



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J.A. (In Chambers))

CIVIL APPLICATION NO. NAI 46 OF 2013

BETWEEN

NAOMI LINA WERE 1ST APPLICANT

CHRISTINA WERE 2ND APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND..... RESPONDENT

(Application for extension of time to file memorandum and record of appeal out of time in the intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mwilu, J.) delivered 10th February, 2012

in

H.C.C.C. NO.789 OF 2003)

RULING

1. The two applicants, **Naomi Lina Were** and **Christina Were** made an application to this Court on 25.2.2013 by way of a notice of motion dated 14th February 2013 seeking orders that
 - “(a) *leave be granted to file memorandum and record of appeal out of time.*
 - “(b) *time be fixed for the filing of the intended memorandum and record of appeal under the grant of such leave.*
 - “(c) *this application is supported by the affidavit of Naomi Lina Were.*”
2. The application was supported by an affidavit sworn on 14.2.2013 by Naomi Lina Were, the 1st applicant.
3. The applicants named the National Social Security Fund as the respondent in the application.
4. The application shows that in the High Court at Nairobi, a ruling was delivered on 10th February 2012 in Succession Cause No.789 of 2003 by Mwilu J., as she then was, striking out from the suit the names of *Elkana Ondari Bosire Sechero, Hon. Justice S. E. Bosire and Donald Misati Bosire,*

the 2nd, 3rd and 4th respondents respectively after finding that there was no justification in their being joined as parties. Dissatisfied with the ruling, the applicants filed a notice of appeal on 14th March 2012. Under the rules of this court, the notice should have been filed within 14 days of the date of delivery of the ruling.

5. In their affidavit in support of the motion, the applicants aver that they did not file the record of appeal within the time prescribed by the rules because the proceedings were furnished by the Court on 20.9.2012 and a certificate of delay issued by the Deputy Registrar of the High Court showed that:

“The time taken by the court to prepare certified copies of the proceedings and ruling was from 12th March 2012 to 20th September 2012, that being 254 days.”

6. The applicants filed the instant application on 25th February 2013 after receiving the proceedings on 20.8.2012. They took five months and 4 days to do so. The reason given for the delay in filing the application is that the applicants intended to peruse the court file and compare the documents they had received with those in the court file but this took time because the court file could not be traced. The applicants aver that they were informed by court officials whose names or designations are not indicated that the court file had been relayed to the Judges and Magistrates Vetting Board. The applicants do not indicate in their affidavit whether they eventually managed to peruse the court file as they intended so as to compare the proceedings with the originals. I observe that the court furnished certified proceedings as requested by the applicants although it is not a requirement of the law that proceedings in a record of appeal to be certified. The applicants submitted that the delay in filing the application for leave to file the record of appeal out of time was occasioned by circumstances beyond their control but they did not indicate what those circumstances were.
7. On 24.1.2014, Naomi Were filed a further affidavit in reply to the replying affidavit by the 3rd respondent, Hon. Justice S. E. Bosire.
8. In her replying affidavit, the 3rd respondent averred that the applicants have not accounted for the time between 20.9.2012 when they received the proceedings and 25.2.2013 when they filed the instant application and that the applicants have no arguable appeal.
9. In her further affidavit sworn and filed in Court on 24.01.2014, the 1st applicant went into the reasons why she was unable to access the court file and endeavoured to show that she has an arguable appeal.
10. The application came up for hearing before me on 7th April 2014 sitting as a single Judge in chambers on 7th April 2014 pursuant to rule 53 of this Court’s Rules. **Mr. Alex Anambo**, the learned counsel for the applicants and **Mr. Chacha Odera**, the learned counsel for the 1st respondent who also held brief for **Ms Mbabu** for the 2nd, 3rd and 4th respondents appeared and submitted on behalf of their respective clients.
11. Mr. Anambo submitted that the applicants applied for a copy of the proceedings on 12.2.2012 and that the same was furnished on 20.9.2012 as indicated in the certificate of delay. He contended that there is discretion on the part of the Court to grant the leave prayed for. The intended appeal, he submitted, had chances of success. He relied on the affidavits filed by the applicants in support of the application and urged the Court to have regard to Article 159(2)(d) of the Constitution and allow the application.
12. On behalf of the 1st, 2nd, 3rd and 4th respondents, Mr. Chacha Odera opposed the application. He conceded that the application for a copy of the proceedings was made in compliance with the proviso to rule 82 of this Court’s Rules and that the proceedings were furnished on 20.9.2012 but the application for leave was not made until after 5 months (on 25.2.2013). He submitted that the filing and service of the notice of appeal was out of time because the ruling was delivered on 10.2.2012 and the notice of appeal should have been filed within 14 days pursuant to rule 75 of this Court’s Rules. It is patent that the notice of appeal was filed out of time without leave.
13. Mr. Odera further pointed out, quite correctly, that there was no need for certified copies of the proceedings. But the certification does not appear to have contributed to the time taken in the typing and preparation of the proceedings. He pointed out that the application does not show why

- the applicants did not file the record of appeal within 60 days after receipt of the proceedings.
14. It was Mr. Chacha's contention that Article 159(2)(d) of the Constitution which the applicants invoked in aid and which requires courts in exercising their judicial authority to be guided by, *inter alia*, the principle that justice shall be administered without undue regard to procedural technicalities did not oust the substantive law or rules of procedure and was therefore inapplicable in the circumstances of the application.
15. In his reply to Mr. Chacha's submissions, Mr. Anambo conceded that the notice of appeal should have been filed within 14 days from the date of delivery of the ruling on 12.2.2012 and further, that the period for filing notice of appeal elapsed on 26.2.2012. In effect, therefore, he conceded that the notice of appeal filed on 12.3.2013 was filed out of time without leave. Consequently, there was no competent notice of appeal for the purpose of service. Yet, the application seeks leave to file "*memorandum of appeal and record of appeal out of time.*" Although leave has not been sought or obtained to file and serve a notice of appeal and as there is no competent notice of appeal in place, the question of filing a record of appeal does not arise.
16. This Court has unfettered power under rule 4 of the rules of this court to extend time. Rule 4 Stipulates:

"r. 4 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.

17. The discretionary power of the Court under rule 4 is required to be exercised judicially with the object of serving justice to the parties. The policy of the Court is to sustain an appeal. But there is none here as there is no competent notice of appeal in place.
18. As there is no competent notice of appeal in place, the orders sought cannot be granted for the simple reason that the applicants have not complied with rules 75, 77 and 82 of this Court's Rules. These rules state:

"75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal"

"77.(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:"

"82(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –" (emphasis added)

19. It is quite clear in this application that the applicants did not comply with these rules and as a result there is no valid or competent notice of appeal in place pursuant to which a record of appeal can be filed as requested. At any rate, even if the notice of appeal had been duly filed and served, in the circumstances of this application, the delay in seeking leave is inordinate and there is culpable laches and lack of plausible explanation and clearly the applicants do not deserve the orders they seek.
20. Accordingly, I have no alternative but to dismiss the application which I do. The applicants shall pay the costs of the respondents. It is so ordered.

Dated and delivered at Nairobi this 30th day of May 2014.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR