



IN THE COURT OF APPEAL

AT NAIROBI

GATEMBU, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 130 OF 2018

BETWEEN

THE ATTORNEY GENERAL.....APPLICANT

AND

KISILU MUTUA.....RESPONDENT

(An Application for extension of time to file and serve the Notice of Appeal and Record of Appeal respectively, out of time in an intended Appeal from Judgment of the High Court of Kenya at Nairobi (Mativo, J) dated 12th May 2017 in H.C. Petition No. 91 of 2015

RULING

1. In an application presented to the Court on 3rd May 2018 and bearing the same date, the applicant, the Attorney General, has applied, under Rule 4 of the Court of Appeal Rules, for extension of time within which to file and serve the notice of appeal and the memorandum and record of appeal. It intends to appeal against the judgment of the High Court at Nairobi (Mativo, J) given on 12th May 2017 declaring that the rights of the respondent, Kisilu Mutua, not to be subjected to torture and degrading treatment was violated by the State and awarding him general damages of Kshs. 2,500,000.00.
2. The background, in brief, is that on 5th July 1965, approximately 54 years ago, the respondent was charged alongside another person, with the offence of murder. He was accused of murdering Pio Gama Pinto. He was convicted and sentenced to death. His appeal to the then East African Court of Appeal for East Africa was dismissed on 12th November 1965. He was released from prison on 4th July 2001 by orders of the then President of the Republic of Kenya after being in prison for 36 years.
3. By his constitutional petition to the High Court at Nairobi dated 18th February 2015 (Constitutional Petition No. 91 of 2015) the respondent sought a declaration that his fundamental rights were violated by the State when in 1965 he was tortured by the police. He also claimed that his trial for murder was a miscarriage of justice.
4. At the conclusion of the hearing of that constitutional petition, the court reserved judgment for delivery on 24th May 2017. According to counsel for the applicant, however, judgment was not delivered on the scheduled date but was delivered earlier on 12th May 2017 without prior notice to the applicant. In an affidavit sworn on 3rd May 2018 in support of the application, Linah Wawira, a litigation counsel in the office of the applicant, has deposed that the applicant did not become aware that judgment had been delivered until 20th March 2018 when it was served with notice of taxation of the respondent's party and party bill of costs; that immediately thereafter, the applicant, being aggrieved by the judgment, filed a notice of appeal on 22nd March 2018 by which time the 14 days period provided under the rules for the filing of notice of appeal had long since expired.
5. Urging the application before me, learned counsel for the applicant Ms. Wawira reiterated that the judgment complained of was scheduled for delivery on 24th May 2017 but was instead delivered on 12th May, 2017 without notice to the applicant; that on becoming aware, on 20th March 2018, that the judgment had been delivered, the applicant promptly filed and served a notice of appeal and applied for typed proceedings from the High Court; that as demonstrated in the draft memorandum of appeal, the intended appeal is arguable; that there are questions worthy of consideration on appeal for instance whether the respondent's claim was time barred having been lodged approximately 50 years after the alleged torture; that the Judge wrongly concluded that the respondent's claims were not controverted; that the award of general damages of Kshs. 2,500,000.00 was not supported; that no prejudice will be occasioned to the respondent if the time for filing the appeal is extended; and that the delay was not intentional and has been explained; that the further delay in presenting the present application was due to challenges in perusing the High Court file as it was not readily available in the registry as it was moved on account of the taxation

proceedings.

6. Opposing the application, learned counsel for the respondent Mr. Agina referred to the replying affidavit sworn on 6th August 2018 and grounds of opposition bearing the same date and filed on 19th September 2018. In the replying affidavit, the respondent deposes that the impugned judgment was delivered in open court on 13th May, 2017; that efforts by his advocates to thereafter file his bill of costs was frustrated by the absence of the court file from the registry; that his advocates were compelled to write a letter to the Deputy Registrar of that court on 10th November 2017 seeking assistance to trace the court file; that there is no evidence that on 24th May 2017, when judgment was scheduled for delivery, the applicant enquired about the fate of the judgment from the court and neither is there evidence of enquiries made from the registry; and that there is no plausible explanation why the appeal was not filed in time.

7. In his grounds of appeal, the respondent asserts that he is entitled to the fruits of the judgment; that the intended appeal is not arguable and the judgment is well grounded on the law and the facts and the intended appeal does not raise any issue of law, and is incompetent and frivolous; and that the delay in filing the notice of appeal and the memorandum of appeal is inexplicable and inexcusable. Amplifying on the same, counsel urged that the intended appeal is not arguable; that the applicant failed to produce a single witness before the lower court and the evidence of the respondent was therefore not controverted and judgment is therefore well grounded on the pleadings and the law; that the applicant has not shown an intention to file the intended appeal expeditiously and allowing the application would be prejudicial to the respondent having regard to the fact that the respondent was on death row for 36 years, he is now an aged man and is ailing.

8. I have considered the application, the affidavits, the grounds of opposition and the arguments by counsel. I am called upon to exercise a judicial discretion and in doing so I bear in mind the banal principles stated in **Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai.255 of 1997 (unreported)** that:

“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.”

9. It is common ground that at the conclusion of the hearing of the constitutional petition, judgment was reserved for 24th May 2017 but as is evident from the judgment itself, it was delivered on either the 12th May 2017 or 13th May 2017. Strangely, the copy of the judgment attached to the application bears the date of delivery as 12th May 2017 while the copy attached to the respondent’s affidavit bears the date of delivery as 13th May 2017. Whatever the case, it was not delivered on the date it was scheduled to be delivered.

10. The applicant asserts, and the respondent has not challenged that assertion, that notice of delivery of judgment on either 12th or 13th May 2017 was not given to the applicant which learnt that the same had been delivered when it was served with notice of taxation on 20th March 2018 whereupon two days later, on 22nd March 2018, it filed and served a notice of appeal, albeit out of time. On the same date, the applicant filed a request for typed proceedings and the judgment with the court.

11. The present application was however not filed for another month and a half. Counsel for the applicant explained from the bar that the delay in doing so was due to unavailability of the court file in the lower court on account of the taxation proceedings that the respondent was pursuing under the same file.

12. I am satisfied that in the foregoing circumstances, the delay involved in filing and serving the notice of appeal and the memorandum of appeal has sufficiently been explained.

13. As to the chances of the intended appeal succeeding, I do not think, based on the draft memorandum of appeal, that the intended appeal is frivolous. There is for instance the question with which the trial judge grappled regarding the limitation of time and on which, the applicant contends, the Judge erred.

14. With regard to the degree of prejudice to the respondent if the application is granted, I think an expedited hearing of the appeal, once filed, would ameliorate the prejudice to the respondent.

15. Consequently, I allow the application dated 3rd May 2018. The notice of appeal dated and filed in the lower court 22nd March 2018 is deemed as duly filed. The applicant shall serve the notice of appeal on the respondent (if it has not already done so) within 7 days of delivery of this Ruling. The applicant shall file and serve the memorandum and record of appeal within 45 days from the date of delivery of this ruling.

16. The costs of the application shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 22nd day of February, 2019.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR