



Mwangi & 2 others (Suing on their own behalf and on behalf of Twendane Company Limited) v Kanyamwi Trading Company Limited (Civil Application 287 of 2014) [2015] KECA 967 (KLR) (30 January 2015) (Ruling)

Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR

Neutral citation: [2015] KECA 967 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 287 OF 2014**

**J MOHAMMED, JA
JANUARY 30, 2015**

BETWEEN

**STANLEY KAHORO MWANGI 1ST APPLICANT
TIMOTHY NJOROGE 2ND APPLICANT
JOSEPH MWANGI 3RD APPLICANT
SUING ON THEIR OWN BEHALF AND ON BEHALF OF TWENDANE
COMPANY LIMITED**

AND

KANYAMWI TRADING COMPANY LIMITED RESPONDENT

(An application for orders granting leave to file appeal out of time from the ruling of the High Court of Kenya at Nakuru (Waitbaka, J) dated 20th June, 2014 in ELC NO. 113 of 2012)

RULING

1. This is an application by way of Notice of Motion application dated 9th October, 2014, brought pursuant to Rules 42 and 43(1) Rules 82 & 4 of the Court of Appeal Rules (the Rules) and Section 3A of the Civil Procedure Act. The applicant seeks the following orders:

- “1. ...
2. The Honourable Court be pleased to grant the applicant leave to file its Memorandum and Record of Appeal out of the stipulated time.



3. The notice of Appeal dated 18th July, 2014 and lodged at the High Court Registry on the 21st July, 2014 be deemed as duly filed.
4. The costs of the application be provided for.”
2. The grounds upon which it relies on in support of its application are that being dissatisfied with the ruling of the High Court, [Waithaka, J] dated 20th June, 2014 the applicants filed a notice of appeal dated 18th July, 2014; that the said notice of appeal was filed after the stipulated fourteen [14] days’ period; that the applicants through their advocates made an application to be supplied with a copy of the typed proceedings in the matter to enable them file their appeal but the typed proceedings have not yet been availed; that the time for filing a memorandum and record of appeal has lapsed pending receipt of a copy of the typed proceedings; that the delay was not occasioned by indolence on the part of the applicants but circumstances beyond their control and therefore it is in the interest of justice that the application be allowed.
3. At the hearing of the application Mr Kibet, learned counsel for the applicants, appeared while there was no appearance for the respondent though the record indicates that they were served with the hearing notice. Mr Kibet submitted that the applicant seeks extension of time to file the memorandum and record of appeal out of time; that the applicant also seeks to have the notice of appeal filed on 21st July, 2014, deemed as properly filed. Counsel submitted that the reason for the notice of appeal being filed out of time was brought out by the fact that it took time for members of the applicant company to instruct a lawyer to file the notice of appeal. Counsel submitted that the delay of twenty eight [28] days is not inordinate and is excusable in the circumstances of this case. Counsel further submitted that no prejudice will be occasioned to the respondent if the present application is allowed; that in view of the fact that this matter relates to a land dispute, it is only fair and just that the applicants are allowed to exercise their right of appeal. Counsel urged the single judge to allow the application.
4. I have considered the application, the affidavits on record, submissions by counsel for the applicant 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:
5. 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.”
6. 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.
7. The parameters 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 OF 2004 (unreported) where this court rendered itself thus:
8. 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.”

9. 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, 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.”

10. This application is dependent on whether or not the delay can be viewed as being an exceptional one. The intended appeal herein is in respect of the decision of the High Court delivered on 20th June 2014. The applicant lodged a notice of appeal out of time on 21st July, 2014. The applicant under Rule 75 of the Rules was required to lodge the notice of appeal within fourteen [14] days from the date of delivery of the impugned ruling. The applicant was required to file the notice of appeal by 4th July, 2014.

11. 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 Portreiz 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.”

12. 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.”



13. The delay in filing the notice of appeal has, in my view, been adequately explained by the applicant in the circumstances of this case. I am, therefore, inclined to exercise my discretion in the applicants favour as no substantial prejudice will be occasioned by the respondent. Accordingly, I make the following orders:

1. That the Notice Appeal dated July 18, 2014 and lodged at the High Court registry on July 21, 2014 be deemed as duly filed.
2. The applicant shall file its Memorandum and Record of Appeal within 60 days of the issuance of the Certificate of Delay.
3. Costs of this application to the respondents.

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

