



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. NYR. 40 OF 2017

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

BETWEEN

NANCY WAIRIMU KIBUI.....APPLICANT/RESPONDENT

AND

PETER WACHIRA NJOROGE.....1<sup>ST</sup> RESPONDENT

MICHAEL GACHERU NJOROGE.....2<sup>ND</sup> RESPONDENT

*(Being an application for extension of time to serve Notice of Appeal against the Judgment of the Environment and Land Court in Kenya at Nyeri (Ombayo, J.) dated 23<sup>rd</sup> March, 2016*

in

*E.L.C. No. 141 of 2008)*

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RULING

I am asked under **Rules 4, 41** and **77** of our rules to deem the notice of appeal already filed to have been served on time or to extend the time for such service. The background to the notice of motion dated 20<sup>th</sup> April, 2017 as set out in the grounds in support of the same and in an affidavit of **Charles Muchemi Karweru**, the advocate of the applicant, is that, after judgment had been delivered by the High Court on 23<sup>rd</sup> March, 2016, the applicant, **Nancy Wairimu Kibui**, did, through her advocate, file a notice of appeal on 29<sup>th</sup> March, 2016. According to the applicant and her said lawyer that notice of appeal was handed over to a clerk, Mbuthia, with instructions to serve the same upon the respondents' lawyers but that clerk did not carry out the instructions. It is further stated that upon inquiry of the said clerk whether he had served the notice of appeal he immediately resigned from his job at M/s Karweru & Company Advocates and it took the advocates time to trace the document to another clerk, Thuku, who had been given the document to serve on an unstated date. The notice was eventually served on 28<sup>th</sup> February, 2017 well out of the time allowed by the rules for service of a notice of appeal. Mr. Karweru, the advocate freely admits the mistake that has happened, takes responsibility for the same and pleads that I exercise discretion and allow the notice to be deemed as duly served.

In a replying affidavit sworn on 8<sup>th</sup> January, 2018 by Kelvin Mogeni, advocate for the respondents, the adverse says that notice of appeal was not served on time; that the applicant has not given an explanation why service was not effected as required; that no record of appeal has been filed and finally; that the applicant has not laid grounds upon which I should exercise a discretion in favour of the applicant.

I heard the motion on 15<sup>th</sup> January, 2018 when I was addressed by learned counsel for the applicant Mr. C. M. Karweru and Miss P. K. Makori, learned counsel for the respondents. The said address was a repeat of what I have already reproduced as a summary of the background, Mr. Karweru submitting that the explanation given for delay in service of notice of appeal was reasonable and the mistake excusable while Miss Makori took the view that the period of delay was too long. Why, in any event, asked Miss Makori, was there no affidavit of the clerk, Thuku, in the absence of which, submitted learned counsel, the facts enumerated in the application could not be verified.

Having considered the application, the grounds set out in support and the opposition by the respondents, I must say that the principles applicable in considering an application for extension of time like the present one are now well agreed. They were well summarized by Waki, JA., as was confirmed by the full court, in **Fakir Mohamed v Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004** as

cited in Wachiuri Wahome v Festus Gatheru Wahome & 6 Others [2016] eKLR as follows:

***“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 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, 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 facts: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General, Civil Application No. Nai.8 of 2000 (ur) and Murai vs Wainaina (No. 4) [1982] KLR 38”.***

I also recognize the duty imposed on the Court by **Sections 3A and 3B** of the **Appellate Jurisdictions Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation to ensure the just, expeditious, and proportionate and affordable resolution of disputes before the court. This was explained in the case of **City Chemist (Nbi) & Another v Oriental Commercial Bank Limited Civil Application No. NAI. 302 of 2008 (UR 199/2008)** as follows:

***“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attribute of the overriding objective”.***

Applying those principles to the matter at hand it is the case of the applicant that after judgment was delivered by the High Court on 23<sup>rd</sup> March, 2016 a decision was immediately taken by the applicant and his legal adviser to challenge that judgment through an appeal to this Court. A notice of appeal was drawn and lodged in court on 31<sup>st</sup> March, 2016. I have seen that notice which is dated 29<sup>th</sup> March, 2016 lodged on the said date which is to say that it was lodged on time in accordance with the rules of this Court. The applicant’s lawyer says in the affidavit that he instructed a clerk in his law firm to serve that notice on the respondents’ lawyers but that the said clerk, instead of carrying out that instruction, had forwarded the notice of appeal to another clerk in Nairobi, but that the 2<sup>nd</sup> clerk did not effect service of the notice upon the said advocates. When the 1<sup>st</sup> clerk was asked to explain the happenings leading to lack of service of the notice of appeal on time or at all upon the respondents’ lawyers he promptly resigned. Miss Makori, learned counsel for the respondents submits that the period taken to serve notice of appeal is too long as to be unreasonable.

Looking at all material presented before me I am prepared to accept the facts as related by learned counsel for the applicant. The lawyer did what a prudent lawyer must do– he ensured that notice of appeal was filed on time in accordance with the rules. He then instructed a clerk he says had served his law firm for many years to serve notice of appeal but that clerk did not carry out the instructions. Un-known to learned counsel for the applicant the clerk transmitted the notice of appeal from Nyeri to a named clerk in Nairobi but this latter clerk did not do what he was required to do. He sat back and only served notice of appeal upon the respondents’ lawyers when it dawned on learned counsel for the applicant that the notice had not been served at all.

I do not agree with Miss Makori that the period for service of notice of appeal is too long. The notice was served immediately learned counsel for the applicant established that notice had not been served on time or at all. I am also not persuaded by the other submission of Miss Makori that the application before me has been prompted by an application by the respondents to strike out the notice of appeal. That, I think, is not one of the factors that should influence me on an application like this one where my discretion is called upon.

Having considered all the relevant factors and the principles I have discussed in this ruling I am prepared, as I hereby do, to exercise my discretion in favour of the applicant. I do so by allowing the motion dated 20<sup>th</sup> April, 2017. The notice of appeal served on the respondents counsel on 28<sup>th</sup> February, 2017 be and is hereby deemed as having been served on those lawyers on time.

As a soft landing for the respondents I grant costs of the motion to them, and I assess such costs at Ksh. 10,000/= (ten thousand) payable by the applicant to the respondents within 30 days of today.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of February, 2018.***

***S. ole KANTAI***

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**