



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA IN CHAMBERS)

CIVIL APPLICATION NO. NAI 70 OF 2015

BETWEEN

ERIC GOR SUNGUH APPLICANT

AND

GEORGE ODINGA ORARO RESPONDENT

(An application for extension of time to seek leave to appeal to the Supreme Court of Kenya from the Judgment and Decree of the Court of Appeal (Mwera, Ouko & Kiage, JJ.A) dated 31st day of January, 2014

in

CIVIL APPEAL NO. 226 OF 2011)

RULING

[1] Eric Gor Surguh, the applicant in this Notice of Motion, applies for extension of time within which to file an appeal in the Supreme Court of Kenya against the decree of the Court of Appeal in Civil Appeal No 226 of 2011, the judgment of Mwera, Ouko & Kiage JJA., dated 31st January 2014. In the suit before the High Court, George Odinga Oraro, the respondent, filed a suit against the applicant seeking for damages for libel and slander. The respondent also sought for a permanent injunction barring the applicant from further uttering words defamatory of him.

[2] The respondent was awarded by the High Court a sum of Ksh 3 million in general damages, the applicant was ordered to tender a suitable apology and to pay costs. Being dissatisfied with the said orders of the High Court, the applicant appealed before this Court and the respondent cross appealed. The applicants appeal before the Court of Appeal was dismissed, and the respondent's cross appeal was allowed.

The award of the High Court of Kshs 3million for general damages was set aside and substituted with Ksh 5million; an award for aggravated damages to the tune of Ksh 4 million; a permanent injunction was issued against the applicant as prayed in the plaint; the order for the applicant to tender an apology to the respondent was set aside; the applicant was ordered to pay costs of the appeal and of the cross appeal.

[3] On the 17th March 2015, the applicant filed the instant notice of motion which is predicated on several enactments of the Constitution and the law to wit;-Articles 1, 20 (3) (b), 33, 50, (1), 94(1) &(2), 117, 118, (A) &B, 124, 159, 164 (4) (b) & 259 of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9, Rule 4 Court of Appeal Rules and all the enabling provisions of the law.

[4] The application is supported by the grounds stated there under which are elaborated in greater detail by the applicants' supporting affidavit. In summary, the applicant was a Member of Parliament for Kisumu Town East Constituency between 1998 and 2007. In 2003, he contends that he was sued in his capacity as the Chair of the Parliamentary Select Committee that was investigating the death of the Late Dr. Robert Ouko. The applicant wishes to appeal before the Supreme Court of Kenya, wherein he intends to raise certain constitutional issues of whether the judgment of the Court of Appeal went against the provisions of Articles 117 &118 of the Constitution and the provisions of the National Assembly Powers and Privileges Act.

[5] Towards that end the applicant filed a Notice of Appeal against the decision of the Court of Appeal on the 18th June 2014. The applicant states that he was not able to file this application within time provided under the Rules because he could not afford the legal fees and other attendant costs. He has deponed in his supporting affidavit, I reproduce verbatim some of the averments as they clearly explain the gist of the matter as thus;-

“9. That I was not able to file the application for leave to appeal to this honorable court within the time stipulated by the law because I could not afford the legal fees and other attendant costs. I had to seek for the intervention of Parliament for me to file this application in order to safeguard the sovereignty of Parliament and to uphold and defend the constitution. In fact, Parliament deposited in Court on my behalf, the decretal amount awarded by the High Court because I am unable to pay the same.

10. That this is a matter of significant general public interest because the judgment of the High Court and Court of Appeal, if allowed to stand, shall infringe on the freedom of speech in Parliament of Members of Parliament as set out at Article 117 (1) of the Constitution and interfere with the privileges and immunities of Members of Parliament as set out at Article 117 (1) of the constitution and interfere with the privileges and immunities of members of Parliament as set out at Article 117 (2) of the constitution and the National Assembly (Powers and Privileges) Act.

11. That the matters raises a substantial point of law with regard to Parliamentary freedoms and privileges whose determination will have a significant bearing on how Parliamentary business is conducted in future by Members of Parliament and hence of general public interest”

[6] During the hearing of this application, Mr. Mwendwa learned counsel holding brief for Anthony Njoroge for the applicant elaborated on the above grounds and highlighted the written submission. He submitted that under the Supreme Court Rules, a party desiring to appeal to the Supreme Court is required under Rule 30 of the Supreme Court Rules to obtain the leave of the court whose judgment or orders are appealed against. In the instant application, the applicant is seeking for extension of time to file a notice of appeal out of time or the notice already filed on 18th June to be deemed as properly filed. The applicant has always been desirous of pursuing an appeal in this matter but he could not afford legal fees and other attendant costs until he sought assistance from Parliament and it agreed to mount an appeal so as to safeguard its own sovereign authority which was undermined by the decision he wishes to appeal against. The delay was further compounded by the fact that the applicant is currently out of employment, he resides in the rural areas and it has been difficult for his advocates to track him for purposes of this matter.

[7] Counsel cited the Cases of; - **Nicholas Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others Sup Court Application No. 16 of 2014** and **Mwangi v Kenya Airways Ltd [2003] KLR 486**. These two decisions set out the principles that guide the court in deciding

whether to grant an extension of time and they include:-

- **An exercise of discretion in favor of a deserving party who must satisfy the court**
- **The length of delay and the reason(s) must be explained**
- **The possibility, and chances of appeal succeeding and the degree of prejudice to be suffered if the application is not granted are some of the factors to be taken into consideration.**

[8] This application was opposed; the respondent was represented by Mr. Kemboi who relied on the respondents' replying affidavit, written submissions and a list of authorities. It is the respondent's case that the applicant lodged the Notice of Appeal late on the 18th June 2014; that is more than 4 months since the judgment was delivered on the 31st January 2014. The matter came up in court sometimes in April 2014, for settlement of the orders and counsel for the appellant intimated to the Judge that he intended to file an appeal before the Supreme Court. On the 27th June 2014, the applicant filed another application which was certified as urgent but when it came up for hearing on the 18th November 2014, he applied and was given 14 days to file a further affidavit. The applicant went into a lull, before filing the instant application on the 17th March 2015.

[9] According to the respondent, the applicant has not offered any plausible reason why this court should exercise its discretion in his favour. The reason that the delay was caused by the applicants inability to raise legal fees was dismissed as woefully contrived considering the modest fee attendant to the filing of a Notice of Appeal. Moreover the applicant was represented by the same advocate on record who was retained by the Parliamentary Service Commission. Thus the assertion that he was unable to pay legal fees is without basis. Counsel made reference of the case of; **George Mwenda Muthuri v Mama Day Nursery and Primary School Ltd Civil Appl. Nyeri No. 4 of 2014 (unreported)** The applicant was late to file a notice of appeal against an order of the High Court in which his application for injunctive relief was denied. He therefore sought an extension of time under Rule 4 of the Court of Appeal Rules. In declining to grant the application it was pointed out that:

“The delay in this case was attributed to the applicant’s inability to raise legal fees. Failure to raise legal fees per se is not a justifiable reason especially when the delay is inordinate”

[10] Counsel for the respondent also referred to the decision of **Waki JA.**, sitting as a single judge in the case of; **-Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mabera and 3 others [2015] e KLR.** In rejecting the application for extension of time, the judge held that the rules of procedure were not ornamental since they served a pivotal purpose in the administration of justice and are to argument the overriding objective in civil litigation that is to say, just, expeditious, proportional and affordable resolution of disputes that come before court.

[11] It should be appreciated that this is not an ordinary application for extension of time under Rule 4 of the Court of Appeal Rules, that deals with extension of time which is couched in the following terms;-

“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”

[12] This application seeks for extension of time to file a notice of appeal before the Supreme Court and I think there is a difference in the two processes. I am also aware that jurisdiction is everything in decision making. See the oft' cited case of;-

SS Lillian Case” as restated by the Supreme Court In ***the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution,***

Constitutional Application No. 2 of 2011:

“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

[13] What I am trying to emphasize is the fact that the applicant is seeking for extension of time, for filing a Notice of Appeal, to the Supreme Court. This is what the Supreme Court Rules provide regarding the filling of a Notice of Appeal;-

Rule 30 (1) “A person who intends to appeal to the Court shall file a notice of appeal, in form B set out in the First Schedule, with the Registrar of the Court or tribunal against whose decision it is desired to appeal;

(2) Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal.

(3) A notice under sub rule (1) shall be lodged within fourteen days of the decision appealed from and under sub (2), as the court may direct.”

[14] The applicant is seeking to challenge the decision of this Court on the grounds that the appeal raises a point of law of general public importance. In that case it is the full Bench of this Court that will hear the matter of certification which is supposed to grant him the leave to file a notice of appeal and direct him on when to file the notice of appeal in the event that his application for certification is successful.

[15] I will deliberately not comment on the applicant’s right of appeal before the Supreme Court because that is for the full Bench of this court. However In the event that I am wrong on the above conclusion that I have no jurisdiction as a single judge to grant leave for extension of time to file a notice of appeal in the Supreme Court, I will also consider the instant application under Rule 4 of this Court Ruling. It is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filling an appeal a judge exercises unfettered discretion. However, in the exercise of such discretion, the judge must act upon reason(s) not based on whims or caprice. In general the matters which are brought to bear in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (See **MUTISO V MWANGI**) [1999] 2 EA 231. In other words Rule 4 of the Court of Appeal Rules donates unfettered discretion and as long as the discretion is exercised judiciously, a single judge would be entitled to consider any other relevant material.

[16] The delay in this case was attributed to the applicant’s inability to raise legal fees and other incidentals and the fact that the applicant is out of employment and resides in the rural areas where he could not be raised. The delay here being a period of about 4 months. It has been stated by this Court before that financial problems or impecuniousness as never been regarded as a ground for extension of time.

[17] In the case of;- **FRANCIS MWAI KARANI VS. ROBERT MWAI KARANI**, *Civil Application No.NAI. 246 of 2006*, Omolo, J.A. in his ruling delivered on 11th May, 2007 in a similar matter addressed himself at the very beginning of his ruling thus:

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new

principle different from the well known one that lack of financial resources is generally not a basis for extending time.”

[18] Moreover the assertion that the applicant failed to file the notice of appeal for impecunious reasons was seriously contested by the respondent for reasons that the applicant was represented by the same advocate throughout. It is the same advocate who allegedly made representations to the Parliamentary Committee for financial support on behalf of the applicant. It was only logical that he should have filed the requisite notice of appeal as required by the rules so as to establish the basis of seeking for financial aid.

[19] I am therefore not persuaded that the notice of appeal in this matter was not filed because the applicant lacked the paltry sum required to do so. The delay of over 4 months is inordinate; the applicant perhaps ignored the matter, neglected it, or deliberately forgot it and was woken up by the reality of the execution process as stated by the respondent. Even then, it is with a faint heart that he has made an attempt to pursue a right of appeal in the Supreme Court; the applicant filed an application for leave on 27th June 2014, it came up for hearing on 18th November 2014, when his advocate sought an adjournment to file the present application. This was not done until after a lull of another almost 4 months. The applicant has not been diligent, equity aids the vigilant and not the indolent and in my view he is not deserving of the exercise of discretion.

[20] The applicant claimed that the respondent will not be prejudiced if the application is granted as Parliamentary Committee has deposited part of the decretal sum. The respondent in his sworn deposition states that the applicant has never taken any steps to settle the decretal sums either in part or at all despite attempts to execute. I have no reason but to be persuaded that keeping the respondent away from the fruits of his successful litigation for so long is prejudicial. On whether the appeal is arguable, the issue of Parliamentary immunity or privilege was thrashed to a pulp before the High Court and the Court of Appeal and there was a concurrent findings. I am therefore not persuaded the appeal is arguable.

[21] For the above reasons the application for extension of time to file a notice of appeal before the Supreme Court is rejected and the Notice of Motion dated 16th March 2015 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of July 2015.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR