



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 255 OF 2018

BETWEEN

JOHN MWINZI THUVA.....APPLICANT

AND

KASYOKA NZUKA.....RESPONDENT

(Application for extension of time to file and serve the memorandum and record of intended appeal from the Judgment of the High Court at Kitui (L.N. Mutende, J.) dated 19th April, 2018

in

Civil Appeal No. 51 of 2016)

RULING

The discretion of a single judge to entertain an application under **Rule 4** of the Court of Appeal Rules is wide and unfettered. The Supreme Court in **Fahim Yasin Twaha V. Timamy Issa Abdalla & 2 Others**, Civil Application No. 35 of 2014, laid out some general principles in this regard, as follows, in pertinent part;

"As regards extension of time, this Court has already laid down certain guiding principles. In the **Nick Salat** case, it was thus held:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay..."

Over the years, this Court has followed its own dictum in **Leo Sila Mutiso V. Rose Wangari Mwangi**, Civil Application No. Nai. 255 of

1997 that;

“...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”.

What is critical at this stage is to consider the length and the reason or reasons for the delay as well as the degree of prejudice to the respondent if the application is granted. The third consideration in **Leo Sila**, namely, the chances of the appeal succeeding if the application is granted, is rarely applied because only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play in balancing the various factors that have to be considered. That has repeatedly been stated, for example in **Mwangi V Kenya Airways Ltd** (2003) KLR 486 where the Court said;

“It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered. This is understandable because the “the chances of an appeal succeeding” is normally dealt with by this Court under the rubric of “an arguable appeal” or “an appeal which is not frivolous” and the full court normally considers that issue under rule 5(2)

(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on.”

Applying those principles to the application before me, it is apposite to note that the High Court, (Mutende, J) delivered a judgment on 19th April, 2018. A notice of appeal was duly lodged within time on 23rd April, 2018. However, the statutory period of 60 days from 19th April, 2018 lapsed on 19th June, 2018 and this application brought on 5th September, 2018, constituting a delay of approximately 77 days.

Mr. Mulonzya, learned counsel for the applicant explained that the lapse of time and the delay of almost 2 months was not attributable to the applicant; that counsel himself was indisposed from the month of June 2018 before he could file the appeal; that the intended appeal raises arguable points; and that the present application has been brought without unreasonable delay.

Ms. Mutemi learned counsel for the respondent for his part maintained there has been general delay in concluding this dispute since it was filed 2010; that there will be further delay if the applicant was allowed to file this appeal; that litigation must come to an end; and that the medical report on which the applicant was relying was not stamped to authenticate it.

In my honest view, the delay of 77 days is not inordinate, given the circumstances. Counsel for the applicant explained that he was indisposed and produced proof in the form of a letter from the hospital. This fact was corroborated by the applicant in his supporting affidavit where he deposed that in the month of August, 2018 he went to his advocate’s chambers and was informed by the secretary that he had been indisposed from June 2018 and was recovering at home. That is sufficient explanation.

Finally, other than a delay of 77 days, and the inconvenience of waiting, I believe the respondent will suffer no prejudice, and if at all, she can be compensated in damages.

On the basis of the foregoing, the application is allowed with costs. Leave is granted to the applicant to lodge and serve the appeal within 21 days from the date hereof.

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

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR