



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 44 OF 2017

BETWEEN

JUDSON NYABOGA OGWORA.....APPLICANT

AND

MADISON MAROKO NYAMWEYA.....RESPONDENT

(Application for extension of time within which to lodge a record of appeal from the ruling of the High Court of Kenya at Kisumu, (A Okwany, J.) dated 13th December, 2016

in

SUCCESSION CAUSE NO. 285 OF 1995)

RULING

Background

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

1) That this Honourable court be pleased to extend time and or enlarge time within which the applicant do file (sic) record of appeal.

2) That the attached record of appeal be allowed upon payment of (sic) filing requisite fees.

[2] The application was premised on the grounds that the ruling of the High Court was delivered on 13th December 2016 while the Notice of Appeal was filed on 23rd December 2016; that the applicant was indisposed and was therefore unable to file the record of appeal in time as stipulated by the law; that his intended appeal has a high chance of success and that the respondent would not suffer any prejudice if the application is allowed.

[3] The application was opposed by the respondent vide his replying affidavit dated 25th January, 2018 on the ground that there is no evidence that the applicant was admitted to hospital or was unable to instruct counsel to appeal against the impugned ruling during the time he was indisposed.

Submissions by Counsel

[4] During the hearing of the application, Mr. S. M Sagwe, learned counsel for the applicant submitted that the delay in filing the record of appeal was not inordinate and could be explained as the applicant was indisposed and as a result lost his memory; that the applicant still intends to proceed with the appeal; that it was clear that the applicant had the intention to prosecute the said appeal since the notice of appeal was filed 10 days after the delivery of the impugned ruling; that the delay in obtaining the typed proceedings was due to the shortage of clerks in the Court Registry; that the respondent will not be prejudiced if the application is allowed as he does live on the suit property while the applicant who lives on the suit property will be prejudiced.

[5] Mr. R. Abisai, learned counsel for the respondent opposed the application and submitted that the applicant's alleged illness is not a sufficient reason for the delay in filing the Record of Appeal since the applicant had counsel on record who was present for the delivery of the impugned ruling and served on them the notice of appeal. Counsel submitted that it was therefore the applicant's counsel's responsibility to ensure that the record of appeal was filed in time. On the issue of the delay in obtaining the typed proceedings, counsel submitted that the applicant delayed in requesting for the said proceedings and has not demonstrated to the court that any efforts were made to follow up on the said proceedings; that the fact that the respondent does not live on the suit property is immaterial and does not mean that he will not suffer prejudice. Counsel urged the Court to dismiss the application.

Determination

[6] I have considered the application, the affidavits on record, submissions by counsel and the law. The discretion that I am called upon to exercise in this application is provided under 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 the doing of any act authorized or required by these Rules, whether before or after the 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.”

[7] The impugned ruling was delivered on 13th December, 2016. The applicant lodged the Notice of Appeal on 23rd December, 2016. Rule 75 provides that the Notice of Appeal should be lodged within 14 days from the date of the decision. The Notice of Appeal was therefore filed outside the prescribed time.

[8] 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 stated 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. In the case of **Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported)** this Court rendered itself thus:-

“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.”

[9] The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In **Mwangi V. Kenya Airways Ltd, [2003] KLR 48**, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) 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 outside those listed so long as the factor is relevant to the issue being considered.”

[10] The applicant seeks this court's discretion to allow him to file his notice of appeal and record of appeal out of time. The issue that falls for my consideration is whether the explanation given by the applicant for the delay in lodging his appeal is reasonable and excusable. It is upon the applicant to place sufficient material before the Court which would explain the delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case **M/S Portreiz Maternity V. James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court stated:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

[11] 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 & Ano V. R. Eldoret Civil Appln 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.”

The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained.

[12] 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.”

[13] Regarding the issue whether there is merit in the appeal, I note that there is no draft memorandum of appeal filed and there is therefore not sufficient material to enable me determine whether the intended appeal is arguable or not. On the issue of whether the extension of time to file the appeal will cause undue prejudice to the parties, Counsel for the respondent argued that the inordinate delay has occasioned the respondent prejudice as he has been denied the fruits of his judgment.

[14] On the issue of delay, I note that the notice of appeal is dated 22nd December, 2016 but was lodged in court on 23rd December, 2016. The letter bespeaking copies of the proceedings was dated 13th March, 2017. Rule Rule 82 provides that the letter bespeaking proceedings should be filed within 30 days of the date of the decision against which it is desired to appeal. The letter bespeaking proceedings was in this case therefore filed outside time. Further, there is no evidence on record indicating that the applicant or his counsel have followed up on the issuance of the proceedings.

[15] I am guided by the case of **Waweru & Another V Karoni [2003] KLR 448** where it was stated that:

“The rules of the Court 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.”

[16] There is no material placed before me to warrant the exercise of my discretion in favour of the applicant and accordingly, I find that this application has no merit. In the result, I dismiss the Notice of Motion dated 27th April, 2017 with costs to the respondent.

Dated and delivered at Kisumu this 26th day of April, 2018.

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR