



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. NAI 214 OF 2013

BETWEEN

GEORGE KAGIMA KARIUKI1ST APPLICANT

DANIEL BARAGU 2ND APPLICANT

SUSAN WAIRIMU NDIRANGU 3RD APPLICANT

AND

GEORGE M. GICHIMU 1ST RESPONDENT

PAULINE WANGARI THUO2ND RESPONDENT

JOHN GATHU MBOTE3RD RESPONDENT

(An application for extension of time within which to file and serve the notice and record of appeal out of time in the intended appeal from the judgment and decree of the High Court of Kenya at Nakuru (Koome, J) dated 16th April, 2010

in

NKR H.C.C.C NO. 533 OF 1999

CONSOLIDATED WITH

NKR H.C.C.C NO. 137 OF 2000

R U L I N G

This is an application by Notice of Motion dated 30th July 2013 expressed to be brought under *Rules 4, 42 and 43 of the Court of Appeal Rules* seeking, *inter alia*, the following orders:

“1. That this Honourable court be pleased to grant an extension of time for the lodgment of the Notice of Appeal out of time from the judgment and decree of the superior court dated 16th

April 2010.

2. That this Honourable court be pleased to grant an extension of time for the lodgment of the Record of Appeal out of time from the judgment and decree of the superior court dated 16th April 2010.”

The application is supported by an affidavit sworn on 30th July 2013 and a further affidavit sworn on 28th January 2014 by *Daniel Baragu (herein the 2nd Applicant)*. *George M. Gichimu* and *John Gathu Mbote (the 1st and 3rd Respondents respectively)* have sworn replying affidavits dated 18th October 2013 and 16th October, 2013 respectively in opposition to the instant application.

Rule 4 of the Court of Appeal Rules on extension of time 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 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.”

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 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 are now clear. See

MUTISO V MWANGI, CIVIL APPLICATION NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, [2003] KLR 486, MAJOR JOSEPH MWERERI IGWETA V MURIKA M’ETHARE & ATTORNEY GENERAL, CIVIL APPLICATION NO. NAI 8 OF 2000 (UR) AND MURAI V WAINAINA, (NO. 4) [1982] KLR 38. See also FAKIR MOHAMMED V JOSEPH MUGAMBI & ANOTHER, CIVIL APPLICATION 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 stricture of “sufficient reason” as removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider too 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.”

Earlier, in **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI,**

CIVIL APPLICATION NO. NAI 255 OF 1997 (unreported) this court stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters, which this Court takes into account in deciding whether to grant an extension of time, are first the length of the delay. Secondly, the reason for the delay thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”

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*, went on to hold:

“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.

On the issue of compliance with the rules of this Court, the case of *RATMAN V CAMARASAMY*, [1964] 3 All ER 933, Lord Guest stated at page 935:

“The Rules of the Court must prima facie, be obeyed and in order to justify the court extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The foregoing sets out the manner in which this Court is to consider applications brought under *Rule 4 of the Rules*. In this case the judgment sought to be appealed against was delivered on 16th April, 2006. After filing the appeal, the record of appeal was struck out on 24th February 2012 as incurably defective. It is therefore apparent that the length of delay sought to be excused by the granting of an extension would appear to start from the date the appeal was struck out on 24th February 2012 and to end on the filing of the instant application on 30th July 2013 which is a period of about 516 days. Taking into account the Christmas vacation in December and January the relevant length of delay is about 492 days.

When the application came up for hearing before me, learned counsel Mr G.F.O. Ogola appeared for the Applicants, Mr. Omolo holding brief for Mr Aminga, appeared for the 1st Respondent while the 2nd and 3rd Respondents were represented by learned counsel, Mr. Kahiga Waitindi.

Regarding the reason for delay, Mr Ogola submitted that after the appeal was struck out, he instructed the firm of Ochieng, Onyango Kibet & Ohaga Advocates to take over the conduct of the matter since he did not have the capacity in his law firm. He instructed the said firm to amend the pleadings and apply for copies of the proceedings and prosecute the appeal. Mr Ogola further submitted that in 2013 he realized that the firm of Ochieng, Onyango Kibet & Ohaga Advocates did not proceed as instructed. Counsel submitted that the delay was, therefore, not deliberate and that he had discharged his duties by giving clear instructions to the said firm and paid legal fees of Ksh.200,000/= to the said firm. In support of this, Mr Ogola referred me to a copy of the bank Transfer dated 21st March 2013 for Ksh.200,000/= paid to the firm of Ochieng, Onyango, Kibet & Ohaga Advocates, Account Number 0900245005 Prime Bank Nairobi in respect of this matter. Counsel submitted that the situation was further complicated when he was elected the Migori County Assembly Speaker in the 2013

General Elections and was, therefore, not able to effectively discharge his duties as a lawyer to his clients.

The applicant reinforces the above submissions in his further affidavit dated 28th January, 2014, in support of the application as follows:

“7. That on the 21st March 2012, I made a down payment of kshs. 200,000 to the aforesaid firm vide RTGS transfer form annexed hereto and marked as DB(2);

9. M/s Gordon Ogola had recommended that I instruct the said firm to handle the matter, since he did not have enough capacity in his office to deal with the matter;

10. That I personally carried all the files and documents to the firm of Ochieng, Onyango, Kibet & Ohaga Advocates and handed them over to Mr. Ochieng.

11. That we agreed that he was to apply for amendment of the decree, and also apply for typed proceedings in HCC No. 137 of 2000, which had been left out of the record of appeal.

13. Since then, Mr. Ochieng could not pick my phone, I severally went to his office but could not meet him, but when we eventually met, he demanded to be paid a certain sum before he could proceed.”

Counsel further argued that the appeal has high chances of success and that no prejudice or inconvenience would be occasioned to the respondents as the same could be compensated by way of costs.

On their part, Counsel for the Respondents both argued that the delay was inordinate and the explanation offered not plausible. That the record of appeal was struck out on 24th February 2012 while the application to rectify and or amend the decree was made on 4th December 2012, that is a delay of 10 months after the appeal was struck out. Whereas the application to amend the decree was allowed on 24th February, 2013, it took the applicants 5 months and five days to extract the decree on 26th July 2013. That the appeal was struck out on 24th February, 2012 while the instant application was filed on 30th July, 2013, a delay of 516 days. Counsel submitted that such a length of delay is a clear demonstration of indolence on the part of the applicants and a total failure by the applicants to offer a plausible and acceptable explanation. For the above propositions, reliance was placed on

GEORGE ROINE TITUS & ANOTHER V JOHN P. NANGURAI, CIVIL APPLICATION NO. 331 OF 2000, MAWATT ESTATE LIMITED V MBWANJI LTD, CIVIL APPLICATION NO. 247 OF 2000, REPUBLIC V DISTRICT COMMISSIONER MACHAKOS & ANOTHER, CIVIL APPLICATION NO. 263 OF 1990, SAMKEN LIMITED & ANOTHER V MERCEDES SANCHENZ RAU TUSSEL & ANOTHER, CIVIL APPLICATION NO. 21 OF 1999, and ANTHONY CHUMA GOITI V KIERU GOITI, (2006) eKLR.

I have carefully considered the application before me, the rival affidavits, the oral submissions made by the learned counsel, and the annexures put forward to explain the delay of about 492 days. It is trite law that the discretion to extend time to file an appeal is indeed unfettered. The same has nonetheless to be exercised in a judicious manner taking into consideration the circumstances of each case. Before the court can exercise such discretion, the applicant has to show the following:

1. That the intended appeal is arguable, that is, it is not frivolous;

2. That the respondent would not suffer undue prejudice if the application is not allowed [see WASIKE V SWALA, [1984] KLR 591; and lastly,

3. That the application has been brought without undue delay.

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. In this case the delay can clearly be demonstrated to have been caused by the inactions of the two law firms instructed by the applicants. The explanations given by the applicants and the evidence tendered are such that I am inclined to find that the applicant was keen on prosecuting the appeal were it not for the errors and inactions of the advocates.

Regarding the issue of the effect of the mistakes of counsel this court

in **BAMANYA V ZAVER**, [2002] EA 329, held that errors or faults of counsel

should not necessarily debar a litigant from enforcing his rights.

Further, 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.”

In **SHABIR DIN V RAM PARKASH ANAND**, [1955] EACA Briggs, JA said at page 51 thus:

“In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”

An arguable appeal does not necessarily mean that which will succeed. In this case, I find the appeal arguable as it raises issues for determination such as whether there was an established existence of a partnership or an existence of a contract between the parties to engage in a business with a view of making and sharing profit.

I am in no doubt that the respondents are anxious to enjoy the fruits of their judgment without any further delay and are justified in submitting that further delay in the matter will cause them prejudice. The justice of the matter nevertheless demands that an opportunity be given to the applicants to argue their appeal in the Court of Appeal.

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 Lady Justice Martha Koome made on 16th April, 2010.***
- 2. The notice of appeal shall be filed and served on or before 5pm on 16th June, 2014.***
- 3. That time be and is hereby extended for filing the record of appeal against the judgment of the Hon Lady Justice Martha Koome made on 16th April, 2010.***
- 4. The record of appeal shall be filed and served on or before 5pm on 18th August, 2014.***
- 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 30th day of May, 2014.

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR