



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: KARANJA, JA.)**

**CIVIL APPLICATION NO. 15 OF 2018**

**BETWEEN**

**MUNIR ABUBAKAR MASOUD**

**(AS MEMBERS OF TAWHEED MUSLIM ASSOCIATION.....APPELLANT**

**AND**

**ALI ABDALLA SALIM.....1ST RESPONDENT**

**ALI YISLAM ALI BASHAMAKH.....2ND RESPONDENT**

*(An application to strike out the Record of Appeal from the Judgment of the Environment and Land Court (Angote, J.) 15th October, 2017*

*in*

*E.L.C. No. 78 of 2015.)*

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**RULING**

1. This is a **Rule 4**, Court of Appeal Rules, application seeking extension of time within which to file and serve the record of appeal which has already been filed out of time. The circumstances leading to this application are quite unique and bear revisiting.
2. The applicant, who is a layman by any standards but who appears quite knowledgeable in matters of law and procedures of this Court was sued along with another in their capacity as members of Tawheed Muslim Association, in Environment and Land Court (ELC) at Malindi in **ELC Suit No.78 of 2015**. After a full hearing, judgment was entered against the applicant and his co-defendant to the extent that they were restrained from interfering, obstructing, impeding and or otherwise tempering with the running and management of Tawhid Girls Secondary school. They were also ordered to pay costs of the suit.
3. Being aggrieved, the applicant filed a Notice of Appeal dated 11th October, 2017, which was lodged at the ELC court at Malindi on 13th October, 2017. According to the applicant however, when he went to file the memorandum and record of appeal, his documents were found to be non-compliant with the Court of Appeal Rules and the Court's Practice directions and he was therefore asked to go and rectify them. He says that he did so but, in the process and without his knowledge, he missed the deadline with what he thought was only one day.
4. Be that as it may, he did not seek extension of time and the respondents through their counsel on record moved the Court by way of a Motion on notice filed under **Rules 42 and 84** of the Rules of this Court for the striking out of the Appeal. Although the application was strenuously and emotionally opposed by the applicant, this Court in its Ruling rendered on 8th November, 2018 found the appeal had been filed out of time and without leave of the Court. The Court found it had jurisdiction to hear and determine only those appeals filed within time or outside time but with the requisite leave. The appeal was consequently struck out.

5. The Court clearly moved by the circumstances surrounding the delay, in one of the very rare occasions, in the interest of justice gave the appellant a small window to correct his mistake. The order striking out the appeal was therefore suspended for 60 days to enable the applicant file the application for extension of time. The applicant filed the application four days later. This is the application that is the subject of this ruling.

6. The application is supported by the applicant's affidavit sworn on 12th November, 2018, in which he has also cited several authorities. The application is opposed vide the affidavit in reply filed on 11th March, 2019. Mr Mohammed Ali learned counsel for the respondents conceded that the delay was only for nine days but nonetheless urged the Court not to countenance it and decline the invitation by the applicant to extend time. In his brief reply, the applicant maintained that the delay was not inordinate and that it had been sufficiently explained.

7. I have considered the application, the grounds it is predicated on, the rival affidavits of the parties and the guiding principles applicable in applications made under **Rule 4** of this Court's Rules. I am aware that the discretion that this Court has to exercise under **Rule 4** is unfettered and does not require establishment of "sufficient reasons". This principle has time and again been adopted by this Court and was recently considered in the case of **Alfred Iduvagwa Savatia v Nandi Tea Estate & another [2018] eKLR** where the learned Judge stated that:-

***"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities in this regard. 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.***

Earlier on, in the case of **Fakir Mohammed V Joseph Mugambi & 2 Others, [2006] eKLR**, this Court rendered itself thus:-

***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it 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."***

***The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4 went on to hold;-***

***"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."***

8. Applying the above principles, there is no doubt in my mind that the delay of nine days cannot be said to be inordinate in the circumstances of the case as explained by the applicant. I am also convinced that the explanation given for the delay is plausible. The applicant who as stated earlier is a layman cannot be faulted for the misconception he harbored relating to the calculations. He cannot either be unduly faulted for having failed to comply with this Court's practice directions which caused his documents to be returned to him for compliance. Lastly, the respondents have not persuaded me that they will suffer any prejudice that cannot be compensated by way of costs.

9. I do not find it necessary at this point to consider the possibility of the success of the applicant's appeal. In view of all the above, I am inclined to give the applicant another chance to pursue his appeal so that the issues he has raised can be determined on merit. Accordingly, this application is allowed. Pursuant to this Court's Ruling of 8th November, 2018, Civil Appeal No. 15 of 2018 is hereby deemed to have been filed within time. Costs of this application be in the Appeal.

**Dated and delivered at Malindi this 20th day of March, 2019**

**W. KARANJA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**