



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 210 OF 2018

BETWEEN

ELIJAH KINYUA NG'ANG'A Aka GENERAL BAHATI

MWAI WA MUTHIGI

WAWERU MUGO

MUIRURI NJUGUNA Aka GENERAL

MUIRURI NJUGUNA.....APPLICANTS

VERSUS

GITU WA KAHENGERI

JACOB NYAGA

MAU MAU WAR VETERANS ASSOCIATION

THE REGISTRAR OF SOCIETIES

PETER NZUKI NDETI.....RESPONDENTS

(Being an Application for extension of time to file and serve a Memorandum of Appeal and Record of Appeal out of time against the Ruling and Order of the

High Court of at Nairobi (J.K. Serгон, J.) Dated 7th December, 2017

in

H.C. C.C. No. 64 of 2014)

RULING

Before me is a Notice of Motion dated 18th day of July, 2018, brought under Rule 4 of the Court of Appeal Rules, 2010, seeking an order for leave of court to file a memorandum and record of appeal out of time, together with an attendant order that costs be in the cause.

The application is supported by grounds on its body and a supporting affidavit deposited by **Elijah Kinyua Ng'ang'a** alias **General Bahati**, together with annexures thereto. It has been opposed by a replying affidavit deposited on the 9th October, 2018 by **Gitu Wa Kahengeri**.

The application was canvassed by way of oral submissions by learned counsel **Mr. Eric Mutua**, instructed by the firm of E.K. Mutua & Co. Advocates for the applicants, and learned counsel **Miss Muriithi**, holding brief for **Mr. Muriithi** instructed by the firm of Muriithi Kireria & Associates for the respondents.

In support of the application, learned counsel **Mr. Erick Mutua**, submitted that the applicants filed a suit against all the respondents on the 21st March, 2014 seeking various reliefs; that the suit was subsequently set down for hearing on the 17th day of October, 2017; that unfortunately, on the said date, counsel on record for the applicants was out of the jurisdiction on official duties; that before leaving the jurisdiction, he made arrangements for a representative to attend court and seek an adjournment on his behalf, which the representative did but the court declined to grant the request for an adjournment, and instead dismissed the suit for want of evidence.

Being aggrieved, the applicants unsuccessfully sought reinstatement of the dismissed suit as that request was also declined on the 7th December, 2017. Undeterred, the applicants timeously filed a Notice of appeal on the 11th day of December 2017. They also timeously applied for a certified copy of the proceedings on the 8th December, 2017 to facilitate the filing of the intended appeal. It was not until the 3rd day of July, 2018 when they were notified by the courts Registry that a certified copy of the proceedings and ruling were ready for collection and which they diligently collected on the 4th day of July, 2018.

Counsel continued to submit that, by the time they were capacitated to initiate the appellate process, time for initiating the appellate process had lapsed; that the intended appeal is arguable; that no prejudice will be suffered if the orders sought were granted as prayed; and lastly, that there has been no unreasonable delay in seeking the courts intervention and which delay has also been satisfactorily explained.

In opposition to the application, learned counsel **Miss Muriithi**, for the respondents contended that it is the applicants who set down the suit for hearing and served a hearing notice on the respondents; that since counsel on record for the applicants flew out of the jurisdiction two days to the hearing date, he had sufficient time within which to instruct another advocate to take over the conduct the hearing of the suit.

Counsel submitted further that the applicants failed to act diligently as no efforts were made by them to make follow ups on the supply of the certified copy of the proceedings and are therefore underserving of the exercise of any discretion in their favour. Lastly, that the respondents would suffer great prejudice if the application were to be allowed.

Counsel cited **Edward Njane Njenga and another versus Daman Wanjiku Kamau & another** [2016] eKLR, a High Court decision on the discretionary power of the High Court to extend time for the lodging of an appeal to the Court of Appeal; and the case of **Fahim Yasim Twaha versus Timamy Issa Abdalla & 2 others** [2015] eKLR, a Supreme Court decision for propositions on elements of justice as enshrined in the Kenya Constitution 2010.

My invitation to intervene has been invoked under rules 4 of the Court of Appeal Rules, 2010. It provides:

1. 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 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.

The principles that guide the exercise of this jurisdiction are now well settled. I will highlight a few cases by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi** [2015] eKLR, it was stated that the exercise of the mandate is discretionary which discretion is unfettered and does not require establishment of “sufficient reasons” save that it has to be guided by factors not limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance. In **Nyaigwa Farmers’ Co-operative Society Limited versus Ibrahim Nyambare & 3 others** [2016] eKLR, it was stated that the principle that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited** [1998] eKLR, it was stated that an order sought under Rule 4 of the Rules of the Court should be liberally granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court or that the Court is otherwise satisfied beyond *para adventure*, that his intended appeal is not an arguable appeal. Further that the discretion granted under rule 4 of this Court to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the Court may think just. In **Cargil Kenya Limited Nawal versus National Agricultural Export Development Board** [2015] eKLR, The Court added that, Rule 4 empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of any act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered. Further that the exercise of this Courts discretion under rule 4 has followed a well beaten path since the stricture of “sufficient reasons” was removed by the amendment in 1998. 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 for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the applications is granted; the degree of prejudice to the respondent if the applications is granted; the effect of the delay on public administration and the importance of compliance with time limits; 5th the responses of the parties whether the matter raises issues of public importance are all relevant but not exhaustive factors.

In **Mathenge versus Duncan Gichane Mathenge** [2013] eKLR, it was stated that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through proceedings relied upon by such an applicant. Further that the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before Court. Lastly in **Richard Nchapi Leiyagu versus IEBC & 2 others Civil Appeal No. 18 of 2013**, it was stated that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.

I have considered the above principles in light of both the opposing pleadings and submissions. In my view, it is not disputed that the High Court declined to exercise its discretion to reinstate the applicants' suit dismissed for want of evidence. The applicants were aggrieved by that decision and timeously filed a Notice of Appeal and also applied for a certified copy of the proceedings and ruling. A certificate of delay was not exhibited to the application. The applicants' explanation for its non availability was that the same had not yet been availed to them by the High Courts Registry as at the time this application was filed. Both parties were however in agreement that it was not until the 3rd day of July, 2018 when they were notified that a certified copy of the proceedings was ready for collection. The applicants collected theirs on the 4th day of July, 2018.

The respondent has urged me to fault the applicants for the failure to make follow ups on their request for a typed certified copy of the court proceedings and ruling. Indeed, none has been demonstrated. It is however, my view, that the applicants can only be penalized for the delay in availing the said copies as between the 8th day of December, 2017 if it can be demonstrated first that the applicants had control over that process; and secondly, that had such efforts been made, the certified copy of the court proceedings and the ruling could have been supplied earlier. I find nothing on the record to suggest that efforts to make a follow up although such efforts is commendable as portraying evidence of diligent and serious litigants, failure to take such an action cannot be used against the applicants in the absence of demonstration that they were in a position to do so but failed to take such remedial action to their own detriment.

In light of the above assessment and reasoning, I find that the delay between 11th December, 2017 to 3rd July, 2018, has been sufficiently explained. It is also excusable. That leaves the applicants with the burden of explaining the delay between 3rd July, 2018 and the 19th July, 2018, when the instant application was filed, slightly over a period of two weeks from the date of capacitation.

Taking the totality of the above in mind, it is my view, that the delay in seeking the courts' intervention was not inordinate. Allowance has to be given for the time spent on obtaining instructions and preparation of the application before filing the same.

Although a draft memorandum of Appeal has not been annexed to the application, I have no doubt the crux of the intended appeal will turn on the issue as to whether the Judge exercised his discretion judiciously when he withheld the applicants' request for the reinstatement of the suit dismissed for want of evidence. I therefore find that the intended appeal is not frivolous.

The upshot of all the above assessment and reasoning is that, I find merit in the application. The same is allowed on the following terms.

(1) The applicants have 14 days of the date of the delivery of the ruling to file the record of appeal.

(2) The costs of the application to abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 23rd day of November, 2018.

R.N. NAMBUYE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR