



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 59 OF 2018 (UR NO. 37 OF 2018)

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED.....APPLICANT

AND

JOSEPH MORARA OMOKE.....RESPONDENT

(Application for leave to file and serve memorandum of appeal and record of appeal out of time against

the ruling of the High Court of Kenya at Kisii (Nagilla, J.) dated 1st April, 2016

in

MISC. APPLICATION NO. 59 OF 2015

NOW NO. 4 OF 2016 AT NYAMIRA)

RULING

[1] Before me is a notice of motion dated 6th June, 2018, brought under **Rule 4** of the **Court of Appeal Rules**. The applicant Invesco Assurance Company Limited seek to have time extended to enable it file and serve a memorandum of appeal and a record of appeal out of time.

[2] The applicant is dissatisfied with a ruling delivered on 1st April, 2016, by the High Court sitting in Kisii (Nagillah J), in which the learned judge reviewed a ruling made on 3rd November, 2015, granting an order for stay of execution, dismissed the applicant's application dated 25th June, 2015 and lifted the order of stay. The applicant intends to appeal against the ruling of 1st April, 2016 hence the application for extension of time.

[3] According to an affidavit sworn by Rosemary Okumbe, the Company Secretary of the applicant, a notice of appeal was filed, but the memorandum of appeal and the record of appeal were not filed in time as there was delay in the applicant receiving copies of the proceedings and judgment. A copy of the certificate of delay has been exhibited showing that although the proceedings were requested for on 11th April, 2016, they were not ready for collection until 11th April, 2018.

[4] The applicant contends that they have an arguable appeal and should therefore be given an opportunity to ventilate the same. In addition, the applicant has complied with an order made for deposit of Kenya Shillings One Million One Hundred Thousand (**Kshs.1,100,000/=**) as security and therefore maintains that the respondent will suffer no prejudice if the orders sought are issued.

[5] The respondent, **Joseph Morara Omoke** who appeared in person objected to the applicant's motion contending that the learned judge made appropriate orders in the ruling of 1st April, 2016 as the applicant failed to file a notice of appeal and instead obtained temporal orders by misleading the court and that the order was properly reversed.

[6] The application before me being one for extension of time under Rule 4 of the Court Rules, the principles which I am required to take into account in exercising my discretion are now well laid out. For instance in **Mwangi vs Kenya Airways Limited KLR [2003]**, this Court

stated as follows:

“The law as to the principles that the single judge needs to consider in the exercise of his discretion when considering an application under Rule 4 of the Rules is now well settled. In the case of Leo Sila Mutiso vs Rose Hellen Wangari Mwangi - Civil Application No. Nai 251 of 1997 (unreported) delivered on 5th November, 1999, this Court stated, inter alia, as follows:

‘Whilst the discretion under Rule 4 of the Rules is unfiltered, it must like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy. 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.’

[7] It is apparent that the applicant lodged the notice of appeal on 11th April, 2016, and the notice was therefore filed within fourteen (14) days as provided under **Rule 75** of the **Court Rules**. Under **Rule 82** of the **Court Rules**, the applicant was required to institute the appeal by lodging a memorandum of appeal and a record of appeal within 60 days from the date of lodging the notice of appeal. However, Rule 82 has a proviso providing for exclusion of the time certified by the Registrar of the Superior Court as required for the preparation and delivery of a copy of the proceedings, on condition that the request for certified copies of proceedings is made in writing within thirty (30) days of the decision intended to be appealed against and a copy of the request is served on the respondent.

[8] The applicant has not exhibited the letter that he wrote to the registrar of the High Court bespeaking the proceedings nor has he provided any evidence to show that such letter was served on the respondent. This means that the applicant has not demonstrated compliance with the conditions provided under Rule 82 of the Court Rules such as to entitle it to exclusion of the time certified as required for preparation and delivery of the proceedings.

[9] The decision subject of the intended appeal was made on 1st April, 2016 and the application for extension of time was made on 6th June, 2018. This means that there has been a delay of about two (2) years as the memorandum and record of appeal ought to have been filed within 60 days from 11th April, 2016 when the notice of appeal was filed. The only explanation given by the applicant for the delay in filing the documents is the delay in obtaining the proceedings. However, this explanation cannot help the applicant as he has failed to comply with Rule 82 of the Court Rules.

[10] As regards the intended appeal, the information provided is not adequate nor is it appropriate for me at this stage to make a finding on the likelihood of the success of the appeal. However, from the draft memo of appeal that has been provided, it is evident that the intended appeal is neither frivolous nor vexatious but is arguable. In its written submissions, the applicant has contended that the respondent will not suffer any prejudice as it has deposited a sum of Kenya Shillings One Million One Hundred Thousand (Kshs.1,100,000/=) as ordered by the Court. Although evidence of this deposit was not availed to the court this fact was not disputed by the respondent. In the circumstances, it is evident that the respondent will not suffer any prejudice. For these reasons, I find it fair and just that I exercise my discretion in the applicant’s favour in order to give it an opportunity to be heard on its appeal.

[11] Accordingly, I allow this application and extend time for the applicant to file the appeal against the ruling delivered by Nagillah J on 1st April, 2016, provided that the memorandum and record of appeal is filed and served within fourteen (14) days from the date hereof.

[12] The applicant shall pay costs of this application to the respondent.

DATED and delivered at Kisumu this 24th day of January, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.