



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI.22 OF 2014

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

JUSTUS MIKE KITIVO.....RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal out of time in an intended Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Khaminwa, J.), dated 16th July, 2012 in H.C.C.C. No.336 of 2008)

RULING OF THE COURT

1. On the 4th of July, 2014, **Hon. Gatembu Kairu, JA**, sitting as a single Judge, dismissed an application lodged by the applicant for extension of time under **Rule 4** of the Court Rules. The applicant has now referred the matter to a full bench under **Rule 55(1)(b)** of the Court Rules, urging the Court to vary, discharge, or reverse the ruling of the learned Judge on the ground that the learned Judge failed to exercise his discretion properly, and failed to appreciate the fact that though the filing of the application was done late, that was merely a matter of procedure. Further, that the learned Judge failed to appreciate the discretion of a prosecutor in a criminal trial.
2. In support of the reference, the applicant filed written submissions that were duly highlighted by learned counsel Mr. Martin Munene. In brief, the applicant referring to ***Josphine Njoki Mwangi vs Housing Finance Company (K) Ltd [2014] eKLR***, on the matters to be taken into account in deciding whether to extend time, contends that although there was delay in filing the appeal, there were good reasons for the delay, and that the length of the delay was reasonable and excusable. It is further argued that the applicant's appeal has good chances of success; that the damages awarded to the respondent as general damages was unreasonably high; that no prejudice is likely to be occasioned to the respondent if the application is granted; that the delay in filing the application was a matter of procedure arising from a mistake which the Court can rectify in the interest of justice; and that the respondent's suit militates against the discretion of the prosecutor in the criminal case.
3. The application was opposed by the respondent on the grounds that the applicant's notice of appeal and the notice of motion were both defective. The respondent further buttressed his objection to the application through a replying affidavit sworn by his advocate Ms. Judith Omollo. In the affidavit, Ms.

Omollo reiterated that the notice of appeal as filed was defective having been filed and served out of time without leave; that the delay of 15 months had not been duly explained; and that the delay was inordinate. The Court was therefore urged to uphold the decision of the single Judge.

4. In considering this application, the following holding by this Court in *Gitetu vs Kenya Commercial Bank Ltd [2009] KLR 545*, is instructive:

“1. In an application under Rule 4 of the Court of Appeal Rules, a single Judge exercises an unfettered discretion but such discretion has to be exercised judicially and upon proper principles of law.

2. In exercising the unfettered discretion as granted by the rule, the single member of the Court did so on behalf of the whole Court and the full bench of the Court would only be entitled to interfere with the exercise of the discretion if it was shown that in the process of exercising the discretion, the single Judge:

a. took into account an irrelevant matter which he ought not to have taken into account or;

b. he failed to take into account a relevant matter which he ought to have taken into account or;

c. he misapprehended some aspect of the law applicable or;

d. his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law applicable to it.

3. A reference to the full Court is not an appeal and it is not enough to show that the full court would have come to a different result if it had been sitting in the place of the single Judge.

4. For an applicant to succeed in an application under Rule 4 of the Court of Appeal Rules, he has to satisfy to the Court that:

a. the delay was not inordinate and has been sufficiently explained;

b. the intended appeal was arguable; and

c. no prejudice would be caused to the respondent if the application to extend time was allowed.”

5. In his ruling delivered on 4th July, 2014, the learned single Judge gave reasons for his decision as follows:

“(10) ...there is no doubt that the judgment in this matter was delivered by the High Court on 16th July, 2012. Under rule 75(2) of the Rules of this Court, the notice of appeal was not filed within 14 days of that judgment. It was not filed until 12th June, 2013. That is a delay of close to one year. And what is the explanation for that delay? It is that the instructions to appeal were awaited from the Ministry involved. But the applicant did not wait to receive instructions before filing the notice of appeal. According to the affidavit in support of the application, the instruction’s to appeal were received from the Ministry on 17th October, 2013. By the time the applicant received instructions to appeal, he had already filed a notice of appeal earlier on 11th June, 2013. It follows that if the applicant could file the notice of appeal before receiving formal instructions to appeal from the Ministry, there is no reason given why the notice of appeal was not filed earlier. In effect, the delay is not satisfactorily explained.

(11) The matter is further compounded by the fact that despite having received instructions from the Ministry to appeal on 17th October, 2013, the present application seeking extension of time was not itself filed until 13th February, 2014. That is delay of approximately 4 months before presenting this application which is also not explained.

(12) Absent any or any satisfactory reasons for the delay in filing the notice of appeal, and for presenting the present application, I find the delay involved inexcusable. For that reason alone I am unable to exercise my discretion in favour of the applicant.”

6. We do not see how we can fault the learned Judge for coming to the decision that he did. There was a delay of about one year before the applicant filed the notice of appeal. The learned Judge considered the explanation given for the delay and found the same to be unsatisfactory. We agree with the learned Judge that there was nothing preventing the applicant from filing the notice of appeal even before receiving formal instructions from the Ministry. It is wrong for the applicant who is the Attorney General to flout the rules expecting to be treated differently merely because he is representing public interests. Under **Article 159(2)** of the Constitution Courts are expected not only to administer justice to all irrespective of status but also to ensure that justice is not delayed. Therefore, when litigants are before the Court, they are all equal regardless of their status and they must all abide by the rules of the game and the Attorney General is not an exception.

7. We are mindful of the holding in Wasike vs Swala [1984] 591, that an applicant under **Rule 4** of the Court Rules must show in descending scale of importance, (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. In arguing this application, the applicant focused mainly on the delay and the reasons for the delay. As far as the merit of the appeal is concerned, the applicant merely referred the Court to the grounds stated in a memorandum of appeal. While this may have been sufficient to show that there were arguable issues, it was not sufficient to show that the appeal was meritorious, that is likely to succeed on the merit of the case. In any case, the delay in this matter was inordinate and an extension of time is likely to cause prejudice to the respondent.

8. In our view, in all the circumstances of this matter, there is no justification for us to interfere with the decision of the learned single Judge as he exercised his discretion properly, taking into account the law and all relevant facts of the case. Accordingly, this application is dismissed with costs.

Dated and Delivered at Nairobi this 24th day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR