



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: J. MOHAMMED J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. 6 OF 2017**

**BETWEEN**

**ALFRED W. MUCHENDA.....APPLICANT**

**AND**

**PETER PUNGA PIUS.....1<sup>ST</sup> RESPONDENT**

**MARTIN ASITIWA ONGOMBE.....2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file and serve memorandum of appeal out of time against the ruling of Justice Chitembwe in Kakamega High Court Succession Cause No. 240 of 1991 delivered on 11<sup>th</sup> December, 2014.*

*in*

*H.C. Succession Cause No. 240 of 1991)*

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**RULING**

**Background**

[1] By a Notice of Motion dated 12<sup>th</sup> January, 2017, the Applicant Alfred W. Muchenda seeks the following orders expressed to be brought under Rule 4, 42(1) and 47(1) of the *Court of Appeal Rules, 2010* that: -

- a) *The applicant herein be allowed to appeal out of time*
- b) *The draft memorandum of appeal annexed be admitted and deemed as duly filed.*

[2] The grounds on which the applicant relies on to file and serve his record of appeal out of time are set out in the applicant's affidavit where he states that upon delivery of the ruling, his Advocates on record did not inform him that the impugned ruling was delivered on 11<sup>th</sup> December, 2014. The applicant deponed that he visited his advocate's chambers on a number of occasions inquiring on whether the ruling was delivered, to which he did not receive any information; that in November, 2016 his advocates informed him that the ruling was delivered in December, 2014 by which time the period within which he should have filed the Record of Appeal had lapsed.

[3] The respondent filed a replying affidavit opposing the application for filing the appeal out of time. The main ground of opposing the application is that the applicant's advocate was present in court when the impugned ruling was delivered. That in the High Court suit, the applicant was the 1<sup>st</sup> objector and on perusal of the ruling, it is stated "*Miss Rauto h/b for Fwaya (present) Counsel for Objectors*"; that accordingly, the applicant was well represented in Court when the impugned ruling was delivered; that the applicant's application is unmerited and will deprive the respondents of the fruits of their judgment.

**Submissions**

[4] At the hearing of the application, the applicant was unrepresented while the respondent was represented by learned counsel, Mr. Nyanga.

The applicant submitted that he was not informed of the delivery of the ruling by his advocates and reiterated the grounds in his supporting affidavit; that he and the 1<sup>st</sup> respondent are brothers and the 1<sup>st</sup> respondent sold the applicant's piece of land to the 2<sup>nd</sup> respondent; that the applicant was not informed by his counsel that the ruling was delivered on 11<sup>th</sup> December, 2014; that after several enquiries, his advocates informed him that the ruling had been delivered; that the mistakes of his advocate should not be visited on the applicant; that from the date the applicant was informed that the impugned ruling was delivered, he had endeavoured to obtain proceedings to enable him file his appeal; that he has an arguable appeal with high chances of success.

[5] Counsel for the respondent opposed the application and relied on the grounds set out in the respondent's replying affidavit; that the applicant has taken an inordinately long period of time to file his appeal; that in any event, he was well represented in Court by counsel when the ruling was delivered; that the proceedings before the High Court have been ongoing since 1993, and there should therefore be an end to litigation.

**Determination:**

[6] 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.”*

[7] The impugned ruling was delivered on 11<sup>th</sup> December, 2014. Rule 75 provides that the Notice of Appeal should be lodged within 14 days from the date of the impugned decision.

[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 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.”*

[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 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.”*

[11] 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, the applicant’s draft memorandum of appeal raises various grounds, inter alia, whether the distribution of the estate was carried out in accordance with the law. An arguable appeal does not necessarily mean one which will succeed. 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 as the delay has been inordinate and unexplained and has deprived the respondents of the fruits of their judgment.

[14] On the issue of delay, I note that the impugned ruling was delivered on 11<sup>th</sup> December, 2014. I further note that the letter bespeaking copies of the proceedings dated 3<sup>rd</sup> March, 2016 was not copied to counsel for the respondents as required by Rule 82.

[15] It is instructive that the instant application was filed on 12<sup>th</sup> January, 2017 a period of over one year after the delivery of the impugned ruling. The reasons for the delay have therefore not been substantiated upon satisfactorily.

[16] It was the applicant’s contention that his counsel informed him that the impugned ruling was delivered two years after delivery. There is no evidence of any steps taken by the applicant to follow up on the progress of his matter. Waki, JA in the case of **Habo Agencies Limited V Wilfred Odhiambo Musungu [2015] eKLR** when faced with a similar situation stated as follows:-

*“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”*

[17] 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.”*

[18] 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.”*

[19] 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 12<sup>th</sup> July, 2017. In the circumstances of this case, the order that commends itself to me on costs is that each party will bear their respective costs.

**Dated and delivered at Kisumu this 26<sup>th</sup> 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**