



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 12 OF 2016

BETWEEN

HEZRON ALLOYS NYACHAE.....APPLICANT

AND

JAMES OBIRI OENGA.....1ST RESPONDENT

JOHN MURARO.....2ND 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 Eldoret, G.K. Kimondo, J. dated 1st October 2015

in

HCCA No. 114 of 2012)

RULING

The applicant, **Hezron Alloys Nyachae** has applied for time to be extended to file and serve a Notice and a Record of Appeal under **Rule 4** of the **Court of Appeal Rules 2010**.

Before I deal with the application for extension, a brief background of the case would be of necessity. Though the record is scanty, I have been able to discern that the trial court entered judgment against the applicant on 26th October 2012 for the torts of false imprisonment and malicious prosecution. Each of the plaintiffs, the respondents herein, was awarded Kshs 30,000/- for wrongful arrest; Kshs 30,000/- for false imprisonment; Kshs. 200,000/- for malicious prosecution and Kshs 50,000/- in special damages. The applicant appealed against the decision in the High Court but failed to fix the appeal for hearing. This prompted the respondents to file an application for its dismissal. The High Court found in favour of the respondents and dismissed the appeal on 1st October 2015.

The applicant was aggrieved and sought to file an appeal in this Court against the decision of the High Court, but the period for filing the appeal lapsed.

By a Notice of Motion dated 9th February 2016, supported by an affidavit of the applicant sworn on the same date, the applicant sought to have time extended to file the appeal on the grounds that following the

decision of the High Court of 1st October 2015 the notice of appeal was filed on time; that though the proceedings were ready by 24th November 2015 the applicant only learnt of this on 10th December 2015; that by this time, the period to lodge the appeal had already lapsed; that thereafter the applicant's advocate proceeded on leave and it was after he resumed his duties that this application was filed on 9th February 2016.

Learned counsel for the applicant, **Mr. Momanyi** submitted that the appeal was arguable because, it was wrong for the court to dismiss the appeal in the High Court since the applicant had already filed and served the record of appeal. Furthermore, **Order 42 rule 12** of the **Civil Procedure Code**, made it a requirement for the court to notify the applicant that the appeal had been admitted for hearing. Counsel argued that since the Deputy Registrar had not issued any such notice, the applicant was not aware that the appeal was fixed for hearing.

Counsel further argued that **Order 42 rule 13** contemplates that an appeal can only be set down for hearing 3 months after directions have been taken, but this provision was not applied in the applicant's case.

With respect to the delay, counsel submitted that the proceedings were obtained after the period for filing the appeal had already lapsed; that the proceedings were obtained on 10th December 2015, and that since his counsel was proceeding on vacation, this application could not be filed until after his return.

Counsel concluded by submitting that there would be no prejudice suffered by the respondents, as they were at all times aware that the applicant intended to pursue his appeal.

Mr. Shivega, learned counsel for the respondents opposed the application. Relying on the replying affidavit of the 1st respondent, counsel submitted that the delay was inordinate as the proceedings were ready on 24th November 2015. For no explained reason, the proceedings were not collected until 10th December 2015. Counsel submitted that further delay was then occasioned when the applicant filed the instant application on 9th February 2016, which was two month after the proceedings were obtained. The only reason proffered for the delay was that the applicant's advocate had proceeded on vacation, which in counsel's view was not a satisfactory explanation, given the circumstances of the case.

Counsel further submitted that this Court was not in a position to determine the probability of success of the appeal as the record was incomplete, and the applicant had not annexed a draft Memorandum of Appeal. It was further argued that, the respondents would be prejudiced by a grant of extension of time as, since the judgment in the trial court was delivered on 26th October 2012, they have been denied the fruits of the judgment.

Under **Rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically having regard to the guiding principles, including 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 extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** – **Civil Application No. Nai 251 of 1997** where the Court stated;

“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 crux of the applicant's complaint is that firstly, he was not notified by the registry that the proceedings were ready, and therefore the cause of the delay in filing the appeal must lie with the registry, and further, that his advocate, Mr. Momanyi who was to prepare the application for extension of time proceeded on vacation prior to filing it.

The ruling was delivered on 1st October 2015. The Notice of Appeal, and the request for the certified ruling and proceedings was lodged and served on 2nd October 2015. The applicant says that he received the proceedings on 10th December 2015, and there is no dispute between the parties that the proceedings were actually ready on 24th November 2015. I have not seen a certificate of delay specifying the period (if any) that it took to prepare the proceedings. Therefore, from the date of filing the Notice of Appeal, the applicant had 60 days within which to file the Record of Appeal, which period would have lapsed on 2nd December 2015. That date to the date of this application can be computed as 71 days delay.

Has sufficient reason been enlisted to explain this delay? The proceedings were ready for collection on 24th November 2015. They were not collected until 10th December 2015. It will be borne in mind that the filing of an appeal is at the instance of an aggrieved party. Therefore it is incumbent upon an appellant to assiduously pursue the proceedings so as to ensure that the appeal is filed in accordance with the rules of this Court.

That said, though it seems the registry did not inform the applicant that the proceedings were ready for collection, I can find no letters or evidence of regular visits to the registry to show that the applicant anxiously followed up on the proceedings. There is also no Certificate of Delay produced to explain how much time it took to prepare the proceedings which would enable this period be excluded from the computation of delay.

This laxity is further compounded by the fact that after the proceedings were obtained, the applicant's counsel is alleged to have proceeded on vacation instead of urgently lodging this application. It will be appreciated that this Court's rules are prescriptive in the manner an appeal ought to be filed. Various steps require to be taken within specific and stipulated timeframes. Given that the period for filing the appeal had already lapsed, prudence would have demanded that the application be filed as a matter of urgency.

But having said that, I would have been prepared to accept this reason if, by way of an affidavit, the applicant's advocate had taken responsibility for the delay in filing the application, and explained why it was not filed until 9th February 2016.

In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98, the Court stated thus:

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

Accordingly, I find that the delay has not been explained to my satisfaction, since no viable reason has been proffered to explain the over two month's delay.

Regarding the question of whether the appeal is arguable with, chances of success, I have been through the record, and observe that no draft memorandum of appeal was annexed that would have enabled me determine whether on its face, the appeal was arguable. Similarly, though it was deponed that the certified proceedings were supplied, these were not annexed to the application. Without the arguments or submissions of counsel before the High Court, I find that I have not been placed in a position to make an informed decision on the probability of success of the appeal.

It is not lost on me that this application is to extend time for filing of an appeal in this Court against a ruling of the High Court that dismissed the applicant's appeal for failure to prosecute the appeal in that court. The appeal in the High Court arose from a decision of the trial court delivered on 26th October 2012. Since then, the respondents have been waiting to access the outcome of trial court's decision. On account of the unprosecuted appeal in the High Court, and the missteps in filing the intended appeal in

this Court, it is evident to me that, the respondents have suffered prejudice, and will continue to do so were I to extend time to file this appeal.

For the reasons above, I decline to allow the application, and hereby order that the Notice of Motion dated 9th February 2016 be and is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Eldoret this 25th day of November, 2016.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR