on the face of the application. There were no further pleadings on record in support or against the application.

Determination

4) I have considered the application, grounds in support thereof and the law. The issue for determination is whether the application is deserving of the orders sought. **Rule 82 of the Court of Appeal Rules** provides that a record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal. In the instant case the notice of appeal was lodged on 24th May, 2018.

5) The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** which provides as follows:

“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.”

6) 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 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.” [Emphasis supplied].

7) 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.”

8) 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.”

9) 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.

10) 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.”

11) The delay in filing the record of appeal was approximately three months. The applicant cited the mistake of his erstwhile advocates for failing to file a memorandum of appeal within the prescribed time as the reason for delay. It is trite that an advocate should act swiftly to safeguard the rights of his client as was held in Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR where the Court stated thus:

“The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest”.

12) In the case of Greene MR in Gatti v Shoosmith [1939] 3 ALL ER 916 at p. 919 it was held thus:

“On consideration of the whole matter, in my opinion, under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say “may be,” because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.”

13) It is evident from the circumstances of this application that the applicant’s advocate filed a notice of appeal but failed to file a record of appeal in compliance with Rule 82 of the Court of Appeal Rules.

14) As regards the chances of success of the intended appeal, the applicant contends that he has an arguable appeal. I have perused the Draft Memorandum of Appeal which claims *inter alia* that the learned Judge failed to weigh all the facts and evidence on record to reach his

determination. An arguable appeal is not one that must succeed, but one which is not frivolous and merits consideration by the Court. The impugned judgment was however not availed and I therefore find that in the circumstances of this application the applicant has not placed sufficient material before me to determine whether the intended appeal is arguable. I am guided by the sentiments of this Court 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.”

15) 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 him 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. However, the time for him to exercise his right of appeal has since lapsed hence the present application. On the other hand, the respondent who acts in person did not file any pleadings and does not appear to have been aware of the instant application.

16) 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). Without expressing definitive conclusions, the applicant has failed to explain the delay in filing the record of appeal or the prejudice that he will suffer if the orders sought are not granted. In the result I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 3rd September, 2018 with no order as to costs.

Dated and delivered at Nairobi this 7th 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