



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 59 OF 2015

BETWEEN

JOSEPH ONYANGO WANYAMA.....APPLICANT

AND

CHARLES JUMA OLOO.....RESPONDENT

(Application for extension of time to file and serve a Record of Appeal out of time from the Ruling of the High Court at Busia, S.M. Kibunja, J. dated 24th June 2015

in

(Civil Appeal No. 38'A' of 2006)

R U L I N G

By a Notice of Motion dated 18th November 2015, the applicant, **Joseph Onyango Wanyama** has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** to file a Record of Appeal out of time.

The Motion is brought on the grounds that, the Notice of Appeal was filed in time but that the delay in filing the record of appeal was beyond the applicant's control, and that the intended appeal is arguable.

In his supporting affidavit, the applicant contended that once the ruling was delivered, he filed the Notice of Appeal in the stipulated time, and thereafter sought to obtain the proceedings, which were not supplied to him by the High Court. He further stated that the proceedings were supplied to him on 20th October 2015, but that he was unable to file the record of appeal at the Court of Appeal registry, as time for filing had already lapsed. In his submissions before me, he stated that he had written to the registry so as to be supplied with the proceedings, but that he could not remember the date the request was made.

Mr. Namatsi, learned counsel holding brief for Mr. Fwaya for the respondent, opposed the application. It was counsel's submission that the Motion did not provide sufficient particulars upon which this Court could exercise its discretion to extend time under **rule 4**. Counsel argued that the ruling was delivered on 24th June 2015 and this application was filed 5 months later. No letter applying for proceedings or Certificate of Delay was made available to the Court. Counsel concluded that in the absence of these

crucial documents the application should be dismissed.

The application is brought under **rule 4** of this Court’s rules, where it is settled that the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate 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 Court were to grant the extension sought. The case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** these principles were set out thus;

“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.”

The applicant’s complaint in the main, is that the reason for delay in filing the record of appeal was the delay in obtaining the proceedings from the High Court Registry. In his view, this was sufficient explanation for delay, to warrant the grant of extension of time.

Rule 82 of this Court’s rules requires that once an appellant, in this case the applicant, has requested for proceedings from the registry, and served the notification on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant or applicant, which period shall be excluded when computing delay.

The judgment was delivered on 24th June 2015. A Notice of Appeal was filed on 7th July 2015. This application was filed 132 days later. The applicant contends that he requested for the proceedings, of which he subsequently obtained. He did not attach a copy of the letter of request to the application. Without it, I am not able to discern whether it was copied to the respondent, as required by **rule 82**, as this would have enabled me to determine whether time for filing the record of appeal stopped running until such time as the proceedings were supplied to the applicant. Also not attached was a Certificate of Delay which would have computed the time taken by the registry to prepare the proceedings.

As Mr. Namatsi has rightly observed, and I agree with him, there is insufficient information upon which I can rely in order to exercise my discretion to extend time to file the Record of Appeal. In addition, the applicant has not advanced any other reason for delay upon which I can rely. In the circumstances, I am constrained to conclude that the reason for delay has not been satisfactorily explained.

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 to the respondent.

For the reasons above, my hands are tied. I decline to allow the application, and hereby order that the Notice of Motion dated 18th November 2015 be and is hereby dismissed with costs.

DATED and DELIVERED at KISUMU this 29th day of July, 2016.

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR