IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 198 OF 2017 (UR 157/2017)

BETWEEN

ABDULKADIR ATHMAN SALIM ELKINDY.........................APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS................1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION......2ND RESPONDENT

(An application for extension of time to file and serve a notice of appeal out of time from the judgment and decree of the

High Court (Mativo, J.) dated 25th July 2017

in

HC PET. NO. 181 of 2016)

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RULING

This ruling relates to a motion on notice taken out by ***the applicant, Abdulkadir Athman Salim Elkidy***, under ***rule 4*** of the rules of this Court for extension of time to file a notice of appeal. The motion has a rather murky background, which deserves sketching in broad strokes for the necessary context before considering its merits. At all material times the ***Judicial Service Commission*** had employed the applicant as a ***Principal Magistrate*** deployed in Kisumu, where he also served as a ***Deputy Registrar*** of the High Court. On 29th September 2010, the applicant with 8 others were charged before the ***Chief Magistrate Court*** in Kisumu in ***Criminal Case No. 429 of 2010*** with various offences under the ***Penal Code*** and the ***Anti-Corruption and Economic Crimes***, including conspiracy to defraud contrary to ***section 317*** of the Penal Code and fraudulent acquisition of public property contrary to ***section 45(1)(a)*** as read with ***section 48*** of the Anti-Corruption and Economic Crimes Act.

The prosecution alleged that the applicant and his co-accused jointly conspired to fraudulently transfer a parcel of land known as ***LR No. 7545/3*** measuring ***9,394 acres*** and valued at ***Kshs 2.32 billion*** from its lawful owner, ***Miwani Sugar Mills (1989) Limited (Miwani)*** in which the public, through the Government of Kenya, held 49% shares, to a shell company known as ***Crossley Holdings Limited (Crossley)***. Specifically against the applicant, it was alleged that he had presided over sham proceedings in furtherance of the fraud, by *inter alia*, acting without jurisdiction; purporting to extend the validity of summons to enter appearance 14 years after the filing of a suit; purporting to enter *ex parte* default judgment against Miwani and in favour of Crossley without evidence of service of summons; purporting to tax *ex parte* costs of a suit that had not been prosecuted; purporting to grant *ex parte* orders for removal of restrictions on the title of the land in question; purporting to grant orders divesting Miwani of title to the land and transferring and vesting the same in Crossley; and purporting to entertain and grant applications that had previously been dismissed by a judge of the High Court.

After taking plea, the applicant's co-accused filed in the High Court at Kisumu ***Miscellaneous Application No. 12 of 2010***, seeking an order of prohibition to stop their prosecution. The High Court granted the order of prohibition, but the ***1st respondent, the Director of Public Prosecutions*** and the ***2nd respondent, the Ethic and Anti-Corruption Commission***, were aggrieved and preferred an appeal in this Court at Kisumu, which, by a judgment dated 21st April 2016, allowed the appeal and directed the prosecution of the applicant and his co-accused to proceed.

About two weeks after the said judgment, the applicant filed in the High Court at Nairobi ***Petition No. 181 of 2016*** contending that his prosecution was in violation of his privileges and immunity as a judicial officer, as guaranteed by the ***Constitution*** and the ***Judicature Act***. Accordingly he sought a new order of prohibition of the prosecution. He obtained an order staying his prosecution until the hearing and determination of the Petition, which was ultimately heard and dismissed by ***Mativo J***. in a judgment dated 25th July 2017, after he found that the Constitution grants immunity to judicial officers only when they are acting in good faith. It is that judgment that the applicant wishes to change on appeal.

After the judgment, the applicant did not file a notice of appeal within 14 days as required by ***rule 74(2)*** of the ***Court of Appeal Rules***. It is common ground that the applicant's counsel was aware of the judgment from the day it was delivered. The applicant's explanation for the failure to file the notice of appeal within the prescribed time is that it was an "inadvertent" omission occasioned by his inability to give instructions to his counsel. It is further explained that the applicant's advocate tried to contact him on phone, but he could not reach the applicant. Eventually on 27th July 2017, the advocate forwarded the judgment to the applicant through his postal address in Kisumu and sought instructions on whether to lodge an appeal. On 19th August 2017 the applicant called his counsel on phone and informed him that he had learnt way back on 3rd August 2017 that the High Court had dismissed his application. He instructed the advocate to file an appeal and on 22nd August 2017, he filed the application now before me. The applicant contended further in support of the application that his intended appeal had overwhelming chances of success; it raises fundamental issues of public importance; and that the respondents would not suffer any prejudice if I allowed the application.

The applicant relied on the ruling of the Supreme Court in ***Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others [2014] eKLR*** on the considerations to take into account in determining an application for extension of time and the rulings of this Court in ***Gichugu Koine v. Stephen Njathi Thoithi [2014] eKLR*** and ***Keziah Stella Pyman & 2 Others v. Paul Mwololo & 8 Others [2013] eKLR*** in support of the proposition that time should be extended if no prejudice will be occasioned to the respondents.

The 2nd respondent opposed the application vide a replying affidavit sworn by ***Charles Kiptanui,*** one of its investigators in the case against the applicant and his co-accused. It was contended that the applicant had not presented any plausible reasons for his failure to file the notice of appeal on time, because he had confirmed having known of the delivery of judgment on 3rd August 2017, which was well within the 14 days required to file the notice of appeal. It was urged that the alleged inadvertence on the part of the applicant was not disclosed and that the more plausible explanation was that the applicant was merely seeking to delay the hearing and determination of the criminal case against him, having managed already to stall it for more than six years. In the 2nd appellant's view, the applicant's intended appeal was also not arguable because the Constitution was very clear that the judicial officers enjoy immunity only when discharging their duties in good faith. The 2nd respondent therefore urged me to dismiss the application for lack of merit.

The 2nd respondent cited the rulings in ***Aviation Cargo Support Ltd v. St. Mark Freight Services Ltd [2014] eKLR*** and ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others [2015] eKLR*** and submitted that where delay is inordinate or unexplained, the applicant is not entitled to extension of time. It also relied on ***Kenya Agricultural & Livestock Research Organization v Stephen Naruiya Kanyanja [2015] eKLR*** and urged me not to extend time because the applicant had not demonstrated that the intended appeal is arguable.

The 1st respondent neither filed a replying affidavit nor appeared for the hearing of the application.

I have carefully considered the application, the submissions by counsel and the authorities they relied upon. It bears repeating that the jurisdiction of the Court under rule 4 is wide and unfettered (See. ***Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others*** *(supra)* and ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi, CA No. Nai. 255 of 1997).*** However, like all judicial discretion, it must be exercised judiciously and on the basis of reason rather than arbitrarily, capriciously or on whim and sentiment. (See (See ***Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA No. 14 of 2013).***

Whether or not to grant an application for extension time will depend on the circumstance of each case. There is no limit to the number of factors that the Court should consider in an application for extension of time, so long as they are relevant. Some of the factors to bear in mind include the period of delay; the reason for the delay; the degree of prejudice the respondent stands to suffer; the effect of the delay on public administration; the constitutional imperatives, on the one hand that justice should be administered without undue regard to procedural technicalities and on the other, that justice should not be delayed; the overall importance of complying with prescribed timelines; the resources of the parties; whether the intended appeal raises issues of public importance; among others. (See ***Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others*** *(supra)* and ***Fakir Mohamed v Joseph Mugambi & 2 Others, CA No. Nai. 332 of 2004).***

As the Supreme Court aptly stated ***Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others*** *(supra)*, extension of time is not a right of a party. It is a discretionary remedy that is only available to a deserving party. The applicant is therefore obliged to place before the court some plausible material explaining the reason for failure to comply with the rules and for any delay occasioned, not the least because expeditious resolution of dispute is a constitutional value and principle which would otherwise be undermined by unexplained or inexcusable dilatoriness.

Turning to this application, the applicant was represented by an advocate who knew of the judgment of the High Court the same day it was delivered. He explains that he was not able to get in touch with the applicant on phone and two days later he forwarded the judgment to through his postal address in Kisumu. The applicant confirms that as of 3rd August 2017, which was 9 days after the judgment, he was aware of the delivery of the judgment.

That was still within time for filing the notice of appeal. He did nothing until 19th August 2017, some 16 days after he leant of the delivery of the judgment and well after the expiry of the prescribed time, when he called the advocate and instructed him to lodge an appeal.

The rather casual reason given for failure to comply with the rules is "inadvertence", the nature of which is not expounded. Although the other reason given is the advocate's inability to communicate with the applicant, I think there is no substance in that contention because by

3rd August 2017 the applicant was aware of the judgment. There is absolutely no reason given why the applicant, who has a background in law and who knew of the judgment in good time to file a notice of appeal, had to wait for the prescribed period to expire before instructing his advocate to file a notice of appeal. To exercise discretion in favour of the applicant, I am entitled to look at the conduct of the parties in the entire litigation whose history I have set out above. In a different circumstances I would not have found the delay involved here inordinate, but in the circumstances of this case, I am persuaded by the 2nd respondent's contention that this application is a stratagem in furtherance of the delay of resolution of the pending criminal trial, which has stalled for the last seven years primarily through orders of prohibition. Failure to explain the delay in complying with the rules amounts to saying that the applicant has not offered any reason to justify exercise of discretion in his favour (See ***Kenya Power & Lighting Co Ltd v. Harrison Musoga Obimbo*** ***CA. No. Nai. 89 of 2017***).

Persuaded, as I am that that the applicant does not deserve exercise of discretion in his favour, I hereby dismiss this application with costs to the 2nd respondent.

Dated and delivered at Nairobi this 16th day of February, 2018

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR