



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: MURGOR, J.A.**

**CIVIL APPLICATION NO. 60 OF 2016**

**BETWEEN**

**GEORGE KIMNGENY ARAP METO.....APPLICANT**

**AND**

**NANDI BEARS CLUB THROUGH**

**1. FRED TOROREY (CHAIRMAN).....1<sup>ST</sup> RESPONDENT**

**2. MRS. ROBIN DAVIS (SECRETARY).....2<sup>ND</sup> RESPONDENT**

**3. MICHAEL KOIN (TREASURER).....3<sup>RD</sup> RESPONDENT**

*(Application for extension of time to lodge an Appeal out of time from the Judgment of the High Court at Eldoret, G.K. Kimondo, J. dated 22<sup>nd</sup> October 2015*

*in*

***PETITION No. 16 of 2013)***

**\*\*\*\*\***

**RULING**

The applicant, **George Kimngeny Arap Meto** has applied for time to be extended to file and serve a Notice and a Record of Appeal under **Rule 4** of the **Court of Appeal Rules 2010**.

The facts in brief are that, the applicant lodged a petition dated 7<sup>th</sup> November 2013 against the respondents, in their capacity as officials of the Nandi Bears Club (*the Club*), to challenge his indefinite suspension from the Club by the respondents. The suspension was alleged to have been for reasons that he testified on behalf of a third party who had sued the Club at the Kapsabet Law Courts. The applicant contended that the decision to suspend him violated his constitutional rights to a fair hearing, and that the club management committee was not vested with powers of suspension.

The court found that the petition lacked merit as the applicant had not proved that his rights had been violated, and having so found, the court dismissed the petition.

In the instant Notice of Motion dated 8<sup>th</sup> August 2016, the applicant applied to extend time to file an appeal on grounds that, following the decision of the High Court of 22<sup>nd</sup> October 2015, there was a delay in obtaining the certified proceedings and judgment, which the applicant claimed were not supplied to him until 10<sup>th</sup> February 2016. Further, that the company contracted to bind the copies of the record, delayed in releasing it to the applicant. In his affidavit supporting the application of the same date, the applicant deponed that the printers improperly bound the record, resulting in repeated binding causing delay, which delay was not in any event inordinate. The applicant further deponed that the respondents would not be prejudiced in any way.

In a replying affidavit dated 16<sup>th</sup> November 2016 sworn by the **Robin Davis**, the secretary of the Club, it was deponed that the delay, that was over 9 months from the date the Notice of appeal was filed, was inordinate and inexcusable, and furthermore, it had not been explained. It was further averred that the proceedings and the judgment were ready on 12<sup>th</sup> February 2016, following which, the applicant had sufficient time to file the record of appeal. Additionally, there was nothing to show when the applicant submitted the documents for binding to the printer, and when the suitably bound copies were released. On account of the unexplained delay, the respondent would be ordained to suffer undue prejudice if this Court were to extend time for filing of the appeal.

**Mr. Otieno**, learned counsel for the applicant, submitted that due to the indefinite suspension, the applicant was no longer considered a member of the Club, and was unable to enjoy the privilege of reciprocating with other clubs. Despite the trial court having ordered that the applicant be reinstated to the Club, the order had yet to be effected. Counsel's further submission was that, after the Notice of Appeal was filed on 3<sup>rd</sup> November 2015, by a letter dated 20<sup>th</sup> November 2015, the applicant applied for the certified proceedings, which copy was served on the respondents. A certificate of delay was issued on 12<sup>th</sup> February 2016, specifying that a total of 100 days were taken to prepare the proceedings and judgment.

Counsel stated that the delay was adequately explained as having been occasioned by the printer's failure to adhere to the document binding requirements. Counsel concluded that the record of appeal was ready for filing; that the appeal had a high chance of success, and the respondents would not be prejudiced by the grant of an order of extension.

**Mr. Bett**, learned counsel for the respondents, opposed the appeal. Counsel relied on the replying affidavit of Robin Davis and submitted that the delay was inordinate; that the applicant was indolent and had not exercised due diligence in filing the record of appeal. The record could have been lodged on time, since the proceedings were ready on 10<sup>th</sup> February 2016, but that he had waited until the period for filing the appeal had already lapsed. The applicant ought to have filed at least one copy of the record, whilst awaiting the remaining copies. Counsel further submitted that the application had been overtaken by events as the applicant had since been reinstated as a member of the club.

Under **Rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”***

Was there a delay in filing the appeal, and was it sufficiently explained by the applicant? The judgment was delivered on 22<sup>nd</sup> October 2015, and the Notice of Appeal was filed on 3<sup>rd</sup> November 2015.

Thereafter the applicant applied for certified copies of the proceedings, and the judgment on 2<sup>nd</sup> November 2015. The certificate of delay was issued on 12<sup>th</sup> February 2016. This application was filed on 8<sup>th</sup> August 2016. When computed, the period of delay, after providing for the period of preparation of the proceedings, was approximately 179 days.

According to the applicant, this was caused by the registry's failure to supply the proceedings, which was further exacerbated by the printer in binding eight copies of the record of appeal.

When the reasons for delay are considered, I am unable to find fault with the registry as, the certificate of delay adequately accounted for the delay of 100 days. When the delay attributed to the alleged printing firm is examined, the applicant has not provided any information on the identity of the printing firm, when the documents were lodged, or how many days it took to complete binding the record. There was nothing to demonstrate that the printing firm was indeed the cause of the delay in releasing the record.

**In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98**, the Court stated thus:

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

Since no viable reason has been advanced to explain the nearly six month's delay, I find that the delay has not been explained to my satisfaction.

With respect to the other factors, I find that the information on the record is inadequate to determine whether the appeal has any chance of success, or whether a grant of extension would be of prejudice the respondents.

For the reasons above, I decline to allow the application, and hereby order that the Notice of Motion dated 8<sup>th</sup> August 2016 be and is hereby dismissed with costs.

***It is so ordered.***

***Dated and Delivered at Eldoret this 24<sup>th</sup> day of March, 2017.***

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**