



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 74 OF 2019

BETWEEN

COMMISSIONER OF POLICE.....1ST APPLICANT

THE HON. ATTORNEY GENERAL.....2ND APPLICANT

AND

EMMANUEL KURIA WA GATHONI.....RESPONDENT

(An application for leave to file and serve the Notice of Appeal and Record of Appeal out of time

from the judgment and decree of the High Court of Kenya at Nairobi (Hon. L. Njuguna, J.)

dated 2nd February, 2017

in

NAIROBI H C C NO. 934 of 2004)

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RULING

BACKGROUND

1. This is an application by way of Notice of Motion dated 6th March, 2019 brought under Rule 4 of the Court of Appeal Rules (the Court Rules) in which the **Commissioner of Police** (the 1st applicant) and **the Honourable Attorney General** (the 2nd applicant) seek orders:

a) THAT this honourable court be pleased to grant leave to the applicants to file and serve the Notice of Appeal and the Record of Appeal out of time from the judgment of the High Court of Kenya at Nairobi (Hon. L.Njuguna, J.) dated 2nd February, 2017 in Nairobi HCCC No 934 of 2004.

b) That the costs of the application be provided for.

2. The application is based on the grounds in the body of the application, the supporting affidavit sworn by **Mr. Kepha Onyiso**, a State Counsel in the Office of the 2nd applicant, who has the conduct of the matter on behalf of the applicants. The respondent is **Emmanuel Kuria Wa Gathoni**.

3. The application is anchored on grounds that the applicants intend to file an appeal against the judgment of the High Court (L. Njuguna, J.) and that their failure to file a Notice of Appeal was occasioned by the fact that the respondent had filed a notice of appeal and the applicants were intending to file a cross-appeal within 30 days before the hearing in compliance with **Rule 93 of the Court Rules**; that the matter was handled by several State Counsel and the Counsel currently handling the matter has experienced difficulties in obtaining appropriate instructions hence the delay in filing the appeal or the instant application; that the mistake of an advocate should not be visited on his client; and that the appeal has high chances of success.

4. The application was opposed by the respondent who filed a replying affidavit on 19th March, 2019 and a supplementary replying affidavit on 21st March, 2019. The respondent's main grounds for opposing the application are that while he had filed a notice of appeal as alleged by the applicants, his subsequent actions of filing the party and party bill of costs on 26th April, 2017, which was served on the applicants on 10th May, 2017 was a clear and unequivocal indication that he had abandoned his intended appeal; further, that he filed an application for review of the decree/judgment on 17th November, 2017, which was served on the applicants on 24th November, 2017; that the applicants responded to his application vide their grounds of opposition filed on 4th May, 2018; that his affidavit filed in support of his application for review was clear that he had abandoned his intended appeal and was proceeding with the execution of the decree/judgment; that the applicants cannot therefore rely on the notice of appeal filed by the respondent to justify their failure to take the necessary steps to appeal against the impugned judgment.; that the applicants' appeal does not have high chances of success; that the applicants are guilty of inordinate delay in filing the instant application and are not entitled to the orders sought; and that the application is an afterthought which should be dismissed with costs.

SUBMISSIONS BY COUNSEL

5. At the hearing of the application, **Ms. Makori** represented the applicants while learned counsel, **Mr. Kimondo Mubea** represented the respondent. **Ms Makori** relied on the supporting affidavit filed by the applicants. Counsel submitted that the file in respect of **HCCC No 934 of 2004**, the suit which is the subject of the impugned judgment was handled by several State Counsel which occasioned **Mr. Onyiso**, the State counsel who filed the instant application, difficulties in getting the requisite instructions to file the notice of appeal and the record of appeal; that the respondent had filed a notice of appeal against the impugned judgment and the applicants intended to file a cross appeal against the impugned judgment within 30 days of the hearing in compliance with **Rule 93 of the Court Rules**; and that the intended appeal has high chances of success.

6. **Mr. Kimondo Mubea** opposed the application and relied on the respondent's replying affidavit and supplementary replying affidavit. Counsel submitted that the reason for delay given by the applicants that **HCCC No 934 of 2004** was handled by various counsel cannot stand; that pursuant to the delivery of the impugned judgment, the respondent filed a party and party bill of costs which was an indication that the respondent had abandoned the intended appeal; that as a further indication that the respondent had abandoned his intended appeal, the respondent filed a notice of motion dated 16th November, 2017 wherein he deponed in his supporting affidavit that he had an ailing daughter who required medical attention in India and he therefore urgently required payment of the decretal sum; that on 24th September, 2018 the respondent's counsel wrote to the 2nd applicant demanding payment of the decretal amount within 30 days from the date of his letter, failing which he would take necessary legal action for the recovery of the amounts outstanding together with interest and costs; that the applicants have not given a plausible reason for the delay in filing the notice of appeal and the record of appeal save for the allegation that the matter was handled by various counsel; that the intended appeal is frivolous and has no chances of success; and that the applicants have not placed any material before the Court to enable the Court exercise its discretion in their favour.

Counsel urged the Court to dismiss the application with costs to the respondent.

DETERMINATION

7. I have carefully considered the application, the submissions by counsel, the authorities cited and the law. The discretion that I am called upon to exercise in this application is provided under **Rule 4 of the Court Rules** as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the 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.”

8. The impugned judgment was delivered on 2nd February, 2017. **Rule 75 of the Court Rules** provides that a Notice of Appeal should be filed within 14 days from the date of the impugned decision.

9. The parameters for the exercise of such discretion are clear. In **Njuguna v Magichu & 73 others [2003] KLR, 507**, this Court stated as follows:

“The discretion exercisable under Rule 4 of the Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual legal basis.”

10. The factors to be considered were stated in **Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No Nai. 332 of 2004)**, where it was held that:

“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, (possible) 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 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.” [Emphasis supplied].

The principles set out by this Court upon which the judicial discretion under **Rule 4 of the Court Rules** may be exercised are as stated in **Mwangi v Kenya Airways Ltd (2003) KLR 486**:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in Leo Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. 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.”

11. On the length of the delay, the law does not set out any minimum or maximum period of delay. All that it requires is that any delay should be satisfactorily explained. There has to be valid and clear reasons upon which discretion can be favourably exercisable by a Court. In the instant application, the explanation for the delay in filing the notice of appeal and the record of appeal was that the respondent had filed a notice of appeal and the applicants intended to file a cross appeal within 30 days of the hearing in compliance with **Rule 93 of the Court’s Rules**. Further, the suit which is the subject of the impugned judgment was handled by various State Counsel which occasioned delay in obtaining instructions to file the notice of appeal, the record of appeal and the instant application. In the circumstances of this case, I find that the applicants have offered a satisfactory explanation for the delay and have laid a proper basis upon which I can exercise my unfettered discretion in their favour.

12. On whether there is merit in the intended appeal, it is the applicants’ contention that they have an arguable appeal. It is imperative to point out that in dealing with an application for extension of time, a single Judge cannot make definitive pronouncements on the success of the intended appeal as the same may embarrass the Court that will deal with the main appeal. I have perused the draft memorandum of appeal and find that the intended appeal is arguable as it raises issues for determination, *inter alia*, whether from the evidence on record there was a basis for the learned Judge of the trial court to award damages for malicious prosecution and false imprisonment to the respondent when the said prayers were not sought in the plaint ; whether the arrest and prosecution of the respondent was actuated by malice; and whether the damages awarded to the respondent for malicious prosecution and false imprisonment had a legal basis and were reasonable. As this Court stated in **Wasike v Swala, [1984] KLR 591**, an arguable appeal need not be one with an overwhelming probability of success. In the circumstances of this case, I find that the applicants have an arguable appeal and that the demands of justice will be better served by allowing the application so as to allow the parties to ventilate their respective positions on merit. In **Richard Nchapi Leiyagu v IEBC & 2 others, [2013] Civil Appeal No. 18 of 2013**, this Court expressed itself as follows:

“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

13. On the issue of whether the respondent will be prejudiced if the application to extend time is granted, it is the respondents claim that he will suffer prejudice if the application is delayed as he will be deprived of the fruits of his judgment. The applicants intend to exercise their undoubted right of appeal. The applicants’ right of appeal, apparently in pursuit of protection of public funds. The Court has to balance the competing interests of the applicants with those of the respondent. In **Mwaniki Njoroge Kamau & another v Lee Sheth Poong, Civil Application No. Nai 55 of 1998** (unreported) Lakha, J.A. stated:

“As it often happens, this application highlights two principles, each in itself salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”

14. The upshot is that I find merit in this application, and allow it. I direct the applicants to file and serve the Notice of Appeal and Record of Appeal within thirty (30) days from the date hereof. I award costs of the application to the respondent.

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

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR