



**IN THE COURT OF APPEAL**

**AT ELDORET**

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

**CIVIL APPLICATION NO. 91 OF 2017**

**BETWEEN**

**ANDREW KIPLAGAT CHEMARINGO.....APPLICANT**

**AND**

**PAUL KIPKORIR KIBET.....RESPONDENT**

*(An application for extension of time within which to file a notice of appeal*

*and a record of appeal from the Judgment and Ruling of the High Court*

*of Kenya at Eldoret, (H. K Chemitei, J.) dated 31<sup>st</sup> October, 2016*

*and 14<sup>th</sup> February, 2017 respectively*

**in**

**HIGH COURT PETITION NO. 18 OF 2015)**

\*\*\*\*\*

**RULING**

**Background**

[1] This is an application by way of an amended Notice of Motion brought under Rule 4 of the Court of Appeal Rules (the Rules) in which the applicants seeks the following order:-

***1) That the time limited for the applicant to file and serve the Respondents with the Notice of Appeal, Memorandum of Appeal and Record 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] The application was anchored on the grounds that the delay in filing the notice of appeal and the record of appeal was occasioned by the applicant's application which was filed in the High Court that sought a stay of execution of the decree dated 31<sup>st</sup> October, 2016. The aforementioned decree quashed the applicant's appointment as Chief of Sengwer location.

[3] The application was opposed by the respondent in his replying affidavit dated 9<sup>th</sup> June, 2017 where he deponed *inter alia* that the applicant does not have an arguable appeal; that the applicant has failed to demonstrate that the intended appeal will be rendered nugatory and that the applicant did not qualify to be appointed as a Chief of Sengwer Location.

[4] The applicant filed an application to this Court under **Rule 5(2) (b)** seeking stay of execution and of any further proceedings arising from the decisions of Chemitei, J. delivered on 31<sup>st</sup> October, 2016 and 14<sup>th</sup> February, 2017.

[5] On 19<sup>th</sup> October, 2017 this Court allowed the application and stayed the execution i.e. implementation of the judgment of Chemitei, J. delivered on 31<sup>st</sup> October, 2016 for 12 months to enable the applicant to file and prosecute the intended appeal.

## Submissions by Counsel

[6] During the hearing of the application, Mr. J.C.K Cheptarus, counsel for the applicant submitted that the delay in filing the record of appeal and the notice of appeal was not unreasonable as there was no time to prepare the proceedings and supply the same to the respondent; as the file at the High Court was in the custody of the learned Judge immediately before and after delivery of the judgment and ruling.

Counsel argued that the applicant has an arguable appeal and weighty issues of law will be canvassed in the appeal and the respondent will not suffer any prejudice should the application be allowed. Counsel urged the Court to allow the application as prayed.

[7] Mr. Ngumbi, learned counsel for the interested party, the Hon. Attorney General supported the application. Counsel submitted that the Notice of Appeal was filed one day late as a result of delay by counsel for the applicant. Counsel urged that the mistakes of counsel should not be visited on the applicant.

[8] Mr. Olonyi who was holding brief for Mr. Nyamu for the respondent contended that the intended appeal had no chance of success since the applicant was not qualified for the job he obtained as a Chief and therefore the intended appeal is not arguable. Counsel urged the single Judge to dismiss the application.

## Determination

[9] I have considered the motion, the affidavits and the submissions of counsel. The power to extend time under **Rule 4** of this Court's Rules is an exercise of discretion and the factors to be considered were stated in *Fakir Mohammed v. Joseph Mugambi & 2 others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) where it was held that;

*“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 the delay, (possible) 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 factor.”*

[10] The principles set out by this Court upon which the judicial discretion under **rule 4** may be exercised are as stated in the case of *Mwangi v Kenya Airways Ltd* (2003) KRL 486:

*“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:*

*“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.”*

[11] I have examined the application, the affidavits in support of the application, the replying affidavit, the authorities and the law. 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. 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 exercisable.

[13] The applicants contend that they have an arguable appeal. I have perused the Draft Memorandum of Appeal and find that the appeal is arguable as it raises issues for determination *inter alia*, whether the waiver of the minimum age requirement was sufficient to enable the applicant to be employed as the Chief of Sengwer Location. An arguable appeal does not necessarily mean one which will succeed. I also find that the respondent will not suffer substantial prejudice if the application herein is allowed. As this Court stated in the ruling dated 19<sup>th</sup> October, 2017 granting a stay of execution and any further proceedings:

*“All considered, the applicant will suffer financial loss, loss of office, loss of social status and public humiliation if the application is not allowed which will render the appeal if successful, nugatory. The residents of Sengwer location here he is the Chief will not suffer any harm by continuation of the applicant in office pending the hearing of his appeal. The*

**hardships that the applicant will suffer if the application is not allowed are far out of proportion to any injury that any member of public would suffer.”**

**[14]** The upshot is that I find merit in this application, and allow it. I direct the applicants to file and serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal within 30 days from the date hereof.

**Dated and Delivered at Eldoret this 22<sup>nd</sup> day of March, 2018.**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**