



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B.M. KARIUKI (In Chambers))**

**CIVIL APPLICATION NO. NAI 297 OF 2015 (UR 254/2015)**

**BETWEEN**

**WAKABA NDEGWA ..... 1ST APPELLANT/APPLICANT**

**PETER MWAURA NDEGWA ..... 2ND APPELLANT/APPLICANT**

**AND**

**LUCY NYAGUTHII ..... RESPONDENT**

***(Application for extension of time to file memorandum and record of the Appeal out of time in an intended appeal from the Judgment of the High Court of Kenya, Nairobi (Muigai, J) delivered on 12th day of June 2015***

**in**

**H.C.SUCCESSION CAUSE NO.245 OF 2013)**

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**RULING**

1. In an intended appeal from the judgment of the High Court (Muigai J) in H.C.C.C. No.245 of 2015, the applicant, Wakaba Ndegwa, applied to this court on 17th December 2015 by way of notice of motion seeking extension of time to file memorandum and Record of Appeal out of time stipulated by the Court of Appeal Rules. The application is predicated on rule 4 of the Court of Appeal Rules. The rule states –

***“4. 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 or 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.***

2. As the judgment intended to be appealed against was delivered on 12<sup>th</sup> June 2015, the applicant should in compliance with rule 81 (1) of the Rules of this Court have instituted the appeal by lodging in the Court Registry record of appeal within 60 days from 10th August 2015 when he lodged the Notice of Appeal pursuant to rule 75(1) of the said rules. If he had done so, the appeal would have been instituted on or before 10th October 2015 in absence of a certificate of delay excluding time under rule 82(1) certified by the Registrar of the High Court as having been required for the preparation and delivery to the applicant of a copy of the proceedings without which the record of appeal cannot be compiled.

3. The applicant in support of the notice of motion and in explaining the reason for the delay in instituting the suit as required by rule 81 (supra) avers in paragraphs 6,7,8,9 and 10 as follows –

***“6. THAT the matter was argued by both advocates on record by way of written submissions and on 12th June, 2015, Hon. Lady Justice M. Muigai entered judgment against the applicants herein.***

***7. THAT the learned judge erred in not scrutinizing or making reference to the verbatim statements of the counsels which alluded to the fact that indeed the distribution of the deceased’s estate had salient issues which required oral examination of witnesses.***

***8. THAT the appellants however feel that their grievances can be addressed if only be allowed to appeal against the ruling and orders of the High Court. (Annexed hereto and marked “P.M.N. 4” is a copy of notice and a draft Memorandum of Appeal).***

***9. THAT in the meantime, the time within which to file Memorandum of Appeal and Record of Appeal has lapsed and as we are dissatisfied with the decision of the High Court, it is expedient that the application be allowed.***

***10. THAT it is for the said reasons that I seek leave of Court to lodge Memorandum and Record of Appeal out of time.”***

4. It is only in paragraph 9 above that applicant has alluded to lateness in filing appeal but in doing so, the applicant failed to state what militated against his filing the appeal within the period required by the rules. Where, as here, an applicant does not state or offer any reason for the lateness it cannot be assumed that there was any. The burden to satisfy the court that the lateness in complying with the time-lines in the rules reposes on the applicant. An applicant who merely states that he is late in filing appeal pursuant to the rules but does not state the reason or reasons for the lateness and if such reason cannot be inferred from his averments fails to discharge his burden to satisfy the Court that there are reasonable grounds for the court to exercise its discretionary power under rule 4 (supra) to extend time.

5. The overriding objective of the Court of Appeal Rules as shown by Section 3A (1) of the Appellate Jurisdiction Act (Cap 9) is to facilitate the just, expeditious, proportionate and affordable resolution of the governed by the Act. By dint of section 3B(1) of the said Act, the Court is enjoined to handle all matters presented to it for the purpose, inter alia, of attaining the just determination of proceedings. The power under rule 4 is required to be exercised judicially and the factors that the court will take into account in deciding whether or not to exercise or not to exercise its discretion to grant extension of time to file appeal will be examined under the backdrop of the court’s policy postulated by Apaloo JA, as he then was, in *Gitau v. Muriuki* [1986] KLR 211 when he held that a litigant will not be shut out from accessing justice and “the court ought to be inclined to exercise its discretion to enlarge time to appeal where the applicant has shown prima facie what he has an arguable case for consideration ...” *Githinji JA* in *Wasike v. Khisa* [2004] KLR 194 re-echoed *Apaloo JA* when he held that –

***“...the discretion of the court under rule 4 is unferred and must be exercised judicially and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable... and whether or not delay is unreasonable depends on the circumstances of each case.”***

6. Rule 4 has enhanced the amplitude of the discretionary power to extend time limited either by the rules or by the orders of this Court with the object of facilitating filing of appeals and ultimately determining disputes on merit. In effect, rule 4 militates against the harshness resulting from the strictness of the time-lines in the rules or orders of the Court. Clearly, the rule 4 is designed to enhance justice. As stated on 18th November 2016 in *Teresa Mila Lopes versus Abdul Hasis Hajow and another* [Civil Appeal No.148 of 2014] rule 4 serves “as a recognition of human frailties and fallibility. Because human beings will from time to time err or make mistakes, it behoves courts to be flexible, objective, and practical when considering applications for extension of time by those wishing to pursue their appeals. However, each

case must be considered and determined on its own merits. But mistakes due to inadvertence or unavoidable circumstances ought to be excused. However, a litigant requires to be alert and vigilant.”

7. The jurisprudence that has emerged from decisions of this court show that where a party seeks to be excused for lapses on time lines set in the rules or in court orders, it must be demonstrably shown that the extension sought will not be futile because no appeal lies in law or is a non-starter. The facts to be considered in determining whether to exercise the discretionary power to extend time under rule 4 (supra) include the length of the delay; whether the appeal lies or not; the arguability or otherwise of the appeal; the degree of prejudice to the other party; the public interest in the appeal, if any; and generally the requirements of the interest of justice including the need to facilitate access to justice as required under Article 48 of the Constitution of Kenya 2010; and the need to recognize and ensure that the overriding objective of the rules is to facilitate first, expeditious and proportionate and affordable resolution of appeals.

8. In the instant application, the applicant is mum about the cause of the delay. There is not a whimper why, after delivery of judgment on 12th June 2015 which aggrieved the applicant, the latter did not take steps to institute the appeal. He gave notice of appeal out of time on 10th August 2015. He was required to give notice of appeal within 14 days of delivery of the judgment on 12th June 2015, and to serve it within 7 days of filing as required by rule 75 (1) and 77(1) of this Court’s Rules. As the Notice of Appeal was filed outside the stipulated period, it seems to be invalid.

9. The applicant secured a Certificate of delay on 10th November 2015. It shows that the applicant applied for a copy of the ruling delivered on 12th June 2015 and the proceedings thereof on 13th July 2015 which was within 30 days of the delivery of the said ruling. The ruling and the proceedings were collected on 2nd November 2015. The Certificate of Delay states that the period spanning 13th July 2015 and 30th October 2015, a total of 110 days was necessary for the preparation of the ruling and the proceedings. On the basis of the Certificate of Delay, the period between 30th October 2015 to 17th December 2015 when this application was lodged is not explained nor is the delay in filing the notice of appeal. In absence of a valid notice of appeal, there can be no valid appeal. Even if instituted, the appeal would be a non-starter in absence of a valid notice of appeal. Moreover, whether the appeal is arguable or not has not been indicated. The applicant merely states that the learned Judge erred in not scrutinizing or making reference to the verbatim statements of the counsel appearing – see statement in Para 7 of the applicant’s supporting affidavit above. The replying affidavit filed in the High Court in the application which gave rise to the impugned ruling does not shed a little light on the possible legal issues likely to be canvassed on appeal. But even assuming that, prima facie, there is an arguable appeal, the lateness in obtaining the ruling and the proceedings had nothing to do with the giving of notice of appeal. Rule 75(4) of this Court’s Rules stipulates that “when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal. It is doubtful whether, in light of the notice of appeal filed out of time, the appeal lies. But even if it does lie, the delay in seeking extension of time to institute appeal for the period between 30th October 2015 and 17th December 2015 has not been explained. In absence of any explanation, the Court is unable to tell what caused the delay. Where no explanation for delay is given, it cannot be assumed that any exists.

10. In the result, it is my finding that the applicant has failed to satisfy the Court that the extension prayed for is deserved. Accordingly, the application is dismissed with costs to the respondent on the ground that it has no merit. It is so ordered.

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

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**