



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO 185 OF 2014

BETWEEN

CHARLES MUNGE.....APPLICANT

AND

PETER ICHARIA MUNGE.....1ST RESPONDENT

ICHAMU INVESTMENTS LTD.....2ND RESPONDENT

(an application for extension of time to file the notice of appeal and record of appeal from the judgment of the High Court of Kenya at Nairobi (Mutungi, J.) made on the 20th May 2014

in

HC ELC No 1189 of 2007 (formerly HCCC No 1044 of 2003))

RULING

By way of a notice of motion under rule 4 of this Court’s rules, Charles Munge, the applicant herein, seeks orders that:

- 1. This Court be pleased to enlarge time for filing his Notice of Appeal by 37 days;**
- 2. The Notice of Appeal filed on the 14th day July 2014 be deemed as properly filed.**

The application is brought against the backdrop of a judgment against the applicant that was delivered by Mutungi, J on 20th May 2014. Mr Kelvin Mogeni, advocate for the applicant submitted that after the judgment was delivered, he did not have an opportunity to inform his client of the outcome of the case, and therefore did not receive instructions to appeal from him. In his affidavit in support of the application, he states that he left the country on official duty and only informed the applicant of the decision against him when he returned from his travels. It was then that Mr Mogeni received instructions to appeal and thereafter he filed a notice of appeal on the 14th July 2014.

Mr Mogeni therefore concedes that the notice of appeal was filed out of time but states that this was as a result of an error occasioned by him and apologises for the inconvenience caused to the Court. He has urged the court to excuse the delay, despite the fact that it has not been sufficiently explained since the

appeal raises issues that should be ventilated before the court, and also demonstrates high chances of success.

The applicant also asks this court to grant the orders he seeks since the respondents did not utilise the opportunity provided under rule 84 of this Courts rules to apply to the court for striking out of the notice of appeal.

The respondents opposed this application. They point out that during delivery of the judgment by the High Court, the applicant was represented in court by counsel, meaning they were aware of the decision immediately it was delivered. The respondents' position is that Mr Mogeni has been less than candid in his averments. His passport indicates that he travelled on 11th June 2014 and returned to the country on 18th June 2014, meaning that time for filing the notice of appeal had already expired. Therefore the delay in this case is not explained, and the orders sought should not be granted.

The respondents submitted further that even after Mr Mogeni returned on 18th June 2014, he filed the notice of appeal on 14th July 2014, and there is no explanation for this lapse. They submit that the filing of a notice of appeal is routine procedure that would not have required any specific instructions from the client. The respondents further aver that the intended appeal is frivolous and has no chances of success and therefore have asked that the application be dismissed with costs.

I have considered the application, the affidavits in support and against it and the rival submissions of the parties. This Court has repeatedly stated that the discretion of the court under rule 4 is unfettered but an applicant must satisfy certain criteria in order to benefit from it. This was succinctly stated in ***Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR (Civil Application No. Nai 332 of 2004)*** as follows:

“The exercise of this Court’s discretion under Rule 4 has [follows] a well-beaten path ... 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.”

It is plainly obvious that the cause of the delay in this case is the lack of action of applicant’s counsel, Mr Mogeni. Counsel annexed a copy of his passport as evidence that he had travelled during the time that he ought to have filed the notice of appeal. This is no solution. As was stated by this Court in ***Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR (Civil Application No. Nai. 15 Of 2011 (Ur. 10/2011))*** filing a notice of appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment.

Moreover, as was accurately pointed out by the respondents, Mr Mogeni exited the country on 11th June 2014, seven days after the expiry of the fourteen days provided for him to file his notice of appeal. He returned on 18th June 2014, and even then, did not take steps to file the notice of appeal. He did so three weeks later, and took a further two weeks before he filed the present application to regularise the notice of appeal.

In ***Bi-Mach Engineers Limited v James Kahoro Mwangi (supra)*** Waki JA adopted with approval the holding of this Court in ***Rajesh Rughani – Vs- Fifty Investment Ltd. & Another (2005) eKLR*** that:

“If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

That holding applies to the circumstances at hand. Clearly, the delay in this case has not been sufficiently explained; in fact, it has not been explained at all, and in view of that, the applicant has failed to place any material before me that warrants the exercise of my discretion in his favour. The application for extension of time is therefore rejected. The application is accordingly dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 10th day of July, 2015

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR