



IN THE COURT OF APPEAL

AT NYERI

CORAM: OTIENO-ODEK J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 36 OF 2013

BETWEEN

HELLEN WARUGURU WAWERU

(suing as the legal representative of

PETER WAWERU MWENJA (DECEASED)APPLICANT

AND

KIARIE SHOE STORES LIMITED.....RESPONDENT

(An application for extension of time to file record and memorandum of appeal out of time against the judgment of the High Court of Kenya at Embu(H.Ongun'di, J.) delivered on 20th February, 2013

in

H.C.C.A No. 58 of 2010)

RULING

1. By a Notice of Motion dated 3rd December 2013, the applicant seeks two orders under **Rules 4&42** of the **Court of Appeal Rules 2010** that:-
 - ***The time within which to lodge an appeal against the entire judgment of the learned Judge delivered on 20th February 2013 be extended.***
 - ***Costs of the application be in the cause.***
2. The ground in support of the application is that the time within which to prepare and file the record of appeal lapsed before the applicant could prepare the same. The application is supported by the affidavit of the applicant and a further supporting affidavit is sworn by Shadrack Mugambi Njeru, learned counsel for applicant.
3. The applicant deposes that the judgment was delivered on 20th February, 2013 and on 27th February, 2013 the applicant applied for certified copies of the proceedings which were availed on 23rd July, 2013. The Certificate of Delay is attached to the further supporting affidavit sworn by the applicant's counsel. The applicant deposes that between 23rd July, 2013 and the lodging of the

- present application, her counsel committed an inadvertent error by losing track of the file; the advocate's clerk filed away the file without realizing that the record of appeal had not yet been prepared. That it was not until end of the calendar year 2013 that counsel realized the record of appeal had not been filed and the present application to extend time was filed on 4th December, 2013. Counsel for the applicant in the further supporting affidavit deposes that he realized while preparing his yearly schedule that he had not prepared the record of appeal. According to the learned counsel, the applicant had an arguable appeal.
4. A replying affidavit sworn by the respondent was filed in opposition to the application for extension of time. The basis of opposition is that the applicant had not demonstrated inadvertence on the part of her counsel in filling away the file to the extent that the advocate's clerk had not sworn any affidavit to that effect. That no evidence had been given to illustrate the said "filling away" of the file and reasons for delay in filing the record of appeal had not been proved. The respondent deposed that the High Court properly evaluated the evidence on record and the applicant had no arguable appeal.
 5. Learned Counsel, **Mr. Mugambi Njeru** appeared for the applicant while learned counsel, **Ms. I. A. Otieno** appeared for the respondent.
 6. In the present application, the applicant seeks leave to file the record of appeal out of time. The period of delay in filing the record of appeal as calculated from 23rd July, 2013 when certified proceedings were ready to the date when the instant application was filed on 4th December, 2013 is over 140 days.
 7. I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under **Rule 4** is unfettered and does require establishment of "*sufficient reasons*". Nevertheless, the exercise of the discretion ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See ***FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004*** (unreported). There is also a duty now imposed on the Court under **Sections 3A and 3B** of the ***Appellate Jurisdiction Act*** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.
 8. The applicant was represented by counsel at the High Court when judgment was delivered on 20th February, 2013. As was stated by Tunoi, J.A. (as he then was) in ***Njoka Muriu & another – vs- Evans Githinji Muriu & Another- Civil Applic. No. Nai 356 of 2003***, a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. Counsel for the applicant being a careful advocate lodged a notice of appeal to safeguard his client's interest. Despite the fact that certified proceedings were availed to the applicant on 23rd July, 2013, the record of appeal was never filed.
 9. The applicant gives the reason for delay in filing the record of appeal as inadvertence on the part of her counsel in putting the file away in his office. No evidence was given in support of this statement. In ***Mutiso –vs Mwangi (1997) KLR 630***, the criteria that govern an application under **Rule 4** were given as:

“It is now 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 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 application is granted.”

10. Applying the foregoing criteria, the applicant has not attached draft grounds of appeal to the application hence it is not possible to *prima facie* determine the chances of the appeal succeeding; the reason given for delay is not supported by evidence because the clerk in the applicant's counsel did not swear an affidavit to the effect that he inadvertently filed away the applicant's file without realizing that the record of appeal had not been filed. However, I note that counsel for the applicant filed a further affidavit deposing to this fact.

11. During submissions, counsel for the applicant indicated that the judgment sum had been deposited in a joint account and that the respondent shall suffer no prejudice if leave is granted. Whereas I am not fully satisfied that the over 140 day period of delay has been satisfactorily explained, taking into account that the judgment sum has been deposited in a joint account, I grudgingly exercise my discretion in favour of granting leave to the applicant to file the memorandum and record appeal out of time. With great hesitation, I note that errors on the part of counsel should not be visited upon a client.
12. The Notice of Motion application dated 3rd December, 2013 is hereby allowed. The applicant shall have 14 days from the date hereof to file and serve the memorandum and record of appeal. The respondent's cost for this application shall be paid personally by counsel for the applicant Messrs Mugambi Njeru & Co. Advocates.

Dated and delivered at Nyeri this 13th day of May, 2014.

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR