



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: J MOHAMMED, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 39A OF 2016

BETWEEN

EZEKIEL MWENJA NGURE APPLICANT

AND

SAMMY KIPKORIR SERONEY1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

UNICAB HOUSING CO-OPERATIVE SOCIETY LIMITED.....4TH RESPONDENT

(An Application for leave of the Court to lodge the Notice and Record of Appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nakuru (Ouko, J.) dated 22nd day of September, 2010

in

H.C.C.C. No. 155 OF 2002)

RULING

Introduction

1. This is an application by way of Notice of Motion dated 20th June, 2016 brought pursuant to **Rule 4** of the **Court of Appeal Rules** (the Rules) and **Sections 3, 3A & 3B** of the **Appellate Jurisdictions Act** Chapter 9 of Laws of Kenya and **Sections 1, 2, 3(1), 10, 22(1), 27, 50 and 259** of the **Constitution**. The applicant seeks the following orders *inter alia*:-

"a) The Honourable Court be pleased to grant and issue leave to the applicant to lodge and serve the Notice of Appeal and Record of Appeal outside the stipulated period.

b)The costs of this application abide the outcome of the intended appeal.

2. The grounds upon which the applicant relies on in support of his application include: that the ruling of this Court (Nambuye, Okwengu & Kiage, JJ.A.) delivered on **14th April, 2016** held that the Notice of Appeal lodged on **27th September, 2010** had been deemed as withdrawn; that the intended appeal from the judgment of the High Court of Kenya dated **22nd September, 2010** has high chances of success; that the applicant is not privy to the mistakes and misconduct of M/s Karanja - Mbugua & Company Advocates to take further steps to litigate the intended appeal from the impugned judgment despite being duly paid to do so; that no prejudice will be suffered by the respondents if the leave sought for extension of time is granted and that it is equitable, fair and just that this application be allowed.

Submissions by Counsel

3. At the hearing of the application, learned counsel Mr. Simon Wekesa, appeared for the applicant. He submitted that the Notice of Motion was filed by the applicant in person and that he should therefore be excused for any procedural mistakes in the application. Counsel submitted that he was instructed on **28th September 2016** and filed his notice of appointment on **30th September 2016**; that the Notice of Motion dated 20th June, 2016 seeks leave of the Court to file an appeal out of time; that the applicant appointed the firm of Karanja - Mbugua & Company Advocates to follow up on the typed proceedings to ensure that the appeal was filed timeously; that the said firm failed to do so; that the applicant was served with the ruling of this Court delivered on **14th April, 2016** filed by the Applicant on 27th September, 2010 which ruled that the notice of appeal was deemed to have been withdrawn. Counsel urged the Court not to punish the appellant for the mistakes of his advocates and that the intended appeal has merit and should be heard and determined on merit.

4. Learned counsel, Mr. Ochieng Ghai, appeared for the 1st respondent. He submitted that he strongly opposed the application and relied on the affidavit sworn by the 1st respondent dated **4th October 2016** and all the proceedings before the Court; that the application has no merit and the matter has been pending in court for over 15 years and should therefore be concluded expeditiously.

5. Mr. Ghai submitted that the applicant is a vexatious, indolent litigant and equity should not favour him as he is determined to ensure that the matter does not proceed to finality. On the issue of prejudice, counsel submitted that matter has been pending in Court for 16 years and the 1st respondent will therefore be greatly prejudiced by any further delay in concluding this matter.

6. Learned Counsel, Mr. Kipkoech, appeared for the necessary parties, (previously the 5th to 3^{1st} defendants). He submitted that under **Rule 4** of this Court's rules and from previous decisions, this court can only extend time when the delay is reasonable and well explained; that there is a delay of about 6 years in filing this application, that there is also a delay of more than two (2) months since the notice of appeal filed on 27th September, 2010, was deemed to have been withdrawn; that a delay of even one day ought to be sufficiently explained. Counsel argued that in this case there is no plausible explanation for the delay and there is no evidence of communication from the applicant to his then advocates or to the Court following up on the proceedings.

Determination

7. I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. The discretion that I am being called upon to exercise in this application is provided under **Rule 4** of the Rules which states:-

“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 doing any act authorized or required by these Rules, whether before or after 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.”

8. The principles guiding the Court on an application for extension of time premised upon **rule 4** of the

Rules are well settled. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

9. The parameters for the exercise of such discretion are clear. See **MUTISO V. MWANGI CIVIL APPLICATION NO. 255 OF 1997 (UR)**, **MWANGI V. KENYA AIRWAYS LTD, {2003} KLR 486**. See also **FAKIR MOHAMMED V. JOSEPH MUGAMBI & 2 OTHERS Civil Application No. Nai. 332/04 (unreported)** where this court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

10. The issues that fall for consideration vary from case to case and should be determined taking into consideration the particular circumstances of each case. In **MWANGI V. KENYA AIRWAYS LTD, (2003) KLR 48**, the court having set out matters which a single judge should take into account when exercising discretion under **Rule 4**, held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

11. It is not in dispute that the impugned judgment was delivered over 6 years ago, on **22nd September, 2010**. The applicant then filed a Notice of appeal timeously on **27th September, 2010**. The applicant herein under **Rule 82** of the Rules was required to lodge his appeal within 60 days of filing the Notice of Appeal. He failed to do so, prompting the 5th to 31st defendants to apply to have his notice of appeal deemed as having been withdrawn. This Court on **14th April 2016** allowed the said application. Accordingly, the applicant's notice of appeal was deemed as withdrawn.

12. In the circumstances, there is no notice of appeal on record. The applicant now seeks this court's discretion to allow him to file his notice of appeal and record of appeal out of time. The issue that falls for my consideration is whether the explanation given by the applicant for the delay in lodging his appeal is reasonable and excusable. It is upon the applicant to place sufficient material before the Court which would explain the delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case **M/S PORTREITZ MATERNITY V. JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997** where the Court stated:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

13. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in **MONICA MALEL & ANOR V. R, ELDORET CIVIL APPLN NO. NAI 246 OF 2008** stated:

When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are

not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

14. Has the applicant satisfactorily explained the reason for the delay in lodging the appeal? It has been argued on behalf of the applicant that the applicant appointed the firm of M/s Karanja - Mbugua & Company Advocates to follow up on the typed proceedings to ensure that the appeal was filed timeously. However, according to applicant, the said firm failed to do so. From the record it is clear that the advocates on record for the applicant's requested for typed proceedings on **29th September 2010** and thereafter there is no evidence that any action to follow up on the proceedings was taken. It is also clear from the record that the typed proceedings were ready for collection by **22nd May 2014**. That notwithstanding, there is no record that any steps were taken to file the memorandum and record of appeal, prompting the 5th to 31st defendants to apply to have the applicant's notice of appeal marked as withdrawn.

15. The applicant indicates that failure to file his appeal on time was as a result of the mistakes of his previous Advocates. I note that the applicant has not adduced any evidence of any step that he took in following up on his appeal. As pointed out by the advocates for the respondents, there is no letter from the applicant to his then advocates inquiring on the progress of the filing of the appeal or any other supporting evidence. I also note that this application was filed over two (2) months after the applicant's notice of appeal was deemed as withdrawn by this Court in its ruling dated 14th April, 2016. In the circumstances, I find that the reason advanced by the applicant as the reason for the delay in filing the appeal is not excusable.

16. In conclusion, I find that there are no special circumstances demonstrated by the applicant for me to exercise my discretion in his favour. The result is that I dismiss the Notice of Motion dated **20th June, 2016**, with costs to the respondents.

Dated and delivered at Nakuru this 27th day of April, 2017.

J. MOHAMMED

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JUDGE OF APPEAL

This is to certify that this is a true copy of the original.

DEPUTY REGISTRAR