



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 221 OF 2017

BETWEEN

BETH WAMBUI MUGO.....APPLICANT

AND

CHARLES HORNSBY.....1ST RESPONDENT

I. B. TAURIS & CO. LTD.....2ND RESPONDENT

BETHWELL KIPLAGAT

MARGARET SHAVA

TECLA NAMACHANJA

AHMED SHEIKH

GERTRUDE CHAWATAMA

PROF. RONALD SIYE

PROF. TOM OJIENDA

(All being sued as former commissioners of the Truth, Justice &

Reconciliation Commission (TJRC).....3rd RESPONDENT

PRESTIGE BOOKSHOP LT.....4TH RESPONDENT

(An application for extension of time to file and serve the notice of appeal in an intended *appeal from the Ruling and Order* of the High Court of Kenya at Nairobi (**Njuguna, J.**), dated 31st July, 2017 in *H.C.C. No. 234 of 2014*)

RULING

1. This application for leave to file a notice of appeal out of time is brought under **Rule 4** of the Court of Appeal Rules. The applicant intends to appeal against the ruling of the High Court (**L. Njuguna, J.**) delivered on 31st July, 2017 in High Court, **Civil Suit No. 234 of 2014**. By the said ruling, the High Court allowed an application brought by the 3rd respondent herein and struck the applicant's suit for the reason that it was time barred.

2. The application is supported by the grounds on the body of the application and by the grounds in the supporting affidavit. The applicant states in the supporting affidavit that the proposed appeal has high chances of success and that she is likely to suffer prejudice. She has

annexed a draft memorandum of appeal raising three grounds of appeal. The applicant further states in the supporting affidavit that the learned Judge reserved the ruling for delivery on 11th May, 2017; that her advocate attended court on 11th May, 2017, but the ruling was adjourned to 18th May, 2017 as it was not ready; her advocate attended court on 18th May, 2017 but the ruling was not ready and the learned Judge directed that it would be delivered on notice; that her advocates were not served with a notice to attend court on 31st July, 2017 and that her advocate became aware that the ruling was delivered on 2nd August, 2017 when she inquired at the registry.

3. The application is opposed by the respondents. The 1st and 2nd respondents has each filed a replying affidavit. The rest of the respondents did not file replying affidavits. However, the 3rd respondent filed written submissions and list of authorities. The 4th respondent did not file any documents and its counsel did not attend the court at the hearing of the application.

4. The Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time on terms that it may find just. However, the discretion should be exercised judicially and upon the guiding principles laid down in many decisions of the court, including in **Wasike v. Swala [1984] KLR 591**. Those principles include the requirement that the intended appeal or appeal should have merit, the delay in bringing the application should not be inordinate and that the extension of time should not cause undue prejudice to the respondent.

5. As regards the merits of the intended appeal, the applicant states that it has high chances of success and has relied on the grounds in the draft memorandum of appeal. Although a copy of the plaint has not been availed, it is apparent from the documents filed in this application that the applicant sued the respondents for libel by publishing words understood to me that the applicant “benefited from irregular *land deals during Kenyatta administration.*” The 1st, 2nd and 4th respondents are authors and publishers of a book containing the alleged libel. The 3rd respondent published the alleged libel in its report dated 28th June, 2013. The suit was filed on 4th August, 2014. The applicant stated that she brought the suit when she became aware of the publications. The learned Judge made a finding that the cause of action arose when the statements were published and not when the applicant became aware of the publication.

In the draft memorandum of appeal, the applicant questions the factual basis of the finding that the cause of action arose on 28th June, 2015. She states in the grounds of appeal that the 3rd respondent’s report continues to be published and that the suit was brought within one year after the book containing the alleged libel was purchased; that a suit can be brought within one year of the applicant’s knowledge and that each publication a new libel. Although the respondents are represented by imminent advocates, they did not question the merits of the intended appeal. The trial has not been held yet and the true facts have not been established. The applicant seems to say that there is a continuing libel.

In the premises, I am satisfied that the intended appeal is not frivolous and that it is arguable.

6. The application is opposed on the ground that there is inordinate delay in bringing the application which has not been reasonably explained. The application was brought within less than two months after the date of the decision. The notice of appeal should have been brought within 14 days of the decision, that is, by 14th August, 2017 which means that the application was brought less than 50 days from the date of the expiry of the period.

The respondents do not refute the averments that the applicant’s advocate had no notice of the date of the ruling. Indeed, the record of the proceedings support the applicant that the ruling was adjourned on two occasions. The record of 31st July, 2017 shows that only the advocate for the 1st and 2nd respondents was present who undertook to inform other advocates of the outcome. There is no averment or evidence that this was done, and if so, when. The delay is not relatively inordinate and the applicant has given a reasonable explanation for the delay.

7. It is not manifest from the nature of the suit and the intended appeal that the respondents would suffer undue prejudice if the application is allowed.

8. Lastly, **Mr. Chacha Odera**, learned counsel for the 1st and 2nd respondents submitted that the application is incompetent as it does not seek the extension of time to file a record of appeal. He contended in essence that the time for filing of the record has expired and the applicant would not be able to take advantage of time required for the preparation and delivery of the copy of the proceedings under the proviso to **Rule 82(1)** of the Court of Appeal Rules. **Michael Amalemba**, learned counsel for the applicant is of the view that time will start running after the notice of appeal is filed.

In my view, this application should be decided independently of the time required to file a record of appeal. It would be premature and preemptory to rule that the time for filing the record of appeal has expired as the issue is not before the court.

9. For the going reasons, the application is allowed. The time for filing the notice of appeal is extended by 14 days from the date hereof. The costs of the application be costs in the intended appeal.

Dated and Delivered at Nairobi this 18th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR