



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

MISC. APPLICATION NO. 37 OF 2017 (UR NO. 25 OF 2017)

BETWEEN

DIOCESE OF KISII REGISTERED TRUSTEE.....1ST APPLICANT

REVEREND JOSEPH MAIRURA OKEMWA.....2ND APPLICANT

SISTER ROSA CONSTRUCTION COMPANY.....3RD APPLICANT

AND

HEZEKIAH MAIRURA ONGERI.....1ST RESPONDENT

KENNEDY MORURI MOKUA.....2ND RESPONDENT

(Application for leave to file a notice of appeal and record of appeal out of time against the whole of the judgment of the Superior Court in Kisii (Mutungi, J.) on the 2nd day of December, 2016

in

KISII HCA NO. 25 OF 2012)

RULING

[1] By a notice of motion dated 10th April, 2017, the applicant Diocese of Kisii Registered Trustees, Rev. Joseph Mairura Okemwa and Sister Rosa Construction Company, have moved this Court seeking leave under Rule 4 of The Court of Appeal Rules to file a notice of appeal and record of appeal out of time. The intended appeal is against the judgment delivered by the Environment and Land Court judge in Kisii HCC NO. 25 of 2012 on 2nd of December, 2016. The learned judge had dismissed an appeal against the ruling of the trial magistrate dated 9th February, 2012 in which the respondents' application to set aside a consent order dated 11th March, 2009 and the judgment resulting therefrom was rejected.

[2] Father Richard O. Nyangoto who is the Diocesan Finance and General Administrator of the Diocese of Kisii Registered Trustee, has sworn an affidavit in which he explains that contrary to instructions given to the applicants' advocates to file an appeal, no appeal was filed as a staff in the advocate's office who was mandated to file the notice of appeal failed to do so. Mr. Gideon O. Nyambati, the advocate who swore an affidavit in support of the applicants' certificate of urgency, swore that he prepared the notice of appeal and signed the request for proceedings and mandated a staff in his office to proceed to court and file the documents. He only came to realize later that the documents had not been filed. The applicants contend that they have an arguable appeal based on points of law and plead with the Court not to shut them out because of a mistake made by their counsel.

[3] The respondents Hezekiah Mairura Ongeru and Kennedy Moruri Mokuia, have filed grounds of opposition opposing the applicants motion on the grounds that no satisfactory explanation has been given for the failure to file the appeal in time such as to justify the Court exercising its discretion in the applicants favour; that the applicants have not discharged their obligation under Rule 4 of the Court of Appeal Rules; that failure to annexed a draft memorandum of appeal is an indication that the applicants intended appeal is frivolous with no chances of success.

[4] I have carefully considered the applicants motion. The *locus classicus* case in dealing with an application for extension of time under Rule 4 is **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997 (UR) as applied in Mwangi vs Kenya Airways Limited [2003] KLR 486**, wherein it was held that in general, matters which the court takes into account in dealing with an application for extension of time are: the length of the delay; the reason for the delay; the chances of the appeal succeeding if the appeal is granted and the degree of prejudice to the respondent if the application is granted.

The Court noted in the same decision that Rule 4 of the Court rules gives the single judge unfettered discretion, and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor.

[5] In this case, the judgment was delivered on 2nd December, 2016 and the applicants' motion was filed on the 10th April, 2017. Therefore there was a delay of about four months. The delay is being attributed to the mistake of a staff in the advocate's office who has not been identified. Although the advocate claims that he instructed the staff to file a notice of appeal, and certified copies of the proceedings, no receipt has been produced, nor has the advocate explained why it took him so long to discover that no notice of appeal was filed. In effect the reason given for the delay does not provide a sufficient explanation. Further, the applicants have not provided any draft memorandum of appeal nor has the Court been given any arguable issue likely to be raised so as to lead to a conclusion that the intended appeal is not frivolous and has a possibility of success.

[6] In the circumstances, the applicants have not provided any appropriate basis for the Court to exercise its discretion in their favour. Accordingly, the application fails and it is dismissed with costs.

Dated and delivered at Kisumu this 15th day of March, 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.