



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 4 OF 2018

BETWEEN

ALFRED IDUVAGWA SAVATIA.....APPLICANT

VERSUS

NANDI TEA ESTATE.....1ST RESPONDENT

INSURANCE COMPANY OF EAST AFRICA.....2ND RESPONDENT

(An application for leave/extension of time to enable the applicant to file and serve a Notice of appeal out of time arising from the judgment of the High Court of Kenya at Eldoret, (Kimondo, J.) dated 17th November, 2015

RULING

Introduction:

[1] This is an application by way of Notice of Motion dated 9th December, 2016 brought pursuant to **Rule 4** of the Court of Appeal Rules (the Rules). The applicant seeks an extension of time within which to file his notice of appeal. The applicant also seeks costs of the application.

[2] The grounds upon which the applicant relies on in support of his application include that the time of filing the notice of appeal has lapsed and the respondents may exercise their discretion in executing the Decree issued by the High Court; that the application is brought in good faith and this Court has jurisdiction to grant the orders sought.

Submissions:

[3] At the hearing of the application, **ALFRED IDUVAGWA SAVATIA** (the applicant) appeared in person. He submitted that the delay in filing the notice of appeal was occasioned by the delay in obtaining copies of proceedings and the judgment and that the record of appeal is ready and pending filing. The applicant urged that the application be allowed and the notice of appeal be deemed as properly filed to enable him file the Record of Appeal and that the appeal be heard on merit.

[4] Ms Nasiloli Wanjala, learned counsel, **represented Nandi Tea Estate and Insurance Company of East Africa**, (the respondents) and relied on the Grounds of Opposition filed on 15th February, 2018. Counsel opposed the application and submitted that the application is oppressive, in bad faith, vexatious and an abuse of the Court's power and process and should be dismissed; that the application has been made without factual foundation or basis; that the delay on the part of the applicant is inordinate and inexcusable; that the application lacks merit as no draft memorandum of appeal has been attached/annexed to the motion to demonstrate that the intended grounds of appeal are arguable with overwhelming chances of success thus being vexatious and that the application is prejudicial to the respondents and should be dismissed with costs.

Determination:

[5] I have considered the application, the affidavits on record, the submissions 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.”

[6] The impugned judgment was delivered on 17th November, 2015. The applicant lodged the Notice of Appeal on 15th December, 2015. Rule 75 provides that the Notice of Appeal should be lodged within **14** days from the date of the impugned decision. The Notice of Appeal was therefore filed outside the prescribed time.

[7] 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 in this regard. 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, [2006] eKLR**, this Court rendered itself thus:-

“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, (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.”

[8] 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.”

[9] 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 Notice and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondents. This was well stated in the case **M/S Portreitz 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.”

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

[10] 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.”

[11] Regarding the issue whether there is merit in the appeal, the applicant has not annexed a draft memorandum of appeal to demonstrate whether the intended appeal is arguable with overwhelming chances of success. On the issue of whether the extension of time to file the notice of appeal and record of appeal will cause undue prejudice to the respondents, counsel for the respondents submitted that the extension of time is prejudicial to the respondents.

[12] On the issue of delay, I note that the impugned decision was delivered on 17th November, 2015, the notice of appeal is dated 24th November, 2015 but was lodged in court on 15th December, 2015 and was therefore filed outside the prescribed 14 days period. I further note that there is no letter bespeaking copies of the proceedings.

[13] The applicant averred in his affidavit verifying the urgency of the application dated 9th December, 2016 that;

“12. the said appeal was filed out of time after the delivery of the judgment dated 17th November, 2015;

13. the delay was occasioned by obtaining certified copies of the proceedings.”

[14] It is instructive that there is no Certificate of Delay obtained from the court to support the applicant's application. It is also notable that the instant application was filed on 17th January, 2017 a period of over one year after the delivery of the impugned judgment. The reasons for the delay have therefore not been substantiated upon satisfactorily.

[15] 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.”

[16] 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.”

[17] In the circumstances of this case, 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 9th December, 2016. In the circumstances of this case, the order that commends itself to me is that each party will bear its own costs.

Dated and delivered at Eldoret this 19th 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