



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI 296 OF 2014**

**BETWEEN**

**SIMON NGATA KARIUKI..... APPLICANT**

**AND**

**DANIEL KAMAU NDEHI .....RESPONDENT**

**(An application for extension of time within which to lodge an appeal and file & serve the notice of appeal arising from the judgment of the**

**High Court of Kenya at Nairobi (Mabeya, J) dated 15<sup>th</sup> July, 2014**

**in**

**HCCC NO. 1685 OF 2001[OS])**

**\*\*\*\*\***

**RULING**

This is an application by way of Notice of Motion application dated 7<sup>th</sup> November, 2014 brought pursuant to **Rules 4, 41, 42 and 75 of the Court of**

**Appeal Rules** (the Rules). The applicant seeks the following orders:

- “1. That this Honourable Court be pleased to extend the time within which the applicant is to file and serve the Notice of Appeal from the decision of Honourable Justice A. Mabeya given on 15<sup>th</sup> July, 2014 in NAIROBI HCCC NO. 1685 OF 2001 (O.S) and the applicant be granted unconditional leave to prosecute the intended appeal.*”**
- 2. That the Costs of and incidental to this application abide the outcome of the intended appeal.”***

The grounds upon which he relies on in support of his application are that: the matter intended to be

appealed from was heard before Honourable

Justice A. Mabeya who was transferred before he could deliver judgment; that the file was subsequently taken to Bungoma for the Honourable Judge to write the judgment; that parties were notified that judgment would be delivered on notice once the file was returned to Nairobi; that the advocates on record for the applicant were not served with the notice of delivery of judgment and only subsequently found out that the judgment had been delivered on 15<sup>th</sup> July, 2014; that the advocate on record for the applicant moved with speed to inform the applicant of the decision but by the time the said advocates were instructed to lodge the appeal, fourteen [14] days' period within which the notice of appeal should have been filed under **rule 75 of the rules** had lapsed prompting this current application.

Further, that the applicant is desirous of challenging the High Court's award on liability and has reasonable grounds to believe that he has an arguable appeal with extremely high chances of success and that the respondent will not be prejudiced in any way if the orders sought are granted.

The genesis of this application is that the respondent by an amended originating summons dated 5<sup>th</sup> November, 2009, sought *inter alia*, a declaration that the partnership constituted on the 12<sup>th</sup> August, 1963, between himself, one **NJERI NDEHI** (deceased) and one **KARIUKI MACHARIA** also deceased (2<sup>nd</sup> deceased), under the name **KIGUMO TAILORING SHOP**

**COMPANY** was dissolved on the 16<sup>th</sup> October, 1998. The respondent also sought an order for accounts and distribution of the assets of the partnership and costs of the suit.

The High Court in a judgment signed on 23<sup>rd</sup> June, 2014 and delivered on 15<sup>th</sup> July, 2014, held in favour of the respondent as follows:

***“A declaration that there was a partnership constituted on 12<sup>th</sup> August, 1963 named Kigumo Tailoring Company, between Daniel Kamau Ndehi, Njeri Ndehi, Stephen Thiga Ndehi, Chege Kingere and Kariuki Macharia; that the said partnership was dissolved in October, 1998; that plot No. 11, at Komothai Kigumo Township was asset of the partnership; the defendants do pay over to the plaintiff Kshs 550,000/= together with interest thereon at court rate from the date of the judgment until payment in full, the said sum constitutes 50% shareholding of the asset of the partnership held by the parties in 2005, the plaintiff to share the same with those entitled to plot 11A as at 2005 and costs of the suit and interest is awarded to the plaintiff.”***

It is that decision that the applicant intends to appeal against.

At the hearing of the application, Mr Kihara Muriithi, learned counsel for the applicant, submitted that the application before this court dated 7<sup>th</sup>

November, 2014, and is supported by the applicant's affidavit dated the same day. He submitted that he wished to rely on the applicant's affidavit in its entirety. Counsel reiterated the grounds set out in the application and supporting affidavit and argued that the applicant has explained the delay sufficiently for two main reasons: firstly, that the applicant's former advocates did not receive notice of delivery of judgment from the High Court and secondly that this matter relates to other family members who had to be consulted before instructing the advocates on record. Counsel submitted that those averments have not been challenged by the respondent. Counsel urged the single Judge to allow the application.

Mr Omari held brief for Mr Kigano, learned counsel for the respondent.

Counsel submitted that the respondent filed a replying affidavit on 10<sup>th</sup> December, 2014, attaching a copy of the notice of appeal filed on 21<sup>st</sup> July,

2014, in respect of the same judgment that the applicant intends to appeal against, and the applicant

should, therefore, file a cross appeal under **Rule 93 of the Rules** and not a notice of appeal. Counsel argued that **Rule 80 of the Rules** is clear that the second and all subsequent notices shall be deemed to be notices of address for service and the application is, therefore, superfluous, an abuse of the court process and should be dismissed with costs.

I have considered the application, the affidavits on record, submissions by counsel and the law. The discretion that I am called upon to exercise in this application is brought 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 parameters for the exercise of such discretion have been succinctly

laid down by this Court. See **MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486.** See also

**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 matters 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, (2003) KLR 48,** 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.”***

The important point being made in the above passage is that apart from the length of the delay, the reason for the delay, the possible consideration of the appeal succeeding and the degree of prejudice to the respondent if time is extended, a single Judge would be perfectly entitled to consider any other factor outside these four, as long as that factor is relevant to the matter at hand.

The law does not set out any minimum or maximum period of delay. All it states is that any delay should

be explained. 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 exercisable.

This Court in the case of **TRUST BANK LTD V AMALO COMPANY LTD**,

**C.A. No. 215 of 2000** held:

***“1. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigate***

***(sic) from the pursuit of his rights.***

***2. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”***

I note that the respondent, being dissatisfied with the judgment delivered on 15<sup>th</sup> July, 2014, filed a notice of appeal on 21<sup>st</sup> July, 2014, as it intends to appeal against the entire judgment. The applicant herein also seeks to file a notice of appeal in respect of the same decision.

An issue for determination is whether the applicant in the circumstances of this case, is at liberty to file a notice of appeal. **Rule 75** provides that **any** aggrieved party who desires to appeal to the court shall give notice in writing.

**Rule 80 (1)** provides as follows:

***“Where two or more parties have given notice of appeal from the same decision, the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 79 and the party or parties giving those notices shall be respondents in the appeal.”***

**Rule 93 of the Rules** provides as follows:

***“(1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.***

***2. A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal or not less than thirty days before the hearing of the appeal, whichever is the later.***

***3. A notice of cross-appeal shall be substantially in the Form G in the First Schedule and shall be signed by or on behalf of the respondent.”***

Accordingly, the applicant is at liberty to file a notice of appeal under **Rule 80**. The applicant is also at liberty to file a cross appeal under **Rule 93**. Having taken all of the above into consideration including the length of the delay, the reasons for the delay, the **prima facie** arguability of some of the issues intended to be raised on appeal and the lack of substantial prejudice to the respondents in allowing the intended appeal to proceed, I have come to the conclusion that this is a proper case for me to exercise my discretion by granting the application for extension of time.

Accordingly, I make the following orders:

1. ***That time be and is hereby extended to file and serve a notice of appeal against the judgment of the Hon Mr Justice Mabeya delivered on 15<sup>th</sup> July, 2014.***
2. ***The notice of appeal shall be filed and served on or before 30<sup>th</sup> January, 2015.***
3. ***That time be and is hereby extended for filing the record of appeal against the judgment of the Hon Mr Justice Mabeya delivered on 15<sup>th</sup> July, 2014.***
4. ***The record of appeal shall be filed and served on or before 13<sup>th</sup> February, 2015.***
5. ***The costs of this application shall abide by the outcome of the intended appeal.***

It is so ordered.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of January, 2015.**

J. MOHAMMED

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JUDGE OF APPEAL

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