



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 237 OF 2014

BETWEEN

BETH MUGURE GATHUNGU

APPLICANT

AND

JAMES MUCHIRI GATHUNGU

TITUS WAITHAKA GATHUNGU

ISAAC MACHARIA GATHUNGU

RESPONDENTS

(Being an application for extension of time to file the record of appeal in the intended appeal from the ruling of the High Court of Kenya at Nairobi (Rawal, J) delivered on 17th November, 2009

in

HC SUCC Cause No. 2357 OF 1995)

RULING

This is an application by way of Notice of Motion application dated 10th September, 2014, brought pursuant to **Rule 4 of the Court of Appeal Rules** (the Rules). The applicant seeks the following orders:

- 1. That this Honourable Court be pleased to grant an extension of time within which to lodge a Record of Appeal.*
- 2. The costs of and incidental to this application abide the result of the Appeal.*

The grounds upon which the applicant relies on in support of her application are that the impugned ruling was delivered on 17th November, 2009; that the Notice of Appeal was timeously filed on 23rd November, 2009; that she was unable to file her appeal on time due to her poor health and the death of her eldest son; that she has a good and meritorious appeal and that the delay in filing the Memorandum and Record of Appeal is not inordinate in the circumstances of this case.

At the hearing of the application, Mr Z N Gathara, learned counsel for the applicant, submitted that the applicant seeks an extension of time within which to file the record of appeal out of time. Counsel submitted that the applicant filed a notice of appeal timeously on 23rd November, 2009; that the applicant is aged 85 years and the main reason for the delay in filing the record of appeal is that subsequent to the filing of the notice of appeal, the applicant was taken ill and was admitted in hospital for lengthy periods of time and her two sons subsequently fell ill and the eldest one succumbed to his illness in November, 2012.

Counsel submitted that since the filing of the notice of appeal, the applicant's illness and subsequent passing on of her son affected her mentally and she was unable to instruct her lawyers to prepare and file the Record of Appeal within time. Counsel submitted that there are many authorities to the effect that each case should be considered on its own special facts and circumstances. Counsel urged that the special circumstances in this case dictate that time be enlarged to allow the applicant to file her Record of Appeal within 30 days. Counsel opined that the respondents will not suffer any prejudice should this application be allowed.

Mr Kimondo Mubea, learned counsel for the 2nd and 3rd respondents in opposing the application, stated that they rely entirely on the replying affidavit of the 3rd respondent sworn and filed on 24th October, 2014 and a reply to the applicant's supplementary affidavit sworn and filed on 12th November, 2014.

Counsel argued that the applicant is guilty of inordinate delay which has not been satisfactorily explained. That the impugned ruling was delivered on the 17th November, 2009, the Notice of Appeal was filed on the 23rd November, 2009 but no letter bespeaking proceedings has been copied to the respondents as required under **Rule 82**. Mr Kimondo submitted that the applicant should have filed her record of appeal within sixty [60] days that is by 31st January, 2010. That the delay in filing the Record of Appeal spans from 31st January, 2010 to 17th September, 2014, when this application was filed. In counsel's view, a delay of 4 years 7 months is inordinate and the same has not satisfactorily been explained.

Counsel submitted that no plausible explanation for the delay has been placed before the court to enable it exercise its discretion in favour of the applicant.

I have considered the application, the affidavits on record, list of authorities and submissions by counsel and the law. The discretion that I am being called upon to exercise in this application is under **Rule 4 of the Rules** which provides:

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

The principles guiding the court on an application for extension of time premised upon **rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameter for the exercise of such discretion are clear. See **MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR)**, **MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486** and **FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332/04 (Unreported)** where this court rendered itself thus:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it 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.”

The matter to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In MWANGI V KENYA AIRWAYS LTD, (*Supra*) the court having set out matters which a single judge should take into account when exercising the discretion under **Rule 4**, it held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

I note that the impugned ruling was rendered on 17th November, 2009 and that this application was filed on 17th November, 2014. There was therefore a delay of 4 years and 7 months. I also note that the applicant, though ailing, was at all times represented by counsel.

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/S. PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in MONICA MALEL & ANOR V R. ELDORET CIVIL APPLN NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

It should not be supposed that the discretion is entirely unfettered as **Lord Romilly MR** explained in HAYWOOD V COPE, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.

So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

In conclusion, I find that there are no special circumstances demonstrated by the applicant for me to exercise my discretion in her favour.

The result is that I dismiss the Notice of Motion application dated 10th September, 2014, with costs to the respondent.

Dated and delivered at Nairobi this 30th day of January, 2015.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR