



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 30 OF 2016**

**BETWEEN**

**GACHANJA MUHORO & SONS LIMITED .....APPLICANT**

**AND**

**TITUS MWALA NDUVA .....RESPONDENT**

*(An application for extension of time to file and serve a Notice of Appeal from the Judgment/Decree of the High Court at Machakos (B.T. Jaden, J.) dated 21<sup>st</sup> December, 2015*

*in*

*H.C. C. A. No. 50 of 2001)*

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**RULING**

By the motion dated 8<sup>th</sup> February 2016 brought under *inter alia*, Rule 4 of the Court of Appeal Rules, the applicant Gachanja Muhoro & Sons Limited prays for an extension of time for filing a notice of appeal and that the one exhibited dated 8<sup>th</sup> and lodged on 10<sup>th</sup> February 2016 be deemed as duly filed. The application is based on two grounds appearing on its face namely;

- a. It is just a fair and such orders will not in any manner prejudice the rights of the respondent.
- b. That the applicant has an arguable appeal with high chances of success.

The motion is supported by the affidavit of Phillip M. Mulwa the applicant's advocate, sworn on 8<sup>th</sup> February 2013. In it he swore that after judgment was rendered on 21<sup>st</sup> December 2015 dismissing the applicant's first appeal, he was unable to advise the client and/or decide whether to file a notice of appeal as they had not read the judgment itself so as to be appraised of the learned judge's reasoning. It was only after the court staff resumed following the Christmas holidays that they were able to get hold of the judgment whereupon they communicated to ICEA Lion General Insurance Company Ltd about the judgment vide a letter dated 22<sup>nd</sup> December 2015. The insurance company did not respond to that letter until 2<sup>nd</sup> February 2016 when they wrote instructing the advocates to lodge an appeal against the judgment. This was long after the 14 days allocated for the lodgment of the notice of appeal had lapsed hence the application for extension of time.

The respondent opposes the motion by a replying affidavit sworn on 2<sup>nd</sup> March 2016. He avers that the orders sought would be in vain as the applicant's notice of appeal was filed in this Court instead of the High Court as ought; the application is an afterthought as the applicant did not need certified copies of proceedings and judgment to file it; the applicant is guilty of laches and the delay in filing the simple document is inordinate and unexplained; no evidence of a strong appeal has been demonstrated; the application is an abuse of process and litigation must come to an end.

Before me at the hearing learned counsel Miss Mulwa appeared for the applicant while Mr. Nzioka her learned counterpart appeared for the respondent. Counsel by way of submissions reiterated and elaborated on their client's respective cases as stated in the affidavits. They cited no cases prompting me to remind them that courts, and certainly this Court, expect at the very minimum that counsel appearing before them cite authorities and learned pronouncements in support of their urgings. All matters are decided on the basis of sound principles and it behoves counsel to exhibit knowledge and mastery of the same through the citation of authorities. Prudence demands that counsel cite authorities which the Court at its discretion may advise not to be in need of rather than be asked to buttress their arguments by judicial authority and have none to show.

Be that as it may, it is indubitable that on a **Rule 4** application, a Judge of this Court is required to exercise a judicial discretion whether or not to enlarge time. The discretion is a wide and unfettered one. It is exercisable on sound principles and not capriciously or in accordance with an individual judge's personal preferences. Some of the matters the judge takes into consideration include, in the main;

- a. The length of delay
- b. The explanation for the delay
- c. (Possibly) the chance of the intended appeal succeeding
- d. The degree of prejudice that grant of the application may cause to the respondent.

See **MWANGI vs. KENYA AIRWAYS LTD** [2003]eKLR 486; **SILA MUTISO vs. ROSE HELLEN WANGARI MWANGI**. Civil Application Nai. 255 of 1998 (unreported).

Each case is decided in accordance with its peculiar facts and all the other considerations that weight on the judicial mind when acting within the discretionary sphere such as the conduct of the parties including the candour displayed by the applicant, are germane.

In the matter before me, I find it quite remarkable that in an attempt to explain the delay in filing a notice of appeal within time, the applicant states that it was *seeking the proceedings and judgment so as to understand the reasoning of the learned Judge*. With respect, and as pointed out by the respondent, a notice of appeal is a simple document, usually a single page long, that just signifies that the intended appellant is dissatisfied with the decision of that particular court and intends to appeal against it. It is in the memorandum of appeal, to be filed much later, that the issue of the grounds of appeal, to be gleaned from the reasoning of the judge, comes into play. I find wholly unconvincing that reason proffered by the applicant for not filing the notice of appeal. If anything, it is a matter of prudent caution for counsel to immediately file a notice of appeal safe in the knowledge that it can always be withdrawn at minimal cost and trouble should it turn out that the impugned decision cannot with any degree of confidence be assailed on appeal.

The other reason that appears to be given for the delay is that the instructing client, ICEA Lion of Kenya Insurance Company Limited, took long to confirm instructions for the filing of the notice. As I have already stated, such instructions were not needed for the filing. Even assuming that they were, the applicant's case is that the said client took more than a month before giving the instructions to the advocate. That therefore places the delay squarely at the feet of the client and no explanation has come from that client for not acting sooner.

Without explanation being given, I am left at a barren place where I cannot possibly extend time. Delay no matter how short must be explained. It is the explanation that provides the material that unlocks the stream of discretion in an applicant's favour. Without it, a judge would be acting on a whim, out of sympathy or on the basis of a hunch. That would be voodoo witchcraft or divination and not judicial discretion.

I am led to the inescapable conclusion that the application before me is a mere afterthought, an attempt to throw the dice one more time in the hope of obtaining the favourable outcome that has twice eluded the applicant. It ought to have acted diligently but failed to do so.

I find no merit in the application and accordingly dismiss it with costs.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of October, 2016.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**