



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: J. MOHAMMED, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 104 OF 2018

JEPHTER JUMA AMBUCHI.....1ST APPLICANT

JOSEPH KIMARUI JUMA.....2ND APPLICANT

VERSUS

HEZRON BARASA KISACHE.....RESPONDENT

(An application arising from the Judgment of the High Court of Kenya at Bungoma, (Hon. A. O. Muchelule, J.) Delivered on the 5th day of December, 2012

in

MISC.CIVIL APPLICATION NO. 138 OF 2011)

RULING

Background

[1] This is an application by way of a Notice of Motion brought under **Rule 4** of the Court of Appeal Rules (*the Rules*) in which the applicant seeks the following orders:

- 1. That service of this application be and is hereby dispensed with at the first instance due to urgency.*
- 2. That this application is hereby certified as urgent to be heard on priority basis.*
- 3. That the applicants be and are hereby granted leave to file a Notice of Appeal out of time from the Judgment of the Honourable Justice A. O. MUCHELULE dated and delivered at Bungoma on the 5th day of December, 2012.*
- 4. That the applicants be and are hereby granted leave to file and serve a Record of Appeal out time from the Judgment of Honourable Justice A. O. MUCHELULE dated and delivered on the 5th day of December, 2012.*
- 5. That the costs of this application be provided for.*

[2] The application is anchored on the grounds that the delay in filing the notice of appeal and the record of appeal was occasioned by the fact that the 1st applicant was hospitalized in Uganda; the 2nd applicant was taking care of the 1st applicant and their finances were depleted and were therefore unable to instruct their lawyer to file the appeal.

Submissions by counsel

[3] At the hearing of the application, learned counsel, **Mr. Ateya** represented the applicants. Counsel for the respondent was not present in Court though served with the hearing notice.

[4] Mr. Ateya submitted that the applicants were unable to file the Notice of Appeal and Record of appeal within time as the 1st applicant was bed ridden and hospitalized in Uganda; that the 2nd applicant was taking care of the 1st applicant; that the applicants were unable to instruct counsel to file the notice of appeal and the record of appeal within time; that the 1st applicants hospitalization in Uganda depleted the applicants' finances and they were therefore unable to file the notice of appeal and record of appeal within time; that the respondent will not be unduly prejudiced if the orders sought are granted; that the applicants have an arguable appeal and weighty issues of law will be canvassed.

Determination

[5] I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. The discretion that I am being called upon to exercise in this application is provided under **Rule 4** of the Rules which states:-

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, of by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

[6] The principles guiding the Court on an application for extension of time premised upon rule 4 of the Rules are well settled. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear, see **Wasike V Swala [1984] KLR 591** where this Court stated:-

“As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:-

“a) That there is merit in his appeal.

b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c) That the delay has not been inordinate.”

[7] Rule 4 of the Court of Appeal Rules requires me to exercise my discretion judicially. There has to be valid and clear reasons upon which discretion can be favourably exercised.

[8] The applicants contend that they have an arguable appeal. I have perused the Draft memorandum of appeal and found that the appeal is arguable as it raises issues for determination, *inter alia* regarding the rights of a title holder in occupation as against the rights of a trespasser. An arguable appeal is not necessarily one which will succeed.

[9] On the issue of delay, I note that the impugned judgment was delivered on **5th December, 2012**, while the Notice of appeal has not been filed to date. **Rule 75** of the Court Rules provides that a Notice of Appeal be lodged within 14 days from the date of the impugned judgment. The instant application for extension of time was filed on 21st November, 2018 about **six (6) years** after the delivery of the impugned judgment. There is no letter bespeaking a copy of the proceedings, copied to counsel for the respondent as provided in Rule 82 of the Court Rules.

[10] The applicants' explanation for the delay in filing the Notice of appeal and the record of appeal is the hospitalization of the 1st Respondent in Uganda, the 2nd respondent taking care of him and that they were financially constrained.

Regarding the 1st applicant's illness, there is no evidence regarding the nature of the illness, when he fell ill, or the time it took him to recover. No documentary evidence was produced to support the applicants' claim. There is also no documentary evidence to prove that the 1st applicant, was unable to communicate and instruct his counsel. Further, there is no evidence why the 2nd applicant who was not ill was unable to instruct their counsel. The only evidence attached to the Motion are copies of receipts of payments made to a medical centre in Mbale, Uganda dated August, 2017.

[11] Regarding the filing of the Notice of appeal, Rule 75 (1) of the Court Rules provides that:-

“75.(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.”

The filing of the Notice of appeal is mechanical and does not require the input of the appellant. The party or the lawyer can prepare and file the same. I note that to date, over **six (6) years** after the impugned judgment was delivered, no notice of appeal has been filed. I find that the reasons advanced by the applicants for the delay in filing the appeal is not excusable. The delay is in the circumstances, inordinate and inexcusable.

[12] Regarding the applicant's inability to file the appeal due to financial constraints, **Rule 117** of the Court Rules provides relief where an applicant can show that they are facing financial challenges. There is no evidence on record that the applicants have made an attempt to

invoke this process.

[13] On the issue of prejudice, it is not in dispute that the impugned judgment was delivered over 6 years ago. The applicant has not filed and served a Notice of Appeal on counsel for the respondent. The respondent is likely to suffer prejudice if the application is granted as he will be denied the fruits of his judgment which was delivered over 6 years ago.

[14] In **Trade Bank Ltd (In liquidation) vs. L.Z. Engineering Construction Ltd & Another** Civil Appl. No. NAI. 282/98, the Court stated thus:-

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants place before the learned single judge no material upon which he could exercise his discretion.”

[15] In conclusion, I find that there are no special circumstances demonstrated by the applicants for me to exercise my discretion in their favour. The result is that I dismiss the Notice of Motion dated 23rd November, 2018 with costs to the respondent.

Dated and delivered at Eldoret this 7th day of February, 2019.

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR