



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 245 OF 2017

BETWEEN

W B O.....APPLICANT

AND

C A O.....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 (W. Musyoka, J.) dated 11th December, 2014

in

HCCC No. 12 of 2012)

RULING

By **Rule 4** of the Court of Appeal Rules, the single Judge, on behalf of the full Court, has unfettered discretion to extend the time limited by the Rules, or by any decision of the Court or of any court immediately below it.

Being discretionary, the power to extend or not is exercised within clear parameters defined by the length of delay; the reasons for delay; the degree of prejudice that may be caused to the other party if time is enlarged and a consideration of whether the applicant has an arguable appeal. See: **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Application No. Nai 251 of 1997 and **Simon Towett Maritim V. Jotham Muiruri Kibaru**, Civil Application NAI 362 of 2004.

In order to answer these questions, the following dates are indispensable. The judgment by the High Court (Musyoka, J) was delivered on 11th December, 2014 wherein, the learned Judge ordered the distribution of various matrimonial properties to be shared on a 50:50 basis between the parties. That judgment was delivered in the absence of both parties.

Of course, by the time the applicant got information that the judgment had been delivered, time for lodging an appeal to this Court had passed, hence this application. To persuade me that the applicant deserves pardon for the delay, Mr. Njagi, learned counsel holding brief for Mr. Osero for the applicant submitted that the applicant learnt from the respondent’s counsel of the delivery of the judgment on 23rd July, 2015 which was approximately 7 months later; that there was a further delay when the applicant attempted to have the judgment set aside or reviewed; that parties then embarked on discussions on the mode of distribution but could not come to an agreement; that after this and without the applicant’s knowledge, the respondent conducted a valuation of the properties valued and moved to court where on 28th September, 2017, it was ordered that the properties be put in the open market, sold by private treaty and the proceeds deposited in court for distribution. Lastly, it was submitted that the intended appeal has an overwhelming chance of success and the applicant will suffer irreparable harm and damage if he is not able to ventilate his case by having the appeal fully heard on merit.

For the respondent, Ms. Amere submitted that the application has not met the threshold of **Rule 4** aforesaid; that the respondent herself learnt of the delivery of the judgment 6½ later and immediately notified the applicant; that the applicant instead simply sat back only to file the present application approximately 2 years 3 months later on 24th October 2017. As if that was not enough, the applicant did not serve the respondent with this application until 7 months after its filing; that in between, the applicant has filed two applications before the High Court for stay of execution and review of the aforesaid judgment which applications were not served upon the respondent and have remained unprosecuted after the firm of his Advocates sent an unqualified 2nd year law student to represent him. Therefore, for these reasons, the respondent will be prejudiced, having waited since December 2014 to enjoy the fruits of the judgment while the applicant continues to

collect income from the suit properties amounting to almost Kshs. 500,000 per month, translating to almost Kshs. 24 million in 4 years.

Whether a delay is prolonged and inordinate is a question of fact and will depend on the peculiar circumstances of each case and; whether despite the delay, justice can still be done. Leave will also be granted if the applicant demonstrates to the satisfaction of the Court that, for plausible reasons, he was unable to lodge the appeal within the time stipulated in law; and that the intended appeal has a chance of success.

While from the facts of this dispute the court was to blame for delivering judgment without notice to parties, there is uncontroverted evidence that on 23rd July, 2015 upon learning of the delivery, the respondent accordingly informed the applicant. The applicant came to court with this application on 24th October, 2017, some 2 years and 3 months after being aware of the delivery of the judgment. It is the 2 years and 3 months that the applicant was expected to explain. The explanation he has proffered is that there were attempts at a settlement; and that on 2nd October, 2015 he applied for review of the judgment. In my view, these do not explain the delay.

Without being definitive, I doubt the strength of the applicant's intended appeal besides being concerned that any further delay will be prejudicial to the respondent.

In the result, the motion fails and is dismissed with no orders as to costs.

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

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR