



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 71 OF 2019

BETWEEN

NJENGA GACHANJA1ST APPLICANT

HANNAH RINDI THUMBI.....2ND APPLICANT

(Suing as the Administrators of the Estate of WILSON GACHANJA NJENGA)

AND

M.O.M. AL AMIN TRANSPORTERS LTD 1ST RESPONDENT

MARIAM A. AMIN BAHI.....2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 72 OF 2019

BETWEEN

ALEXANDER NDUNGU MBUGUA..... 1ST APPLICANT

EUNICE WAMBUI WANJIKU.....2ND APPLICANT

MBUGUA BORO KIHUYU.....3RD APPLICANT

(Suing as the Administrators of the Estate of OBADIA KARIUKI MBUGUA)

AND

M.O.M. AL AMIN TRANSPORTERS LTD.....1ST RESPONDENT

MARIAM A. AMIN BAHI.....2ND RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal out of time and to serve the letter requesting proceedings out of time in an intended appeal against the Judgment of the High Court of Kenya at Voi (Farah S.M. Amin, J.) dated 27th June, 2019

in

H.C.C.APP. No. 1 of 2017)

RULING

1. This Ruling is in respect of two identical applications in Civil Application No. 71 of 2019 and Civil Application No. 72 of 2019 which were consolidated during the hearing before me. The applicants in their respective motions dated 8th August 2019 presented to the Court on 9th August 2019, under Sections 3A and 3B of the Appellate Jurisdiction Act, Rules 1(2), 4 and 42 of the Court of Appeal Rules seek leave of this Court to file a notice of appeal out of time and for their Notice of Appeal filed on 25th July 2019 to be deemed as duly filed. They also seek an extension of time within which to serve the letter requesting a copy of the proceedings in the High Court in order to benefit from the proviso to Rule 82(1) of the Rules the applicants. They intend to challenge a judgment of the High Court (***F.S.M. Amin, J.***) delivered on 27th June 2019.

2. Urging the applications before me, learned counsel for the applicants ***Mr. M.K. Macharia*** referred to the grounds in support of the applications on the face of the applications and the supporting affidavits sworn by Njenga Gachanja and Alexander Ndungu Mbugua respectively on 8th August 2019 in which is deposed that judgment was initially scheduled for delivery on 28th August 2018 but was subsequently rescheduled to 30th June 2019, a date falling on a Sunday; that the advocate for the applicants wrote to the court pointing out that 30th June 2019 fell on a Sunday and requested the court to reschedule the date and notify the parties of the rescheduled date but no response was received from the court; and that it subsequently transpired that the judgment was delivered on 27th June 2019 without notice to the advocates for the applicants.

3. It is deposed that on learning that judgment had been delivered, the advocates for the applicants wrote to the court on 18th July 2019 and the advocates for the applicants were able to obtain a copy of the judgment on 23rd July 2019; and that on 25th July 2019 they filed a notice of appeal and simultaneously applied for typed proceedings.

4. Although the advocates for the respondents were duly served with notice of hearing of the applications there was no appearance for the respondents during the hearing of the applications and neither were any replying affidavits filed to counter the facts upon which the applications are based.

5. I have considered the applications and the submissions. The principles that guide the Court in matters of this nature are articulated in many decisions of the Court. In ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997)*** (unreported), for instance, the Court stated:

“It is now well settled that the decision whether or not to extend the 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.”

6. The categories of factors for consideration are however not closed. In ***Mwangi vs. Kenya Airways [2003] KLR 486*** at page 489 as follows:

“These, in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

7. Keeping those principles in mind it would appear that the genesis of the delay on the part of the applicants in filing of the notice of appeal and in applying for the typed proceedings is attributable to the fact that the date for delivery of judgment was inadvertently fixed by the court on a date that fell on a Sunday.

The notice of judgment issued by the court on 15th May 2019 which is exhibited to the affidavits does indeed indicate that the date of delivery of the judgment was scheduled on 30th June 2019. By their letter dated 21st May 2019, the advocates for the applicants brought it to the attention of the court that 30th June 2019 was a Sunday and requested the court to advise them on a new date. It does appear that the date of delivery of the judgment date was rescheduled to 27th June 2019. There is nothing to counter the claim by the applicants that no notice was given by the court to their advocates regarding the rescheduled delivery date.

8. Counsel explained that he subsequently learnt that judgment had been delivered; that his partner informed him that he had chanced upon the matter on the cause list on the Kenya Law Report website approximately three weeks after the judgment had been delivered; that on 18th July 2019 he wrote to the Deputy Registrar of the court at Voi indicating that he had not been able to access the court file and requested for a copy of the judgment and after perusing the same and upon taking instructions from the applicants filed the notice of appeal on 25th July 2019.

9. In the foregoing circumstances, I am satisfied that the delay in filing the notice of appeal and in applying for the typed proceedings has satisfactorily been explained. The delay involved is not in the circumstances inordinate and on becoming aware that the judgment had been delivered, the advocates have acted with due diligence.

10. I accordingly exercise my discretion in favour of the applicants and allow the applications dated 8th August 2019 in terms of prayers 2 and 3 thereof. The applicants shall file and serve their respective memoranda and records of appeal within 45 days from the date of delivery of this Ruling. I make no orders as to costs.

Orders accordingly.

Dated and delivered at Mombasa this 19th day December, 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