IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU (IN CHAMBERS)

CIVIL APPLICATION NO. 159 OF 2013 (UR 108/2013)

BETWEEN

DAVID KIPKURUI TENAI ………….……. APPLICANT

AND

NYAYO TEA ZONES DEVELOPMENT... RESPONDENT

(An application for extension of time to file and serve the Record of appeal arising from the Judgment and decree of the High Court of Kenya at Eldoret (Karanja, J) dated 25th October, 2011

in HCCC NO. 170 OF 2007)

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RULING

1. In this application, the applicant David Kipkurui Tenai seeks leave to file a record of appeal out of time.

2. Briefly, the background to the application is that the respondent employed the applicant as a driver. On 21st September 2005 the applicant was driving the respondent's vehicle along Nakuru-Eldoret road when it was involved in an accident. The applicant asserted that the brakes of the vehicle failed causing it to run into another motor vehicle. As a result the applicant sustained serious injuries. The applicant contended that the respondent was negligent in providing him with a defective vehicle and for failing to provide him with a safe system of work. That is the basis on which he instituted suit against the respondent in Eldoret High Court Civil Suit No. 170 of 2007.

3. In its Judgment delivered on 25th October 2011, the High Court (J. R. Karanja, J) dismissed the applicant's suit on the grounds that the applicant failed, on a balance of probabilities, to prove that the respondent's vehicle was defective. In the Judge's view, the applicant could not "*benefit from an accident in which he was apparently the author.*" The applicant's suit was accordingly dismissed.

4. Dissatisfied, the applicant filed a notice of appeal at the High Court in Eldoret dated 7th November 2011 pursuant to rule 74 of the rules of the Court. He did not however file a record of appeal within the prescribed period or at all hence the present application.

5. During the hearing of the application before me, learned counsel for the applicant Mr. Stanley Kagunza referred me to the grounds appearing on the face of the application and the supporting affidavit sworn by Linah Jepkosgei Kigen on 26th June 2013 in support of the application. He argued that upon delivery of the Judgment on 25th October 2011, a notice of appeal was filed within the time prescribed under the rules; that on 7th November 2011 the advocates for the applicant applied for typed and certified proceedings and judgment; that the typed proceedings and judgment were delayed and time had lapsed by the time the same were received; that further delay was occasioned by the advocates clerk one Paul Imbindi who misfiled the record of appeal among closed files instead of filing the same in court; that the intended appeal is arguable and the applicant should not be punished for the mistakes of his advocates and that the delay involved is not deliberate or inordinate and should be excused.

6. Opposing the application, learned counsel for the respondent Ms. Chembeni L. Adisa referred me to the replying affidavit sworn on 24th September 2014 by William Togom, the head of Human Resource and Administrative department of the respondent and submitted that the delay in filing the record of appeal and indeed the present application is inordinate and unreasonable and has not been satisfactorily explained; the applicant's advocates letter dated 7th November 2011 applying for certified proceedings and judgment was not copied or served on the respondent's advocates; the applicant has not disclosed when it received the typed proceedings and judgment and why the present application was not filed until 1st July 2013; the respondent should not be prejudiced by sheer indolence on the part of the applicant and it is not demonstrated, in the absence of the pleadings and proceedings before the High Court that the contention that the intended appeal is not frivolous has any basis.

7. I have considered the application, the affidavits and the submissions by learned counsel. Rule 4 of the Court of Appeal Rules, 2010 provides that:

   "***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 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.***"

8. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

9. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** Waki JA stated:

   "***The exercise of this Court's discretion under Rule 4… 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: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.***"

10. Applying those principles to the present application, the Judgment of the High Court the applicant intends to appeal against was, as already noted, delivered on 25th October 2011. The notice of appeal was filed within the fourteen-day period stipulated under rule 75(2) of the rules of the Court. Under rule 82 of the rules of the court, the applicant was required to haveinstituted the

appeal by lodging the record of appeal within 60 days of the date when the notice of appeal was lodged. The proviso to that rule provides that in computing time, any time certified as required for the preparation of typed proceedings is to be excluded. By reason of rule 82(2) an applicant cannot however benefit from that proviso where the letter bespeaking the typed proceedings was not served upon the respondent.

11. What then is the delay involved here? The notice of appeal is dated 7th November 2011 but appears to have been filed on 8th November 2011. The record of appeal should have been filed within 60 days. Excluding the 2011 Christmas vacation from 21st December 2011 to 13th January 2012, the appeal should have been instituted by 3rd February 2012. Quite apart from the fact that the letter applying for a copy of the proceedings was not copied to the respondent by reason of which the applicant cannot benefit from the proviso to rule 82, the applicant does not say when the typed proceedings were in fact received. There is therefore no indication what amount of time was required to have the proceedings typed.

12. The applicant says that apart from the time lost while waiting for the typed proceedings, further delay was occasioned by reason of misfiling of the record of appeal of appeal by the advocate's clerk. It would have been useful for the applicant to have furnished the court with information pertaining to when the typed proceedings were made available by the court; when the record of appeal was delivered to the clerk for filing; when the record of appeal was subsequently discovered amongst the advocates closed files; why the present application was not filed until 1st July 2013, almost one and half years after the record of appeal should have been filed. The applicant has not provided answers to these pertinent questions.

13. There is therefore, in my view, inordinate and unexplained delay in lodging the record of appeal as well as the present application. It is incumbent upon a party seeking the exercise of discretion in his favour to provide the court with material on the basis of which to exercise such discretion. It is not enough to say, as the applicant has done, that a party should not be punished for the mistakes of his advocates. Absent an explanation, there is not much I can do for the applicant. In the absence of an explanation regarding the inordinate delay therefore, I am unable to exercise my discretion in favour of the applicant. I therefore reject the application. The same is dismissed with costs to the respondent.

Dated at Eldoret this 24th day of June, 2015

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

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DEPUTY REGISTRAR