



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 43 OF 2015

BETWEEN

MWATHI KABA..... 1ST APPLICANT

JUSTIN MURIUKI2ND APPLICANT

AND

DAVID MURIMI MURIUKI.....1ST RESPONDENT

PETER MURIITHI MURIUKI.....2ND RESPONDENT

(Being an application to strike out a Notice of Appeal from the judgment of the High Court of Kenya at Kerugoya (Olao, J) dated 1st October, 2014

IN

ELC No. 204 OF 2013)

RULING

By their Motion dated 1st October 2015, brought under **Rule 4** of the **Court of Appeal Rules 2010**, the applicants seek a single prayer;

“THAT the court do grant an extension of time to the applicants to file and serve the Notice of appeal, Memorandum of appeal and a record of appeal, and the Notice of Appeal dated 18th October 2013 and served on 31st October 2013 be deemed as properly filed and served.”

The Motion is said to be based on the grounds appearing on its face to the effect that, the applicants immediately instructed their counsel to apply for proceedings and to file a notice of appeal but he filed the notice on 23rd October 2013, and that they have a strong appeal with chances of success. It was supported by the affidavit of Mwathi Kaba sworn on 1st October 2015 in which he swore that on 4th October 2013 a letter was written seeking copies of the proceedings and a deposit of Ksh.1,500 paid to court for that purpose. The Notice of appeal was filed on 18th October 2013 and was duly served on the respondents’ advocates who filed a Notice of address of service endorsed by the Deputy Registrar of this

Court on 14th November 2013. The proceedings were supplied to the applicants' previous advocates on 15th July 2015.

The respondents opposed the motion by way of an affidavit sworn by DAVID MURIMI MURIUKI on 3rd December 2015. He averred that the applicants filed their notice of appeal on 18th October outside the 14 days within which they should have filed it. He swore further that his advocate filed an application on 2nd December 2013 seeking to strike out the notice of appeal for being filed out of time but the application was struck out on 12th March 2014 due to the respondents non-attendance. An application to reinstate that application was again dismissed on 4th November 2014. All this while, the applicants did not seek to regularize their notice of appeal and the respondents contended that the applicants are guilty of inordinate and unexplained delay in attempting to regularize the notice of appeal. They suggested that the application is a belated attempt to delay the respondents' enjoyment of the fruits of their judgment prompted by the respondents' move to execute the judgment.

At the hearing of the Motion before me, learned counsel **Mr. Kagio** appeared for the applicants and relied on the affidavit aforesaid. In answer to my question why the Notice of Appeal was filed late, counsel's reply was that he did not know why his predecessor delayed. He explained his own failure to apply for regularization sooner on the fact that he could not file for extension of time before first coming on record for the applicants at the High Court. He urged that the application had a good appeal and asked me to apply **Article 159** of the Constitution to do substantive justice notwithstanding the lapses.

Learned counsel, **Mrs. Munene** for the respondents asserted that the applicants had not explained the delay they were guilty of. They were aware of the defects in their notice of appeal way back in 2013 when they were served with the strike out application and later with an application to reinstate it. Counsel submitted that an advocate has full authority to act for his client and urged that it was not enough to merely blame the erstwhile advocate. She reiterated that the application before Court was a mere afterthought and would further prejudice the respondents who have waited for more than 2 years to enjoy the fruits of their success. Counsel cited in aid the case of **B.O.G. HIGHWAY SEC. SCHOOL –VS- WILLIAM M'MOSI** [2007] e KLR which Mr. Kagio in turn sought to distinguish.

A single Judge's consideration of an application under Rule 4 of the Court of Appeal Rules seeking to extend time is at his discretion which is free and unfettered. It is not a rogue discretion to be exercised capriciously but rather a judicial one, to be exercised upon sound principle. It has been held by various Judges and benches of this Court that some of the issues a single Judge considers include;

- a. length of delay
- b. the cause of the delay
- c. (possibly) the merits of the intended appeal
- d. the degree of prejudice (if any) likely to be suffered by the respondents.

See, **MWANGI –VS- KENYA AIRWAYS** [2003] KLR 486.

Those considerations are merely indicative and are not exhaustive. Each case must be considered on its own merits the discretion being unfettered and the aim being always to do justice between the parties.

I have anxiously considered this application with the foregoing principles in mind. The initial delay in filing the notice of appeal was of about 8 days. It should have been filed within 14 days which ended on 15th October 2013, but was filed after 22 days on 23rd October 2013. Even though that delay appears to be a relatively short one, there is not a word of explanation given for it. To me, this appears to be symptomatic of an attitude of indifference and presumption. The applicants appear content to merely state, without more, that they gave their then advocate instructions for prompt filing of the notice of appeal but it was filed late. That to me does not sound like an explanation. And without some kind of explanation I do not see how I can exercise discretion in favour of the applicants. I am bereft of material on which to exercise it.

Even had I been somehow minded to overlook that paucity, nay, absence of explanation, I think that avenue is totally shut out to me by the applicants' subsequent conduct. Having their notice of appeal late (and it is not lost to me that in both the grounds and the affidavit, they seem to focus on the date they gave it of 18th October 2013 as opposed to the day they lodged it, being 23rd October 2013, which questions their condour) they did not file this Motion to regularize it until 2nd October 2015. That was three weeks shy of two years later.

This latter delay is without doubt inordinate. The inaction for nearly two years is not at all explained. This is compounded by the fact, clear from the record and undenied, that the applicants were aware of the infirmity of their notice of appeal from as early as December 2013 when the respondents applied to strike it out. They were reminded of it when in March 2014 the respondents filed an application to restore their December 2013 one, which had been dismissed for non-attendance.

In short, the applicants have no excuse for their inordinate tardiness and are completely undeserving of my favourable exercise of discretion.

Being of that mind, the Motion is dismissed with costs, to be taxed if not agreed.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR