



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. K. MUSINGA, J.A.)

CIVIL APPLICATION NO. 88 OF 2019

BETWEEN

PCEA KIKUYU HOSPITAL.....APPLICANT

AND

HELEN KIRAMANA.....RESPONDENT

(Being an application for extension of time to file and serve the Memorandum of Appeal

and Record of Appeal out of time from an intended appeal from the Judgment of the

High Court of Kenya at Nairobi (R.E. Aburili, J.) and delivered 12th July, 2016

in

H.C.C. Case No. 254 of 2013.)

RULING

1. This is an application brought under **rules 4, 42 and 47** of this Court's Rules. The applicant seeks extension of time to file and serve the memorandum and record of Appeal. The applicant further prays that the memorandum of appeal herein be deemed as properly filed.
2. The affidavit in support of the application is sworn by **Margaret Opondo**, the applicant's advocate, and states that on 12th July 2016, the High Court (**HCCC No. 254 of 2013**) entered judgement in favour of the respondent in the sum of **Kshs.4,473,851.18**; the applicant was aggrieved by part of the judgment and filed a notice of appeal on 21st July 2016; the applicant also requested for typed and certified copies of the proceedings and the judgment; that despite several follow-ups the requested documents were not availed until December 2018 when her court clerk, **Otieno Okello** collected them; that unfortunately, the said clerk fell ill and was admitted at Kenyatta National Hospital from 4th January to 22nd January 2019 but all along the advocate did not know that the proceedings and judgment had been collected. The clerk has sworn an affidavit to confirm the said averments.
3. The applicant has already paid to the respondent a portion of the decretal amount, **Kshs.3,382,195** and a further **Kshs.1,500,000** has been deposited in an interest earning account in the joint names of the parties' advocates.
4. The respondent did not file a replying affidavit, but her advocate filed grounds of opposition, which are not provided for in the Rules of this Court. The two grounds raised are that the request for a decree was only done on 13th February 2019, 869 days after the judgment was read; and that the applicant knew as at 18th July 2016 when they filed a notice of appeal that they would require a decree but never applied for the same. The respondent's advocate also filed brief submissions reiterating the two grounds stated above.
5. The application was disposed of by way of written submissions only. I have perused the submissions and the applicant's digest of authorities.
6. The principles that guide this Court in an application under **rule 4** of this Court's Rules are well settled. The Court exercises unfettered discretion and is required to consider, *inter alia*, the period of the delay; the reason for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted. See ***Mwangi v Kenya Airways Ltd [2003] KLR 486***.

7. The period of delay is considerable, 869 days, but there is a Certificate of Delay that shows that the time taken by the High Court to prepare and supply certified copies of proceedings and judgment was from 20th July 2016 to 4th December 2018. There was however an administrative lapse on the part of the applicant's advocate that was partly occasioned by counsel's mistake and partly by indisposition of their court clerk. In ***Belinda Murai & 9 Others v Amos Wainaina [1978] eKLR Law, J.A.*** held that "***mistakes of a legal counsel may amount to sufficient cause for purposes of an application for extension of time to file a Notice of Appeal.***" I am satisfied that the delay has been well explained.

8. Having perused the impugned judgment and the draft memorandum of appeal, I am satisfied that the intended appeal is arguable. An arguable appeal is not one that must succeed, it is one that is not frivolous and is worth considering by this Court. See ***Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.***

9. The respondent will not suffer any prejudice if this application is allowed. The applicant has already paid a substantial part of the decretal sum, Kshs.3,382,195, and the sum of Kshs.1,500,00 is held in an escrow account in the joint names of the parties' advocates.

10. For these reasons, the Notice of Motion dated 14th March 2019 is allowed as prayed. I make no order as to costs.

Dated and delivered at Nairobi this 20th day of November, 2020.

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR