



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 83 OF 2018

BETWEEN

SUDI ALI RASHID.....APPELLANT/ APPLICANT

AND

RUTH alias RAYA JEREMIAH ATIENO.....RESPONDENT

(An Application for extension of time to file and serve Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time against the Judgment of Hon. Omolo J., delivered on 31st January, 2018

in

Mombasa ELC Case No. 37 of 2014)

RULING

1. By an application dated 13th May 2018, the applicant has moved this Court under Rule 4 of the Court of Appeal Rules seeking to have the Notice of Appeal filed on 21st March 2018 and the Memorandum and record of appeal filed on 9th April 2018 to be deemed as duly filed or alternatively, that the time for lodging the same be extended. The intended appeal challenges a judgment of the Environment and Land Court given on 31st January 2018 dismissing his suit with costs.
2. The applicant states in support of the application that when the suit was before the trial court for mention to confirm the filing of submissions, he attended court alongside his Advocate, Mr. Said Ali. There was no attendance on behalf of the respondent on the said date. Nonetheless, the trial court, having confirmed that the applicant's submissions were on record, directed that the respondent had until 31st January 2018 to file her submissions and that thereafter, judgment would be rendered on 28th February 2018.
3. However, contrary to its own directive, the court delivered judgment ahead of the date scheduled, on 31st January 2018, in the absence of the parties. On 28th February 2018, the applicant attended court alongside his advocate for purposes of collecting the judgment only to be informed that the same had already been delivered earlier as aforesaid.
4. Given that his advocate was engaged in some election petitions at the time, the applicant thereafter took it upon himself to visit the court registry and apply for a certified copy of the judgment, which took a while to procure. He finally received the same on 20th March 2018 by which time the time frames for institution of appeal had lapsed. The applicant averred that he nonetheless lodged his Notice of Appeal on 26th March 2018 with a Memorandum and record of appeal being filed shortly thereafter, on 9th April 2018. It is the applicant's case that the delay was not intentional and it is in the interests of justice that his appeal should be admitted out of time.
5. When the application came up for hearing there was no appearance for the respondent. Being satisfied that the application had been served on the respondent and notice of hearing duly given, I heard **Mr. Aboubakar**, learned counsel for the applicant on his own. Counsel explained the background to the application as set out above and pointed out that the delay is explained and that the appeal, being Mombasa Civil Appeal No. 41 of 2018, has already been filed.
6. I have considered the application and the submissions by counsel. The principles applicable in considering an application of this nature were stated by **Waki J.A** in ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*** as follows:

“The exercise of this Court’s discretion under Rule 4... 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: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997, Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 and Murai v Wainaina (No 4) [1982] KLR 38.”

7. Guided by those principles, I am satisfied that the delay involved has been satisfactorily explained. Although a copy of the memorandum of appeal was not attached to the application, I take counsel’s word that the appeal has indeed already been filed. The appellant on becoming aware that judgment had been delivered by the lower court took steps without undue delay to lodge the appeal. I think this is a proper case for me to exercise my discretion in favour of the applicant.

8. I accordingly allow the application dated 13th May 2018 in terms of prayers 1 and 2 thereof with the result that the notice of appeal and the memorandum and record of appeal are deemed as duly filed. The costs of the application shall abide by the outcome of the appeal.

Dated and delivered at Malindi this 19th day of June, 2019.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR