



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GATEMBU (IN CHAMBERS))**

**CIVIL APPLICATION NO. 52 OF 2016 (UR 29/2016)**

**BETWEEN**

**MARK OYUGI KASERA .....APPLICANT**

**AND**

**JUBILEE JUMBO HARDWARE LTD....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**(An application for extension of time to file and serve the Record of appeal and supplementary Record of Appeal arising from the Judgment of the High Court of Kenya at Kisumu (E. N. Maina, J.) dated 23<sup>rd</sup> July, 2015**

**in**

**HCCA NO. 89 OF 2013)**

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**RULING**

1. In his application dated 12<sup>th</sup> July 2016 and filed on 14<sup>th</sup> July 2016, the applicant Mark Oyugi Kasera seeks leave to file a record of appeal and supplementary record of appeal out of time and for the record of appeal and supplementary record of appeal filed on 29<sup>th</sup> March 2016 and 20<sup>th</sup> May 2016 respectively to be deemed as duly filed.

**Background**

2. The background to the application, briefly, is that the applicant was an employee of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent made a complaint to the police that the applicant had failed to deliver to the 1<sup>st</sup> respondent, a sum of Kshs. 200,000.00 that had been entrusted to him by the 1<sup>st</sup> respondent's customer. As a result of that complaint, the applicant was charged and tried for the offence of theft by servant. The court found that there was no conclusive evidence that the money had been given to applicant and acquitted him under Section 210 of the Criminal Procedure Code.

3. Following the acquittal, the applicant successfully sued the respondents before Magistrate's Court at

Kisumu in Civil Case No. 450 of 2010 for malicious prosecution. He was awarded general damages of Kshs. 600,000.00 and special damages of Kshs.50,000.00 in a judgment given by that court on 10<sup>th</sup> October 2013.

4. The 1<sup>st</sup> respondent was dissatisfied with that judgment. It successfully appealed to the High Court at Kisumu in Civil Appeal No. 89 of 2013. In a judgment delivered on 23<sup>rd</sup> July 2015, the High Court (E. N. Maina, J.) allowed the appeal and set aside the judgment of the subordinate court on the basis that the ingredients of malicious prosecution had not been established and that the prosecution had reasonable and probable cause for having prosecuted the applicant.

5. The applicant was dissatisfied with the judgment of the High Court. On 7<sup>th</sup> August 2015, he filed a notice of appeal dated 24<sup>th</sup> July 2015 at the High Court in Kisumu pursuant to Rule 74 of the Rules of the Court. He did not however file a record of appeal until 29<sup>th</sup> March 2016, which is outside the time prescribed under the Rules.

6. On 12<sup>th</sup> April 2016, the 1<sup>st</sup> respondent applied to strike out the appeal. I understand that application is pending hearing and determination before the Court.

7. On 20<sup>th</sup> May 2016, the applicant filed a supplementary record of appeal containing a certificate of delay issued by High Court on 19<sup>th</sup> May 2016 certifying that the applicant “applied for certified Judgment... on the 18<sup>th</sup> August 2015 but the said copies were not ready for certification and collection until the 1/3/16”

8. It is against that background that the applicant seeks, as already indicated, an extension of time for the record of appeal and supplementary record of appeal filed out of time to be deemed as duly filed.

#### **The application and submissions by counsel**

9. At the hearing of the application before me, learned counsel for the applicant Mr. Emukule referred to the grounds appearing on the face of the motion and the supporting affidavit and submitted that the notice of appeal was filed and served on time; that the advocates for the applicant applied for certified copies of the proceedings which were received on 9<sup>th</sup> March 2016; that on 29<sup>th</sup> March 2016 the applicant filed the record of appeal; that the applicant’s advocates then prepared a certificate of delay and lodged the same for signature by the Deputy Registrar of the High Court; that the Deputy Registrar delayed signing the same until 19<sup>th</sup> May 2016; that on account of that delay the applicant was in the meanwhile constrained to file the record of appeal without the certificate of delay; that on obtaining the certificate of delay on 19<sup>th</sup> May 2016, the applicant lodged a supplementary record of appeal containing the certificate of delay on 20<sup>th</sup> May 2016.

10. According to counsel, the certificate of delay confirms that the applicant applied for certified copies of the judgment on 18<sup>th</sup> August 2015, some 8 days after filing the notice of appeal. Counsel concluded by submitting the delay was occasioned wholly by the court in that it did not furnish the certified judgment in time and also because the Deputy Registrar did not sign the certificate of delay promptly.

11. The application was strenuously opposed by Mr. P. D. Onyango learned counsel for the 1<sup>st</sup> respondent. Referring to the replying affidavit sworn by a director of the 1<sup>st</sup> respondent Rakesh M. Patel in opposition to the application, counsel submitted that there is no evidence whatsoever that the applicant ever applied for copies of the proceedings and the judgment after the delivery of the judgment by the High Court; that the certificate of delay contained in the applicant’s supplementary record of appeal is an afterthought having been prepared on 19<sup>th</sup> May 2016 after the 1<sup>st</sup> respondent had moved the court to strike out the applicant’s appeal by its application filed on 20<sup>th</sup> April 2016; that in the absence of a letter requesting for proceedings from the court, the certificate of delay cannot be relied upon.

12. According to Mr. Onyango, the delay in filing the record of appeal, the supplementary record of appeal and indeed the present application which was not filed until 14<sup>th</sup> July 2016 is inordinate, deliberate and has not been satisfactorily explained.

13. Learned counsel for the 2<sup>nd</sup> respondent, Mr. S. O. Nyauma, stated that the 2<sup>nd</sup> respondent did not wish to take a position on the applicant's application and left the matter to the Court.

14. I have considered the application, the affidavits and the submissions by learned counsel. Rule 4 of the Court of Appeal Rules, 2010 provides that:

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

15. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

16. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** Waki JA stated:

***“The exercise of this Court’s discretion under Rule 4... 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: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”***

17. Applying those principles to the present application, the Judgment of the High Court the applicant intends to appeal against was, as already noted, and delivered on 23<sup>rd</sup> July 2015. The notice of appeal was filed on 7/8/2015.

18. Under rule 82(1) of the rules of the Court, the applicant was required to have instituted the appeal by lodging the record of appeal within 60 days of the date when the notice of appeal was lodged. The proviso to that rule provides that in computing time, any time certified as required for the preparation of typed proceedings is to be excluded.

19. Under Rule 82(2) of the Rules of the Court, an applicant cannot however benefit from that proviso “unless his application [for a copy of the proceedings] was in writing and a copy of it was served upon the respondent.”

20. What then is the delay involved in this case? The judgment the applicant intends to appeal against was delivered on 23<sup>rd</sup> July 2015. Under Rule 75(2) of the Rules, the notice of appeal should have been lodged within 14 days of that decision which means it should have been lodged by 6<sup>th</sup> August 2015 at the latest. It was lodged a day late on 7<sup>th</sup> August 2015. The respondents have not taken issue with that.

21. The record of appeal should have been lodged within 60 days of the date when the notice of appeal was lodged. The notice of appeal having been lodged on 7<sup>th</sup> August 2015, the record of appeal should have been lodged by 6<sup>th</sup> October 2015.

22. In his affidavit in support of the application, the applicant deposes that “my advocates then applied for certified copies of proceedings but the same were only availed to my advocates on 9/3/2016...” He does not say when the application for proceedings was made. The letter applying for the proceedings, if any, was not exhibited. The advocate for the applicant, Geoffrey O. Yogo, in his affidavit sworn herein on 12<sup>th</sup> July 2016 deposed that “the applicant herein was aggrieved by the said judgment and applied for proceedings and also filed notice of appeal.” He did not also exhibit the application for proceedings.

23. Quite apart from the fact that the letter applying for a copy of the proceedings was not exhibited, the 1<sup>st</sup> respondent says there is no evidence of any such application having been made and that if indeed such application exists, it was never served or a copy thereof given to the 1<sup>st</sup> respondent. It is noteworthy that a certificate of delay does not make an appearance until after the 1<sup>st</sup> respondent had applied to strike out the applicant’s appeal.

24. Absent evidence of an application bespeaking proceedings, and although the applicant says that the proceedings became ready for collection on 9<sup>th</sup> March 2016, one would have expected to see the notification letter from the court inviting the applicant to pay for and collect the typed proceedings and perhaps also evidence of payment for proceedings. In the absence of a copy of the application, such material would have supported the applicant’s assertion that there was indeed an application bespeaking proceedings.

25. It seems to me therefore that in these circumstances, the applicant cannot have the benefit of the proviso to Rule 82(2) of the Rules of the Court which provides that an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

26. The other matter that has troubled me is the delay in presenting this application. If indeed the applicant obtained proceedings on 9<sup>th</sup> March 2016 and the certificate of delay on 19<sup>th</sup> May 2016, why was the present application not filed until 14<sup>th</sup> July 2016? Given that the certificate of delay exhibited bears the date of issue as 19<sup>th</sup> May 2016, there is a delay of almost 2 months (55 days to be exact) that is not explained. I agree with counsel for the 1<sup>st</sup> respondent that that delay is inordinate.

27. A party seeking the exercise of discretion in his favour in an application such as this, must provide the court with material on the basis of which to exercise such discretion.

28. As to the chances of the appeal succeeding, perhaps the less I say the better. I note however that the matter commenced before the Magistrate’s court in 2010 and a second appeal to this Court would be confined to points of law.

29. In the foregoing circumstances, I am unable to exercise my discretion in favour of the applicant. I therefore reject the application. The same is dismissed with costs to the 1<sup>st</sup> respondent.

Orders accordingly.

**Dated and delivered at Kisumu this 18<sup>th</sup> day of November, 2016**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

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**DEPUTY REGISTRAR**