



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GATEMBU, JA (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 77 OF 2020**

**BETWEEN**

**PETER NYOKANGI MORARO.....APPELLANT/APPLICANT**

**AND**

**GEOFFREY MAGORO OSORO.....1<sup>ST</sup> RESPONDENT**

**HENRY NYABUTO MORARO.....2<sup>ND</sup> RESPONDENT**

***(Being an application for leave and extension of time within which to file and serve records of appeal out of time against the Ruling of the High Court of Kenya at Kisii (Ougo, J.) dated 3<sup>rd</sup> October, 2019***

***In***

***Kisii H.C. Succession Cause No. 498 of 2014)***

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**RULING**

1. In his application dated 29th June 2020, the applicant/appellant has moved the Court under Rule 4 of the Court of Appeal Rules seeking an order that he, “*be granted leave and time be extended within which to file and serve records of appeal out of time*”. In his appeal, already filed (the present appeal), the applicant is challenging a ruling of the High Court at Kisii (***R.E. Ougo, J.***) given on 3<sup>rd</sup> October 2019 confirming a grant of letters of administration in respect of the estate of Mararo Songoro, deceased in which the court distributed the deceased’s immoveable property between the parties to this appeal as beneficiaries of the estate.

2. He has deposed in his affidavit in support of the application that following the delivery of the ruling on 3<sup>rd</sup> October 2019, he duly filed a notice of appeal on 17<sup>th</sup> October 2019 which was within the time provided for in the Rules; that he applied for certified proceedings and judgment on the same date which he did not receive until the 6<sup>th</sup> February 2020; that upon presenting his record of appeal to the registry thereafter he was informed that the time for doing so had lapsed; that the delay in filing his record of appeal was not intentional in that the proceedings were obtained after expiry of the 60 days within which he should have filed the record due to the COVID-19 pandemic.

3. Ms. B. N. Ogari & Co advocates have urged, in their written submissions on behalf of the applicant, that this is a proper case for the Court to exercise its discretion in favor of the applicant; that the failure by the applicant to file and serve his record of appeal within the stipulated time was due to inability to obtain copies of proceedings and judgment within reasonable time despite having applied for the same on 17<sup>th</sup> October 2019; that the applicant has since obtained a certificate of delay which is part of the record of appeal; and that no prejudice will be occasioned to the respondent if this application is allowed.

4. In opposition to the application, the 1<sup>st</sup> respondent, Geoffrey Magoro Osoro in his replying affidavit sworn on 2<sup>nd</sup> October 2020 has deposed that the 2<sup>nd</sup> respondent is since deceased; that the impugned ruling was delivered in the presence of all the parties on 3<sup>rd</sup> October 2019; that although the Notice of Appeal was received in court on 17<sup>th</sup> October 2019, it was served on 24<sup>th</sup> October 2019; that there is no good reason why the appeal was not filed within 60 days as required under the Rules in which case it should have been filed by 25<sup>th</sup> January 2020; that the certificate of delay is contradictory in that the proceedings and ruling are indicated to have been ready for collection on 17<sup>th</sup> December 2019 yet the Deputy Registrar has certified the period necessary for preparation of the record to be from 17<sup>th</sup> October 2019 to 6<sup>th</sup> February 2020; that the applicant has not explained why the proceedings and ruling were not collected on 17<sup>th</sup> December 2019; that even though the proceedings and ruling were collected on 6<sup>th</sup> February 2020, it is not clear why the present application was not filed until June

2020; that even then, the application was not served until 7<sup>th</sup> September 2020; and that this is not a proper case for the exercise of the Court's discretion.

5. In view of the prevailing pandemic, the application was scheduled for disposal on basis of written submissions without appearance of counsel on 5<sup>th</sup> October 2020 when it was listed on the cause list of that date before the full court. Being a single judge application, I was tasked by the Court to determine it as such.

6. I have considered the application, the affidavits and the submissions. Under Rule 4 of the Court of Appeal Rules, the Court has unfettered discretion to extend time, albeit, it is a discretion that should be exercised judicially. As stated by Waki, JA in **Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR** :

***“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”***

7. Each case must be considered on its own facts and as the Supreme Court of Kenya pronounced in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014/2014] eKLR**, extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; extension of time is a consideration on a case to case basis; delay should be explained to the satisfaction of the court; and whether there will be prejudice suffered by the respondents if the extension is granted, whether the application is brought without undue delay and public interest are relevant considerations.

8. In relation to the present case, the impugned ruling was delivered on 3rd October 2019. The notice of appeal was filed in the High Court at Kisii on 17th October 2019. That was within the 14 days period provided under Rule 75(2) the Court of Appeal Rules. The first respondent has acknowledged service of the notice of appeal on 24th October 2019 which was also within the period of 7 days stipulated under rule 77(1) of the Rules. The advocates for the applicant applied for typed proceedings by letter dated 17th October 2019 addressed to the Deputy Registrar High Court Kisii. A copy of that letter was on the face of it served on the advocates for the respondents. That accorded with the requirements of Rule 82 of the Rules of the Court.

9. The delay involved arose in lodging of the memorandum and record of appeal. The record of appeal before me does not have a court stamp of the date on which it was received but it is dated 29<sup>th</sup> June 2020. Within the record of appeal there is a certificate of delay issued by the Deputy Registrar of the High Court at Kisii dated 21st February 2020 certifying that the time taken by the court to prepare and supply the typed copies of the proceedings and ruling was from 17th October 2019 to 6<sup>th</sup> February 2020. The respondent has taken issue with the certificate of delay. He pointed out that the respondent was notified by the court that the proceedings and ruling were ready for collection on 17th December 2019 and it is not clear why they were not collected until 6<sup>th</sup> February 2020. Although there was no reply by the applicant to that claim, it is noteworthy that the period involved fell within the Christmas vacation.

10. As for the delay between February and June 2020 when the memorandum and record of appeal was lodged, the applicant has explained that it was *“due to occurrence of the covid-19”*.

Although the applicant has not stated in specific terms how the pandemic prevented him from filing the appeal, I take judicial notice that during the period in question the operations of the courts throughout the country were and continue to be scaled down. There is therefore a satisfactory explanation for the delay involved. As already stated, it is evident that the applicant filed and served his notice of appeal within the time required and also applied for the typed proceedings and judgment in good time. Justice will, in my view, be served by granting him an opportunity to pursue his right of appeal. I do not think that the respondent will suffer any prejudice should the Court allow an extension of time as sought.

11. I accordingly allow the applicant's Notice of motion dated 29th June 2020 and hereby extend time within which to file and serve the record of appeal with the result that the appeal filed herein is deemed as duly filed and served.

Costs of the application shall be in the appeal.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**