



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 14 OF 2017

BETWEEN

**ELIUD WEPUKHULU KHAUKHA.....APPLICANT**

AND

**FRED WANYAMA KOROSIA & 12 OTHERS....RESPONDENTS**

*(Being an application for leave to file and serve notice of appeal and record of appeal out of time from the judgment of the High Court at Bungoma, (Mukunya, J.) dated 6<sup>th</sup> October, 2016*

*in*

*ELC NO. 169 OF 2013)*

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RULING

[1] This is an application by way of a Notice of Motion dated 14<sup>th</sup> February, 2017 brought under Rule 4 of the Court of Appeal Rules (the Rules) in which the applicant seeks the following orders;-

*“(a) That it pleases the Honourable court to grant the Applicant leave to file and serve the Record of Appeal out of time.*

*(b) Any other order this Honourable court deems fit to grant.*

*(c) Costs be in the cause.”*

[2] The application was anchored on the grounds that the delay in filing the notice of appeal and the record of appeal was occasioned by various factors including; that upon filing and serving the Notice of Appeal herein, the applicant obtained court proceedings and compiled records but the Deputy Registrar declined to sign the decree on the grounds that the respondents’ advocates had not approved it; that the respondents’ advocates declined to approve the decree forcing the applicant to secure the same by alternative service by registered post and the decree was signed on 3<sup>rd</sup> February, 2017 after the expiry of the 60 day period; that the delay was occasioned by acts not authored by the applicant or his counsel; that the intended appeal raises pertinent, weighty and serious matters that ought to be heard and determined on merit; that the learned judge did not effectively address all important issues raised and the suit was neither dismissed nor allowed; that the judgment was marked by contradictions, and erroneous legal issues and did not resolve the dispute between the parties; that the appeal is merited and the delay was out of the control of the applicant. Counsel informed the single judge that the record of appeal is ready for filing and service upon the respondents.

[3] The respondents did not file replying affidavits.

Submissions by Counsel

[4] During the hearing of the application, **Mr Joseph Wafula Sichangi** represented the applicant. Counsel submitted that the notice of appeal was filed and served on time; that there was a delay of one (1) month in filing the record of appeal that the instant application was filed on 15<sup>th</sup> February, 2017; that there will be no undue prejudice suffered by any party if the application for extension of time is granted since all the parties will have an opportunity to argue or oppose the appeal and; that the subject matter of the appeal is land and involves

family members. Counsel urged the single judge to allow the application as the delay was occasioned by the respondents who delayed in approving the decree.

[5] **Mr Edwin Otongo** was holding brief for **Mr Ocharo Kibira**, and submitted that the 1<sup>st</sup> to 13<sup>th</sup> respondents do not oppose the application. Counsel urged the court to allow the application and prayed that costs should abide by the outcome of the intended appeal.

#### **Determination**

[6] I have considered the motion, the affidavits and the submissions of counsel. The power to extend time under **Rule 4** of this Court's Rules is an exercise of discretion and the factors to be considered were stated in **Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))** where it was held that;

*“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, (possible) 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 factor.”*

[7] The principles set out by this Court upon which the judicial discretion under **rule 4** may be exercised are as stated in the case of **Mwangi v Kenya Airways Ltd (2003) KRL 486:**

*“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977)** (unreported), the Court expressed itself thus:*

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”*

[8] 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 on 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.”*

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

[10] The applicant contends that he has an arguable appeal. I have perused the Draft Memorandum of Appeal and find that the appeal is arguable as it raises issues for determination, *inter alia*, whether a constructive or resulting trust was established in respect of the suit property. An arguable appeal does not necessarily mean one which will succeed. I also find that counsel for the respondents did not oppose the application and that the respondents will not suffer substantial prejudice if the application herein is allowed.

[11] The upshot is that I find merit in this application, and allow it. I make the following orders:-

*1) That the Notice of Appeal dated 7<sup>th</sup> October, 2016 be deemed as duly filed.*

*2) The applicant shall file and serve its Record of Appeal within Thirty (30) days from the date hereof.*

*3) Failure to comply with any of the time limits stipulated hereinabove, the Notice of Motion dated 14<sup>th</sup> February, 2017 shall stand dismissed with costs.*

*4) Costs of this application to abide by the outcome of the intended appeal.*

Dated and delivered at Kisumu this 21<sup>st</sup> day of June, 2018.

J. MOHAMMED

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**