



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR .2 OF 2015 (UR 2/2015)

JOHN GATU NDERITU.....APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....RESPONDENT

(Being an application for extension of time to file the memorandum and record of appeal in respect of intended appeal against the judgment of the High Court of Kenya at Nyeri

(Sergon, J.) dated 25th March, 2015

in

H.C.C.C. No. 55 of 2001)

RULING

The Notice of Motion before me is made under **Rule 4** of the rules of this Court and it seeks an order for extension of time to lodge a memorandum and record of appeal out of time against the decision of the High Court made on 25th March, 2011, in Nyeri HCCC No. 55 of 2001. The application was filed on 19th January, 2015. The applicant states in the supporting affidavit that he was furnished with the proceedings on the 7th October, 2014, and the certificate of delay on the 15th October 2014. It is apparent at once, that under the proviso to **Rule 82** of the Court of Appeal Rules, the appeal ought to have been filed sixty days after the proceedings were availed to the applicant which ought to have been on or about the 15th of December, 2014.

According to Mr. Macharia, learned counsel for the applicant, the delay in filing the appeal within time was occasioned by the court registry that furnished them with the proceedings and a Certificate of Delay late on 15th October, 2014. He further states in the supporting affidavit that the delay was caused due to pressure of work in his office. Counsel argued that a delay of a few days will not occasion any prejudice to the respondent. He urged me to allow the application to allow the applicant ventilate the appeal which is arguable and has high chances of success. Counsel made reference to a draft memorandum of appeal which in his view raises issues that are substantive and not frivolous.

On the part of the respondent, Mr. Kioni, learned counsel for the respondent, opposed this application relying on the replying affidavit sworn by Mr. Bernard Kimeu. He argued that the applicant

failed to demonstrate sufficient cause for the delay to entitle him to an order of extension. Since the Certificate of Delay was issued on the 15th December, 2014, no reasons at all have been given as to why the record of appeal was not filed within the time provided by the Rules. On the issue of prejudice, counsel submitted that the applicant stopped servicing the loan facility by the respondent, due to that default; even the loan amount owing is likely to outstrip the security held. Moreover, there are orders barring the respondent from exercising the statutory power of sale of the charged property and the applicant seems to be capitalizing on the said orders.

On the arguability of the appeal, the dispute was over the amount of loan that was payable by the applicant, however, due to disparities in the figures given by both parties, the High Court Judge ordered both parties to appoint joint auditors to establish the exact loan amount due; thus the applicant does not deny being indebted to the respondent but he is not servicing the loan and an appeal that only challenges the appointment of auditors is meant to perpetuate the status quo.

I have considered the motion before me, the replying affidavit and the submissions by both counsel. An application under **Rule 4** invokes the exercise of unfettered discretion as provided for in the said Rule:-

“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 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”.

Nonetheless, that discretion must be exercised judicially, not on whim, sympathy or caprice. The guidelines for the exercise of such discretion are now clear and I may set them out briefly as thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture 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 to 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 the 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 V MWANGI, Civil Application No. Nai. 255 Of 1997 (Ur), MWANGI VS KENYA AIRWAYS LTD [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA VS MURIKA M’ETHARE & ATTORNEY GENERAL, Civil Application No. Nai. 8 of 2000 (UR) and MURAI VS. WAINAINA (NO. 4) [1982] KLR 38”. - See Fakir Mohammed vs JOSEPH MUGAMBI & ANOTHER C.APP. NAI. 332/04 (unreported)”.

The issue for determination is whether the applicant is deserving of this court’s exercise of discretion. The applicant was late in filing the Record of Appeal by about 30 days since the Certificate of Delay was issued on the 15th October, 2014, and this application was filed on the 19th January, 2015. However, there is no single reason at all advanced by the applicant for the said delay save that he was prevented from doing so due to the delay caused by the court registry. I must state that delay is immaterial because it is explained by the certificate of delay. The other explanation by Mr. Macharia, his learned counsel, cites pressure of work in his office as the reason for the delay. I do not think that delay caused by a mere allegation by counsel that he failed to meet the deadline of filing the appeal due pressure of work is sufficient and plausible reason. Firstly, it was the same counsel who appeared for the applicant in the High Court. Secondly, after the applicant filed a Notice of Appeal on 25th March, 2011, he and his counsel must have been waiting for the proceedings in readiness to file the appeal. the period of over two years that the court took to prepare the proceedings can only be taken as further grace period for them; thus I am not satisfied that failure by the advocate to comply with the Rules due to pressure of work at his office warrants the exercise of my discretion to extend time.

Regarding the issue that the intended appeal is arguable, the applicant did not attach a copy of the

impugned judgment for my perusal and appreciation of the decision of the leaned Judge. What I can gather from the replying affidavit by the respondent and which was not at all controverted by the applicant was that the dispute involves the amount of money recoverable from the applicant being a loan that was advanced by the respondent to the applicant. The leaned Judge merely ordered the parties to appoint a joint auditor to work out the loan payable by the applicant to the respondent. Although the merit of the appeal is not within my province as a single Judge, going by the scanty material before me, and on the face of it, I am not persuaded there is an arguable appeal to warrant the exercise of my discretion.

For the aforesaid reasons, I find the Notice of Motion dated 15th January, 2015, lacking in merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 13th day of April, 2015.

MARTHA K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR