



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 208 OF 2017

BETWEEN

M M.....APPLICANT

AND

N A.....RESPONDENT

(Application for extension of time to file and serve the Notice of Appeal and Record of Appeal in an intended appeal from the judgment of the High Court at Nairobi (M.W. Muigai, J.) dated 16th June, 2017

in

HC Divorce Cause No. 88 of 2014)

RULING

This is an application pursuant to **Rule 4** of the Court of Appeal Rules for extension of time to file and serve the record of appeal from the judgment of the High Court (M.W. Muigai, J.) delivered on 16th June, 2017.

This application was heard *ex parte* after the respondent failed to attend court even after being duly served with the hearing notice. This absence, notwithstanding, the applicant was still duty bound to persuade the court that he is deserving of the Court's discretion under **Rule 4** of the Court of Appeal Rules. To discharge that burden, Ms. Marai, learned counsel for the applicant submitted that the judgement was not delivered as scheduled on 20th January, 2017; that without any notice to the applicant, the delivery date was changed and yet again the applicant was not notified; that the applicant's advocates made several attempts by writing to the Deputy Registrar on 25th April, 2017; 11th May, 2017 and; 9th June, 2017 to ascertain the new date for the delivery of the judgment to no avail. It was not until 9th June, 2017 that the Deputy Registrar responded, only to inform the applicant's advocates that the judgment would be delivered on notice as the trial Judge was on leave. It therefore came as a surprise when in August, 2017 the applicant's advocates saw the judgment uploaded on the website of the National Council for Law Reporting. After these events, the applicant instructed counsel to appeal the entire decision. By this time, time for the lodgement of an appeal had elapsed. Counsel urged that the delay has not been inordinate having moved to the Court two weeks after becoming aware of the delivery of the judgement; that the intended appeal has overwhelming chances of success on the basis that the trial court dismissed the applicant's divorce petition in view of uncontroverted evidence the hearing having proceeded *ex parte*; and that in the interest of justice, the application be allowed.

It is noted that, although the respondent did not attend court on the day the application was canvassed, she filed a response to the application. In it, she asserts that the application is an abuse of the court process; that the applicant, having known that judgment was delivered on 17th June, 2017, ought to have moved with diligence but failed; that the applicant has had a poor record of complying with court orders.

For instance, it is deponed that he has not honoured the order directing him to pay for the respondent's

maintenance and the up keep of their son; that the applicant is an Italian citizen, employed by the [Particulars Withheld] in Cairo; that Italian courts have unequivocally claimed jurisdiction on the question of the parties' judicial separation and subsequent divorce exhibited in the decision of the Court of Appeal of L'Aquila (Italy), Decreto di rigetto n.cronol. 166/2016 in which the applicant's application contesting that court's jurisdiction was dismissed. According to the respondent, the applicant is using this application to delay, obstruct or derail the proceedings in the Italian courts.

The discretion of a single Judge under **Rule 4**, as has been stated time without end, is wide and unfettered; that in deciding whether to extend time, the single judge takes into account: the length of delay, the reason for delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if time is extended. See: **Leo Sila Mutiso v. Rose Wangari Mwangi**, Civil Application No. Nai. 255 of 1997. Being a discretionary power, it must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, with sympathy or other sentiments.

It is not disputed that judgment was not rendered on the date it was scheduled. It has been stated without being controverted that the applicant learnt of the delivery of the judgment from the National Council for Law Reporting website; that it took him two weeks from the date he learnt of the delivery of the judgment to bring this application. This period in the circumstances is not, in my judgment inordinate. Similarly, on the basis of the novelty of the subject of the impugned decision I am of the view that the intended appeal is not frivolous. The learned Judge concluded, on the basis of the **Marriage Act, 2014** that the High Court lacked jurisdiction to dissolve foreign marriages that do not involve Kenyan citizens and dismissed the petition. Being a marital dispute with an issue of the marriage being involved, it would be prejudicial not to determine the issues arising from the aforesaid decision on merit. In any case, as the respondent has confirmed there is a concurrent consideration of her grievance by Italian courts, hence she stands to suffer no real prejudice if time is extended within which the appeal may be lodged.

Accordingly, the applicant has leave to file a notice and record of appeal within 14 days of the date of this ruling. Costs to the respondent.

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

W. OUKO, (P)

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR