



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 138 OF 2020

BETWEEN

JOHN MURAGE MBOGO.....APPLICANT

AND

THE CHIEF OF THE KENYA

DEFENCE FORCES.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

*(An application for extension of time to file the Amended Notice of Appeal against the Judgment*

*and Decree of the High Court at Nairobi (Mwita, J.) dated 4th May, 2018 in Petition No. 603 of 2013)*

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RULING

The applicant, **John Murage Mbogo**, has filed a Notice of Motion dated 9th July 2020 seeking the following orders;

- 1. THAT the Court be pleased to grant leave to the applicant to amend the notice of appeal herein against the Judgement & Decree of the High Court at Nairobi (Hon. Justice E.C Mwita) dated the 4th day of May 2018 in Petition No. 603 of 2013.*
- 2. THAT the Court be pleased to leave to the applicant/appellant to file and serve the amended notice of appeal in (1) above out of time.*
- 3. THAT the Court be pleased to deem the Amended Notice of Appeal filed before the superior Court on 28th April 2020 and annexed to the supporting affidavit herein as duly filed.*

I have contemplated the application, the grounds in support thereof and the law. This being a **Rule 4** application, I shall be guided by the holding of this Court in **MURINGA COMPANY LTD V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES, Civil Application No. 190 of 2019** where the factors to consider, in the exercise of my discretion, which is free and unfettered, were stated as;

*“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.”*

**Leah Gikonyo**, Counsel for the applicant deposed that she filed the Notice of Appeal on 17th May 2018 following delivery of the impugned

judgment on 4th May 2018. The said notice indicated that the appeal against the judgment was on liability for and quantum of damages. When Counsel re-read the notice in early March 2020, as she prepared the memorandum of appeal, she discovered that she had forgotten to include another aspect of the judgment that was to be appealed against. The said aspect was the court's failure to make a finding or to redress the claim of violation of the applicant's fundamental human rights arising from his arbitrary and unlawful dismissal from the armed forces.

Upon noticing the said error, Counsel filed the amended notice of appeal on 28th April 2020 and served the respondents on 29th June 2020. She beseeched the Court to excuse her inadvertent mistake and not to visit the same upon her client.

Whereas there is no set minimum or maximum time period of delay, the Court must be satisfied that such delay has been reasonably explained. As we have had occasion to say before, a plausible and satisfactory explanation is the key that unlocks the Court's flow of discretionary favour. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**.

I have considered the reasons proffered for the delay and found them to be unsatisfactory. I cannot fathom how it took Counsel over one and half years to discover the omission on the notice, considering that this is an active matter. Due diligence requires that matters actively pending before the courts are regularly appraised in order to ascertain their status. Further, she failed to observe the provision of **Rule 77 (1)** of the **Court of Appeal Rules** by serving the amended notice of appeal on the respondents after two months of filing it as opposed to the 7 days required.

For all those reasons, I have come to the conclusion that the delay was not only inordinate but also inexcusable. In the result, I decline to grant the prayer to extend time and accordingly dismiss the application with costs.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 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**