



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, JA (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 119 OF 2017**

**BETWEEN**

**ALI MOHAMED MWANZIA .....APPLICANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED .....RESPONDENT**

*(Being an application for leave to file the Notice and Record of appeal out of time and for stay of Execution of a Decree in an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Koome, J.) dated 12<sup>th</sup> March, 2010*

*in*

*H.C. Civil Case No. 1705 of 1997)*

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**RULING**

This is a second attempt by the applicant (**ALI MOHAMED MWANZIA**) to file an appeal in the suit herein out of time. Judgment was entered against the applicant in HCCC No. 1705 of 1997 on 26<sup>th</sup> June, 2008. On 11<sup>th</sup> November, 2009, he moved the High Court for orders of setting aside the said judgment. That application was heard by Koome, J (as she then was), who in a reasoned ruling rendered on 12<sup>th</sup> March, 2010 dismissed it with costs. Aggrieved with the decision, the applicant moved to this Court by way of a Notice of Appeal dated 25<sup>th</sup> March, 2010. He did not however follow up with filing the record of appeal within the prescribed time. He filed an application dated 16<sup>th</sup> August, 2010 seeking leave of the court to file the record out of time. The application was allowed and leave was granted on 7<sup>th</sup> December, 2010, but on condition that the appeal be filed within 30 days of date of delivery of the ruling.

This order was not complied with, but the applicant filed the appeal in question almost five years later on 7<sup>th</sup> April, 2015 without any extension of time of the previous order. The competence of the appeal was challenged by National Bank of Kenya Limited (the respondent), which challenge was upheld and the appeal was struck out by the court in a Ruling dated 19<sup>th</sup> May, 2017. In that Ruling, the Court citing the single Judge (Bosire Ag. J. A, as he then was) alluded to the fact that a party whose appeal has been struck out could restart his appeal journey.

The applicant came back to Court on 29<sup>th</sup> May, 2017 by way of this motion on notice seeking *inter alia*, orders for extension of time to appeal against the Ruling of Koome, J.A (as she then was). The grounds on the face of his application are silent on the reasons for the delay and only says that he risks being committed to civil jail if his appeal is not heard. In his affidavit in support, sworn on 29<sup>th</sup> May, 2017, he only makes reference to the delay between the Ruling of this Court dismissing this appeal and the filing of this application. Mr. Jackson Omwenga, learned counsel appearing for the applicant told the court that he was relying on the applicant's affidavit and did not give the history of this matter either. He urged the Court to go through the record, as I have done, and grant the orders sought.

On his part, Mr. Odhiambo learned counsel for the respondent, opposed the application on points of law. He posited that this Court is *functus officio* as a similar application to extend time had already been heard and allowed. The same had lapsed after the applicant failed to comply with it. His submission was that rather than file a fresh application, the applicant should have asked the Court to extend time in the earlier application. He urged me to dismiss this application with costs. I have carefully considered the application, the affidavit in support, and submissions of counsel. I note that this is the second time the applicant is making a similar application. When he was given time to file the record out of time he failed to comply with the Court order and instead went to Court almost 5 years later without leave, and filed the appeal which this Court struck out upon application by the respondent.

Extension of time under **Rule 4** of the Rules of this Court is a discretionary remedy. For that reason, the Court has to consider several things before exercising its discretion in favour of a litigant in deciding whether or not to extend time. In **Mwangi -v- Kenya Airways Limited**, [2003] KLR 486 at page 487, this Court stated of this discretion and the manner it ought to be exercised as follows:-

***“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in, Leo Sila Mutiso -v- Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 (unreported), the court expressed itself thus:-***

***'It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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'.***

***These in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.***

The litigant must be deserving of the favourable discretion of the Court. Has the applicant earned that favour? I don't think so. He may argue that this is a different application altogether and the Court should not consider his conduct in the earlier application. In my view however, the appellant was guilty of laches then. He was indolent and did not offer any explanation for that conduct. It is a fact that cannot be swept under the rug. I also agree with learned counsel for the respondent that the applicant ought to have gone to the Court based on the earlier order and asked for extension of the same before filing the record of appeal that was struck out. He knew however that he was late for almost five years and could not explain why. In my view, this application must be considered holistically and not in isolation from the earlier proceedings.

The applicant moved the Court before; the Court exercised its discretion in his favour; he abused that

discretion; he comes back to the same Court without caring to offer any explanation for his previous conduct and in my view, he is clearly undeserving of the favourable exercise of this Court's discretion. This in my view is abuse of the process of the Court and should not be condoned.

In the circumstances, for the foregoing reasons, I find this application devoid of merit and dismiss the same with no orders as to costs.

***Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2017.***

**W. KARANJA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**