IN THE COURT OF APPEAL

AT ELDORET

(CORAM: J. MOHAMMED, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. 59 OF 2016

BETWEEN

JONAH KIPSAINA CHEROTICH ……..…1ST APPLICANT

PERIS JEPKEMBOI KIMUTAI ……..…... 2ND APPLICANT

ISAAC KIBIWOT CHEROP ……..…. 3RD APPLICANT

FRANCIS KIPSANG KIMUTAI …..……..….. 4TH APPLICANT

AND

RAEL TARLOCK SAWE ……...……... 1ST RESPONDENT

PHILIP KIPROP SAWE ……. 2ND RESPONDENT

FRANCIS KIPKEMBOI SAWE ……..……..... 3RD RESPONDENT

(Application for extension of time within which to lodge an appeal from the judgment of the High Court of Kenya at Eldoret, (Ibrahim, J.) dated 4th June, 2015

in

HCCC NO. 10 OF 2000)

****

RULING

Background

[1] This is an application by way of Notice of Motion brought under Rule 4 of the Court of Appeal Rules (the Rules) in which the applicants seek the following orders;-

> ***1) The time limited for the 1st and 2nd applicants with the Notice of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the court shall deem fit.***

2) Costs of and incidental to this application abide the result of the application.

The applicants filed an amended Notice of Motion on 8th May, 2017 and sought the following orders;-

"(a) The notice of appeal dated 17-6-2015 and the letter dated 17-6-2015 applying for the superior court's proceedings among others were filed on 17-6-2015.

(b) The Deputy Registrar in a letter dated 15-9-2015 wrote to the applicants' former advocates/counsels to collect the proceedings and Judgment upon payment of the court charges since the sum of Kshs.500 had been paid.

(c) The notice of motion dated 30-6-2015 for stay of execution, notice of application dated 17-3-2016 and the bill of costs have been pending and made the parties engaged in the superior court ever since 4-6-2015 to date in the case of the applications and until 29-3-2017 in the case of the bill of costs.

(d) The applicants have an arguable appeal."

Submissions by Counsel

[2] When the application came up for hearing, **Mr Cheptarus**, learned Counsel for the applicant, submitted that the impugned judgment was delivered on 4th June, 2015, the Notice of Appeal filed on 17th June, 2015; that on the same date, the previous counsel for the applicants wrote to the court bespeaking copies of the proceedings, judgment and Decree and that on 17th June, 2015 the Deputy Registrar wrote to the applicant's former advocates to collect the proceedings and judgment upon payment of the requisite charges.

[3] Counsel further submitted that the Notice of change of Advocates was filed on 17th February, 2016, when his law firm came on record; that the applicants' previous advocates did not collect the judgment and proceedings from the court timeously; that mistakes of counsel should not be visited on the applicants; that the applicants had financial constraints and were unable to raise the requisite filing fees to file this application; that the respondents will not suffer any prejudice if the application as prayed is allowed as this will afford the parties an opportunity to argue their appeal and the applicants have an arguable appeal with good prospects for success. Counsel prayed that the application be allowed as prayed.

[4] **Ms Koech**, learned counsel for the 1st respondent opposed the application and filed grounds of objection on 21st November, 2016 and supplementary grounds of objection on 26th July, 2017. Counsel submitted that the application was made after unexplained and inordinate delay; that the applicants have not satisfactorily explained the steps taken after the Notice of Appeal was filed on 17th June, 2015; that the instant application was filed on 8th August, 2016 while the notice of change of advocates was filed on 17th February, 2016; that the inordinate delay of 6 months by the current advocate has not been sufficiently explained and that the applicants are guilty of indolence.

[5] Counsel further submitted that **Rule 82 (1)** of this Court's rules provides that a memorandum of appeal and record of appeal should be filed within 60 days of the date when the notice of appeal was lodged; that the Notice of Appeal herein was lodged on 17th June, 2015; that the applicants have not provided material to convince the court that the intended appeal is arguable; that there is no Certificate of Delay to justify the delay in filing the Record of Appeal and that the 1st respondent will be prejudiced if the court allows the application as prayed. Counsel urged that the application be dismissed.

[6] **Mr Kagunza,** learned counsel for the 2nd respondent also opposed the application. Counsel submitted that it has not been established that the applicants are indigent and could therefore not pay the requisite fees to file this application; that the applicants have advanced lame excuses to justify the

inordinate delay. Counsel urged that the application is not merited and should be dismissed with costs.

[7] In reply, **Mr Cheptarus** submitted that the reasons for the delay in filing the Record of Appeal were not lame; that this application has merit and should be allowed with costs.

Determination

[8] I have considered the motion, the affidavits and authorities on record, the submissions of all counsel and the law. The power to extend time under **Rule 4** of this Court's Rules is an exercise of discretion.

Rule 4 of the Rules which provides:

> ***"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 or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after 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."***

[9] The principles guiding the court on an application for extension of time premised **upon rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance as stated in ***FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332/04*** *(unreported)* the court stated that:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure 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 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 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 factors."***

[10] **Rule 75 (2)** of this Court's Rules requires that any party intending to appeal to this Court ought to file a notice of appeal against the decision within fourteen (14) days of the delivery of the decision. The judgment from which the applicants intend to appeal was delivered on 4th June, 2015. The Notice of Appeal was filed on 17th June, 2015. The present application for extension of time was lodged in this Court on 8th August, 2016. Counsel for the applicants submitted that the delay in filing the record of appeal was occasioned by the applicants' erstwhile advocates and should not be visited on the applicants.

[11] I have examined the affidavit in support of the application. I am guided by the case of **Wasike V Swala [1984] KLR 591** where this court stated:

> ***"As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors;***
>
> ***"a) That there is merit in his appeal.***
>
> ***b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and***
>
> ***c) That the delay has not been inordinate."***

[12] The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. I note that the Deputy Registrar of the Court wrote to the applicants' previous counsel on 15th September, 2015 informing them that the proceedings and judgment were ready for collection. I also note that there is no Certificate of Delay from the Court to support the applicants' application. The applicants' current advocates have not explained satisfactorily what action they took after they came on record on 17th February, 2016. It is notable that the current application was filed on 8th August, 2016 which was about 6 months after the said advocates came on record.

[13] Counsel for the respondents filed Grounds of Objection on 21st November, 2016 and Grounds of Opposition on 26th April, 2017 and contended that the delay of more than year to file the current application is excessive, unreasonable and unexplained; that the instant application is belated and an afterthought; that the intended appeal has been overtaken by events since the terms of the judgment/decree have been implemented and that the applicants have not attached a Certificate of Delay by the Deputy Registrar rendering the application incompetent, fatally defective and bad in law.

[14] The applicants contend that they have an arguable appeal. I have perused the Draft Memorandum of Appeal dated 8th May, 2017. I find that the appeal is arguable as it raises issues for determination including as to whether the learned judge erred in declaring that the surrender of the suit property was null and void. An arguable appeal does not necessary mean one which will succeed.

[15] Lakha, JA stated in **MWANIKI NJOROGE KAMAU & ANOTHER V LEE SHETH POONG, CIVIL APPLN NO. NAI 55 OF 1998** *(unreported).*

> ***"As it often happens, this application highlights two principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case."***

[16] The impugned judgment was delivered on 4th June, 2015. It is important to note that as far back as 15th September, 2015 the Deputy Registrar of the High Court wrote to the applicants' previous advocates informing them that the proceedings and judgment were ready for collection. Counsel for the applicants submitted that due to the applicants' financial constraints they were unable to pay for the proceedings and judgment and that their previous advocates did not file the record of appeal expeditiously. There is no indication what positive steps the applicants took towards prosecuting the appeal until 8th August, 2016 when the instant application for extension of time was made. It cannot be denied that there was inordinate delay which has not been satisfactorily explained. The respondents have certainly been prejudiced by the long delay of about 3 years since the impugned judgment was delivered which has kept them away from the fruits of their judgment.

[17] It is upon the applicant to place sufficient material before the court which would explain the delay in filing the record of appeal. The court has to balance the competing interests of the applicants with those of the respondents. The Rules of the Court must prima facie be complied with so that litigation can be brought to an end.

[18] A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in **Monica Malel & Another V. R. Eldoret Civil Application No. Nai 246 of 2008** stated;

> ***"When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show … the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period***

occurred, which amounts to saying that no valid reason has been offered for such delay."

[19] I am guided by the case of **Waweru A Another V Karoni [2003]** KLR 448 where it was stated that;

> ***"The rules of the Courts must prima facie be obeyed and in order to justify a Court in extending the time during which some step in the procedure requires to be taken there must be material on which the Court can exercise its discretion."***

[20] In the circumstances of this case, there is no material placed before me to warrant the exercise of my discretion in favour of the applicants and accordingly, I find that this application has no merit. In the result, I dismiss the Amended Notice of Motion dated 8th May, 2017 with costs to the respondents.

Dated and delivered at Eldoret this 15th day of February, 2018.

J. MOHAMMED

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR