



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 63 OF 2018 (UR.39 OF 2018)

BETWEEN

DEMUTILA NANYAMA PURUMU.....APPLICANT

AND

SALIM MOHAMMED SALIM.....RESPONDENT

(An application for extension of time within which to file a Notice of Appeal and

a Record of Appeal from the judgment of the Environment and Land Court

at Bungoma(Mukunya, J.) dated 29th day of November, 2016

in

ENVIRONMENT & LAND CASE NO. 53 OF 2012)

RULING

[1] This is an application by way of Notice of Motion dated 14th June, 2018 seeking the following orders:-

“1.THAT service of this application be and is hereby dispensed with at the 1st instance due to urgency;

2.THAT this application be and is hereby certified as urgent to be heard on a priority basis;

3.THAT the applicant be and is hereby granted leave to file and serve a notice of appeal out of time from the judgment and decree in Bungoma Environment and land case no. 53 of 2012 DEMUTILA NANYAMA PURUMU VS SALIM MOHAMMED SALIM;

4.THAT the applicant be and is hereby granted leave to file and serve a record of appeal out of time from the judgment and decree in Bungoma Environment and Land case No. 53 of 2012 DEMUTILA NANYAMA PURUMU VS SALIM MOHAMMED SALIM.

5.THAT costs of this application be provided for.”

[2] The application is based on the grounds in the body of the application, the supporting affidavit sworn by the applicant and the annexed documents.

[3] 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 the fact that the applicant is an elderly woman aged over 80 years who has no income and was therefore unable to pay the requisite fees to instruct an Advocate to file the appeal on her behalf; that the intended appeal raises pertinent, weighty and serious matters that ought to be heard and determined on merit and that the appeal is merited and the delay was out of the control of the applicant.

[4] The respondent did not file a replying affidavit.

SUBMISSIONS

[5] During the hearing, there was no appearance by counsel for both the applicant and the respondent. The Court record indicates that both counsel were served with the hearing notice. The applicant was present in Court and informed the single judge that in view of the fact that the hearing of the instant application had delayed for a considerable period of time she would proceed to argue her application in person.

[6] **Ms Demutilla Wanyama Purumu**, (the applicant herein) submitted that she has an arguable appeal, that E. Bukusu/South Kanduyi/381 (the suit property) was fraudulently transferred into the respondent's name and that the respondent thereafter charged the suit property. The applicant further submitted that she is an elderly woman of over 80 years old and the delay in filing the appeal was occasioned by lack of funds to file the appeal as she has no income and relies on well-wishers for financial support; and that the respondent may at any time execute for the costs awarded.

DETERMINATION

[7] I have considered the motion, the affidavits and the submissions. 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.”

[8] 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.”

[9] 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.”

[10] 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.

[11] The applicant contends that she 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 the suit property was fraudulently transferred to the respondent's name. An arguable appeal does not necessarily mean one which will succeed. I also find that counsel for the respondent did not file a replying affidavit in response to the instant application and that the respondent will not suffer substantial prejudice if the application herein is allowed.

[12] In the circumstances of this application, the upshot is that I find merit in this application, and allow it. I make the following orders:

1) That the applicant shall file and serve a Notice of Appeal within **14 days** from the date hereof;

2) That the applicant shall file and serve the Record of Appeal within **60 days** from the date hereof;

3) Failure to comply with the time lines stipulated herein above, the Notice of Motion dated 14th June, 2018 shall stand dismissed

with costs;

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

DATED and delivered at Eldoret this 4th day of October, 2018.

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.