



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: NAMBUYE, JA (IN CHAMBERS)]**

**CIVIL APPLICATION NO. NAI 87 OF 2019 (UR.62/2019)**

**BETWEEN**

**WILLIAM NJIHIA KIMANI.....APPLICANT**

**VERSUS**

**FRANCIS WAWERU MBOCHI...RESPONDENT**

(Application for extension of time to file and serve a Notice of Appeal out of time against the Ruling of the High Court of Kenya at Nairobi (H.M. Okwengu,J) Dated 23<sup>rd</sup> November, 2010 in ELC No. 2761 OF 1994 Currently E.L.C. Nyahururu No. 36 of 2018)

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**RULING**

Before me is a Notice of Motion dated 11<sup>th</sup> June, 2019 and filed on 12<sup>th</sup> June, 2019, seeking two substantive reliefs together with an attendant relief for costs as follows:

**“2. That this Court may be pleased to grant the applicant leave to file and serve notice of appeal out of time against the whole ruling delivered on 23<sup>th</sup> November, 2010 by Hon. Lady Justice H.M. Okwengu in High Court of Kenya at Nairobi (E.L.C Division) Civil case No. 2761 of 1994 currently E.L.C. of Kenya at Nyahururu E.L.C. case No. 36 of 2018.)**

**3. That this Court may be pleased to grant the Applicant leave to file and serve Record of Appeal out of time against the whole Ruling delivered on 23<sup>rd</sup> November, 2010 by Hon. Lady Justice H.M. Okwengu in High Court of Kenya at Nairobi (ELC Division) Civil case No. 2761 of 1994 currently E.L.C of Kenya at Nyahururu E.L.C Civil Case No. 36 of 2018).**

**4. That’s costs of this application be in the cause.”**

The application is premised on the Civil Procedure Act and Rules provisions which have no application to procedures before the Court of Appeal and will therefore neither be reflected or interrogated in this ruling beyond their being mentioned as above. The relevant and substantive rule for purposes of proceedings of this nature before this Court and which will form the basis for the determination of the application under consideration is Rule 4 of the Court of Appeal Rules (CAR) notwithstanding the inclusion of “**and all other enabling provisions of the law.**”

The application is supported by grounds in its body and a supporting affidavit of the applicant together with annexures thereto. It has been opposed by a replying affidavit deposited by **Francis Waweru** on 18<sup>th</sup> October, 2019 and filed 22<sup>nd</sup> October, 2019.

The application was canvassed by way of written submissions filed by the applicant **William Njihia Kimani** appearing in person and who fully adopted and orally highlighted them in Court. While learned counsel **Mr. Gakuhi Chege** on record for the respondent made oral representations in opposition to the application based on the content of the replying affidavit.

In support of the application, the applicant gave the background to the litigation giving rise to the intended appeal and then submitted that he was surprised when the respondent filed an application dated 10<sup>th</sup> December, 2008 in a non-existing file seeking cancellation of the title deed issued in his favour and which application was allowed on 23<sup>rd</sup> November, 2010 in his absence; that he had an unnamed advocate on record who never informed him of any delivery of the intended impugned ruling (the ruling) as he had fallen out with the said advocate after a disagreement over fees payable by him to the said advocate and as result there was no Notice of Appeal lodged within the stipulated time; that he is aggrieved by the outcome of the said ruling which in essence, took away his title to the suit property which raises a serious legal

issue for determination in the intended appeal. He maintains that he was not aware of the delivery of the said ruling. He only came to learn of its existence when he was served with pleadings filed by the respondent against him in the Engineer Primary (sic) Magistrate court, ELC suit No. 4 of 2018 filed in Court on the 13<sup>th</sup> December, 2018, seeking to evict him from the suit property.

On the issue of the delay in filing and service of the Notice of Appeal within the time line stipulated for in the CAR, the applicant contend that the same is not inordinate. Neither was it deliberate on his part. It was occasioned by the failure of the advocate then on record for him who failed to notify him of the delivery of the ruling.

On the applicable guiding principles of law, the applicant relied on the case of **Tana & Athi River Development Authority versus Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** for the proposition that Courts will readily excuse a mistake of counsel where such an action affords justifiable expeditious and holistic disposal of a matter notwithstanding that, the exercise of such a discretion is not automatic. Secondly, that while acknowledging that mistakes of counsel should not be visited on an innocent client, it should be remembered that counsel's duty is not limited to his client but also to the court in which he practices.

On the Court's discretion to extend time to file the intended appeal, the applicant submitted that the intended appeal raises triable issues with reasonable chances of success as it raises serious issues of law, namely; whether the Court had jurisdiction to nullify a title deed on the basis of an application and secondly whether the Court had powers to entertain such an application founded on a matter that had been withdrawn.

Relying on the case of **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR**, the applicant submitted that the discretion under **rule 4** is unfettered save that it has to be exercised Judiciously, not on whim, sympathy or caprice, bearing in mind the length of the delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted in his favour as according to him, he had satisfied the threshold for granting the same.

Also relied upon is the Supreme Court decision in the case of **Nicholas Kiptoo Arap Salat versus Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** for the exposition of the principles on the threshold for sustaining an application for extension of time within which to validate an intended appellate process.

On the totality of the above submissions, the applicant prayed for the reliefs sought to be granted.

In rebuttal, **Mr. Gakuhi Chege** relying on the applying affidavit filed by the respondent in opposition to the application, submitted that contrary to the applicant's contention, he was fully aware of the delivery of the ruling as he was represented in court by an advocate by the name of T. Kabaka & Co. Advocate; that on the 30<sup>th</sup> November, 2010, the applicant's said advocate applied for proceedings for purposes of filing of an appeal against the ruling and thereafter served the respondent with a notice of appeal; that on 15<sup>th</sup> February, 2011, the High Court informed the applicant's advocate to collect copies of the proceedings upon payment of Kshs.420/-; that records held by the High Court indicate clearly that the said proceedings were collected on 23<sup>rd</sup> February, 2011, together with a copy of the ruling which was also duly paid for as evidenced by copies of the annexed payment receipts for both the proceedings and the ruling.

In light of the above undisputed facts, **Mr. Gakuhi** submitted that it was not therefore true as contended by the applicant that he was not aware of the delivery of the ruling, nor the steps his advocate then on record for him took to regularize his intended appellate process. On that account, **Mr. Gakuhi** submitted contended that the applicant is guilty of laches; that a period of nine (9) years is inordinate especially when the applicant has not offered any reasonable explanation to court for his inaction over the said period; that the applicant's conduct portrays a party who is not only untruthful but economical with disclosure of relevant factors pertaining to the circumstances under which he has come to seek the court's intervention so belatedly and is therefore undeserving of the exercise of the court's discretion in his favour.

In reply to the respondent's submissions, the applicant stated that he has been on the land ever since; that he is still on the land; that at no time did Kabaka Advocates ever inform him of the existence of the ruling, before falling out with him. He denied that the said Kabaka ever informed him of any steps he had taken to initiate the intended appellate process. He reiterated his earlier submission that he has demonstrated sufficient reasons for the exercise of the court's discretion in his favour.

My invitation to intervene has been invoked under **Rules 4** after dispensing with the un applicable provision of the Civil Procedure Act/Rules as indicated above.

The parameters for the Court's exercise of jurisdiction under this rule now form a well beaten path with well-known crystalized guiding principles which I find prudent to highlight as hereunder.

**Rule 4** of the CAR provides as follows:

**“4. 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 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.”**

The principles guiding the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR**, **Odek, J.A.** stated that the mandate under Rule 4 is discretionary, unfettered and does not require establishment of “*sufficient reasons*”. Neither is it limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

In **Nyagwa Farmers' Co-operative Society Limited versus Ibrahim Nyambare & 3 Others [2016] eKLR**, **Musinga, J.A.** stated that the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to

the respondent if the application is allowed are all relevant factors for consideration. In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR, G.S. Pall JA** (as he then was) added *inter alia* that an applicant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the CAR; and which order should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond *para adventure*, that the intended appeal is not an arguable.

In **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board [2015] eKLR, K. M'Inoti J.A** stated that it is a discretion which must be exercised judicially considering that it is wide and unfettered. In **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai. 332 of 2004** it was stated that the factors to be considered are not limited to, the period for the 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 the delay on public administration and the importance of compliance with time limits; the responses of the parties and also whether the matter raises issues of public importance.

There is also **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which **Odek, J.A.** stated that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by the particular applicant that the intended appeal is arguable. In **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012**, it was observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; and lastly, in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013**; it was stated that the right to a hearing is not only constitutionally entrenched but it is also the cornerstone of the rule of law.

I have considered both the rival pleadings and submissions of the respective parties in light of the principles of law that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures as highlighted above. It is not disputed that the intended impugned ruling was delivered on 23<sup>rd</sup> November, 2010, which is a period of eight (8) years, six (6) months and nineteen (19) days to the date the application under consideration was filed. In order for the applicant to succeed on his application, he has to demonstrate that on the basis of the supportive facts relied upon in support of his application, he has satisfied the threshold for granting relief under the Rule 4 CAR procedures with regard to the following factors:

**a. The length of the delay;**

**ii. The reasons for the delay;**

**iii. Chances of the appeal succeeding;**

**iv. Degree of prejudice to the respondent if the application were to be allowed;**

**v. Any other relevant factors.**

With regard to the length of the delay, it is as indicated above. Definitely, it exceeds the two years on the basis of which the exercise of discretion to extend time within which to validate an appellate process was withheld in the case of **George Mwende Muthoni versus Mama Day Nursery and Primary School Nyeri CA No.4 of 2014 (UR)**; and the sixty days after capacitation as was the position in the case of **Aviation Cargo Support Limited versus St. Marks Freight Services Limited [2014] eKLR**.

As for the reasons for the delay, in the entire grounds in the body of the application, content of the supporting affidavit, written submissions as well as the oral submissions in court, there is nothing to show that the applicant ever had an advocate on record for him. The pleadings relied upon at the High Court level annexed to the supporting affidavit are those he filed in his own name. The above being the position on the record, I find nothing on the record to suggest that the applicant had an advocate on record for him other than the advocate whom the respondent mentioned in their submissions. No reason was given as to why the applicant chose not to name the advocate he blamed for inaction to initiate the intended appellate process within the time line stipulated for in the Rule.

The respondent annexed documents to the replying affidavit to demonstrate that the advocate then on record for the applicant was capacitated to initiate the applicant's intended appellate process. When confronted with the above documentary exhibits, the applicant elected to proceed with his application in the condition in which he had presented it. In the absence of any evidence in rebuttal to those annexures there is nothing to oust the respondent's assertion that the applicant was capacitated to initiate the intended appellate process but failed to do so within a reasonable time. He is therefore deemed to have sat on his appellate right. I therefore find nothing to oust the respondent's contention that the applicant has failed to give a reasonable explanation for his inaction for the above lengthy period during which he failed to seek the court's intervention within which to comply with the rules for initiating the intended appellate process.

As for the chances of the intended appeal succeeding, I am obligated to make findings on the same notwithstanding the findings on the above issue of inordinate delay as ruled above. The applicant proposes to raise three grounds of appeal, namely; that the Judge misdirected herself in entertaining an application arising from a matter that had been withdrawn; the Judge erred in law when she nullified a title deed on an application; and lastly that the Hon. Judge misguided herself in dealing with issues that had been settled and therefore there was no jurisdiction as there was no case for determination before the Court in **Joseph wanjohi Njau versus Benson Maina Kabau Civil Application No. 97 of 2012 (UR)**, it was stated that an arguable appeal is not one that must necessarily succeed but one which ought to be argued fully by the Court. Going by the content of the intended three grounds of appeal highlighted above, I have no doubt that the intended appeal is arguable. The right of the applicant to be accorded an opportunity to exercise the above appellate right is however depended on the determination that the application as presented satisfies the threshold for granting relief under **rule 4** of the CAR procedures.

On the degree of prejudice to the respondent, there is uncontroverted deposition that the order issued on 23<sup>rd</sup> November, 2010 was executed pursuant to which the respondent was vested with title to the suit property which he subsequently passed onto 3<sup>rd</sup> parties who are not parties

to the application subject of this ruling. The respondent has supported that assertion by annexing documentary exhibits evidencing the change of ownership of the resulting titles which cannot be ignored.

Turning to any other relevant factors, it is my view that although right of appeal is constitutionally entrenched as was stated in the case of **Richard Nchapi Leiyagu versus IEBC & 2 others** Civil Appeal No. 18 of 2013 (UR), it has to be exercised in accordance with the laid down procedures firstly, that it be timeously initiated. Secondly, that in the event of any default in initiating it timeously, the party in default and who is seeking validation of that process has to meet the threshold for exercising that discretion under the rule 4 CAR procedures of which the applicant herein has not satisfied for the reasons explained above.

The upshot of the above assessment and reasoning is that the applicant's application has no merit. It is accordingly dismissed.

(2) The respondent will have costs of the application.

**Dated and Delivered at Nairobi this 8<sup>th</sup> day of November, 2019.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR.**