



IN THE COURT OF APPEAL

AT MALINDI

[CORAM: SICHALE, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 103 OF 2018

BETWEEN

GLORIA PAOLO.....APPLICANT

AND

PIETRO SCAVO.....RESPONDENT

(Being an application for leave to extend time for filing Notice of Appeal dated 13th July, 2015 in respect of the ruling delivered on 26th June, 2015

IN

Malindi ELC No. 231 of 2014

RULING

The applicant, **Gloria Paolo** filed a Notice of Motion application dated **15th October, 2018** and sought *inter alia*, an order for leave to extend time for filing a Notice of Appeal dated **13th July, 2015** in respect of a ruling delivered by **Angote, J** on **26th June, 2015**. The basis upon which the application is grounded is that the applicant's former lawyers, namely, **Kilonzo Aziz Advocates** failed the applicant. **Pietro Scavo** was named as the respondent.

On **28th May, 2019**, the Motion came before me for hearing. **Mr. Gikandi Ngibuini**, learned counsel for the applicant relied on the supporting affidavit of **Ali Shariff Maulana** sworn on **15th October, 2018**, the applicant's written submissions and list of authorities.

In the submissions, the applicant contended that the Notice of Appeal which was filed on **13th July, 2015** in respect of the ruling delivered on **26th June, 2015**, hence three (3 days) out of time was not inordinate; that a mistake is a mistake as humans are prone to mistakes; that a mistake of an advocate should not be visited upon his/her client; that the overriding objective underpinned by article 159 of the Constitution is to do justice. In his conclusive remarks, counsel contended that the respondent has not demonstrated that he is likely to suffer prejudice if the application is granted. He was amenable to payment of costs.

Mr. Kiarie Kariuki, learned counsel for the respondent vehemently opposed the motion. In opposing the motion, counsel relied on the replying affidavit sworn by **Pietro Scavo** on **6th December, 2018**, the respondent's submissions and a list of authorities both filed on **25th February, 2013**. Counsel was of the view that the motion lacks seriousness as the alleged Notice of Appeal filed on **13th July, 2015** is not annexed to the application and neither is the impugned ruling of the court or an order extracted from the impugned ruling; that **M/s Gikandi & Co. Advocates** came on record on **21st July, 2016** and it was not until **15th October, 2018** that they filed the motion, the subject of these proceedings and further, that the intended appeal arise from a ruling in an interlocutory matter and the main suit is still pending for hearing. **Mr. Kiarie** reiterated that there is no Memorandum of Appeal annexed to the motion to assist the Court in determining the applicant's chances on appeal.

In a brief reply, **Mr. Gikandi** refuted the imputation that the proceedings in the lower court have stalled because of the Notice of Appeal. He conceded that there was a mistake on their part in not annexing the Notice of Appeal.

I have anxiously considered the motion, the supporting and replying affidavits, the rival submissions and the law. The discretion of a single

judge under Rule 4 of this Court's Rule is wide and unfettered. In Karny Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018, Koome, JA stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal”. In Athuman Nusura Juma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015, this Court stated thus, on that issue:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.”

In the instant motion, there was no draft Memorandum of Appeal and neither did the applicant annex the Notice of Appeal. Instead, it is the respondent's counsel who annexed the Notice of Appeal. These lapses tend to suggest laxity on the part of the applicant's counsel. However, be that as it may, and of fundamental concern is that the motion before me was filed on **15th October, 2018**. It seeks leave to extend time for a Notice of Appeal dated **13th July, 2015** in respect of a ruling of **26th June, 2015**. It is now about 4 years since the ruling was delivered. I also note that whereas counsel on record seems to place blame on the applicant's previous counsel, the firm of **Gikandi & Co. Advocate** came on record on **21st July, 2016**. Thereafter, no action was taken until **15th October, 2018** when the instant motion was filed. There was no explanation for this delay. The applicant placed blame on his previous counsel but no explanation was forthcoming in respect of the delay occasioned by the applicant's counsel on record.

In Abdul Azizi Ngoma vrs. Mungai Mathayo [1976] Kenya LR 61, 62, the Court of Appeal said:

“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

Similarly, in Aviation Cargo Support Limited vrs. St. Mark Freight Services Limited CA No. Nai of 2013, G.B.M. Kariuki, JA stated:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time”.

In my view, the delay between the time when the applicant's counsel came on record (21st July, 2016) and the date when the motion seeking leave was filed (15th October, 2018) was inordinate and it has not been explained. It is in view of this that I find that the motion is bereft of merit. It is dismissed with costs to the respondent.

Dated and delivered at Malindi this 31st day of October, 2019.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR