



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 47 OF 2019

BETWEEN

S.K. TARWADI APPLICANT

AND

VERONICA MUEHLEMANN RESPONDENT

(Being an application for enlargement of time within which to serve the Notice of Appeal together with the letter requesting for proceedings in the appeal from the Ruling of the High Court of Kenya at Malindi (Korir, J.) delivered on 24th January, 2019 in HCC Misc. Civil Application No. 6 of 2018)

RULING

1. By an application dated 30th May 2019 presented to the Court on 4th June 2019, the applicant seeks an order that the time within which to serve his notice of appeal on the advocates for the respondent be enlarged. The application is based on Rule 4 of the Court of Appeal Rules.
2. An amended application, to which counsel for the respondent objected as having been filed outside the time allowed by the court, was filed on 30th September 2019 to incorporate prayers that the notice of appeal be deemed as duly filed and served and that the time within which to file the record of appeal be enlarged.
3. Urging the application before me, learned counsel for the applicant **Mr. O. Richard** referred to the applicant's supporting affidavit sworn on 30th May 2019 in which it is deponed that the ruling the applicant intends to challenge on appeal was delivered by High Court on 24th January 2019; that soon after delivery of that ruling, on 30th January 2019, the applicant filed a notice to act in person dated 29th January 2019; that on the same day, the applicant filed a notice of appeal also dated 29th January 2019, which was within the time required under the rules of the Court; that at the same time, the applicant applied for the typed proceedings and ruling by a letter of the same date which was copied to the advocates for the respondent.
4. The applicant deposes further that on preparing the notice of appeal and the letter bespeaking proceedings, he gave the same to one of his workers "to find someone in the court registry to assist on filing and the way forward"; that it is not clear that the notice of appeal was ever served on the advocates for the respondent; and that he subsequently engaged the advocates now on record. 5. According to counsel, upon appointment to act for the applicant, there was no evidence of service of the notice of appeal and hence the need to regularize. It was submitted that no prejudice will be occasioned to the respondent by allowing the application.
6. Opposing the application, **Mr. Macharia** holding brief for **Mr. ole Kina**, learned counsel for the respondent, relied entirely on the grounds of opposition dated and filed on 1st October 2019 in which it is contended that the necessary requirements for the grant of the orders sought have not been satisfied; that the amended application was filed outside 7 days within which it was to be filed following leave of the court given on 30th May 2019 without an explanation being offered; that there is also no explanation given why the notice of appeal, and the letter bespeaking proceedings from the lower court were not served; and that there has to be an end to litigation and to allow the application will not advance justice.
7. I have considered the application and the submissions. The principles that guide the Court in a matter 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.”

8. 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.”

9. Applying those principles to the circumstances of this case, the decision intended to be appeal was given by the High Court on

24th January 2019. Soon after the delivery of the ruling by the High Court, presumably dissatisfied with the advocates who were then acting for him, the applicant filed a notice to act in person on 30th January 2019. At the same time, he filed a notice of appeal and simultaneously applied for typed and certified copies of the proceedings and the ruling of the lower court. The notice of appeal was therefore filed within 14 days as required under Rule 75(2) of the Rules of the Court.

10. The omission which the applicant seeks to cure is the non-compliance with Rule 77(1) of the Rules of the Court under which he was required to serve the notice of appeal on all persons affected by the appeal within 7 days of lodging the notice. He explains that he requested one of his workers to find someone in the registry to assist with the filing and way forward and that he was not sure the notice of appeal was served on the respondent.

11. I do not think the applicant’s explanation is implausible. It seems to me that the applicant was clear immediately upon delivery of the ruling by the High Court that he intended to challenge it on appeal and took timely steps to do so by filing the notice of appeal and applying for the proceedings and the ruling but failed to follow through to ensure service on the respondent. He subsequently engaged the advocates currently acting for him. I think it would be wrong to shut him out on account of that omission, which I think has satisfactorily been explained.

12. Counsel for the respondent has justifiably complained that the amended application was filed outside the time allowed on 16th July 2019. To add to the catalogue of mis steps, and although this was not raised, a copy of the ruling intended to be appealed was not made available to enable the court to consider the chances of the intended appeal succeeding. That should normally be made available for the court to have a wholesome appreciation of the matter.

13. As submitted by counsel, there is certainly some prejudice to the respondent in allowing the application as the matter is kept alive for longer but in balancing the competing interests it is prejudice that can be ameliorated by an award of costs.

14. In the result and taking all factors into account, I am inclined to allow the application, which I hereby do, with the result that the amended notice of motion dated 27th September 2019 is allowed as prayed. The applicant shall file and serve his record of appeal within 45 days from the date of delivery of this Ruling and in default the application dated 27th September 2019 shall stand dismissed with costs to the respondent.

15. The respondent shall have the costs of the application in any event.

Orders accordingly.

Dated and delivered at Mombasa this 19th day December, 2019.

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

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

DEPUTY REGISTRAR