



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: P. KIHARA KARIUKI (PCA))**

**CIVIL APPLICATION NO NAI 294 OF 2013 (UR 214 OF 2013)**

**BETWEEN**

**TERESIAH WANGARI NDUNGU.....APPLICANT**

**AND**

**PAUL KAMAU MWANIKI.....RESPONDENT**

*(An application for leave to appeal out of time against the judgment and decree of the High Court of Kenya at Nakuru (**Omondi, J.**) dated the 14<sup>th</sup> June, 2013*

*in*

**H.C.C.C. No. 476 of 1998)**

\*\*\*\*\*

**RULING**

1. Before me is an application by way of Notice of Motion dated the 18<sup>th</sup> October 2013. Through this application, **Teresiah Wangari Ndungu** (the applicant), seeks orders that she be granted leave to appeal out of time against the judgment and decree of **Omondi, J.** made on the 14<sup>th</sup> June 2013, and that the costs of and incidental to this application abide the result of her intended appeal.
2. The background of the application is fairly simple, and can be gleaned from the applicant's affidavit sworn on the 18<sup>th</sup> October 2013. After delivery of the judgment in the High Court, the applicant instructed her advocate at the time, one **Chuma Mburu**, to file an appeal. The Notice of Appeal and the Record of Appeal were filed and served within time. After service of the record, it came to the knowledge of **Paul Kamau Mwaniki** (the respondent) that the said Chuma Mburu did not have a practicing certificate for 2013, and the respondent therefore filed an application in this Court, dated the 16<sup>th</sup> September 2013, in which he sought that the pleadings filed before this Court on the applicant's behalf be struck out. When Mr. Mburu was served with this application, he informed the applicant and it was at this point that the applicant learnt of her advocate's unqualified status.
3. After realizing that the advocate was unqualified to prepare the documents before the Court, the applicant filed, contemporaneously with the present application, an application to strike out the aforesaid Notice and Record of Appeal, and now seeks leave to file the proper documentation out of time. She states that she has a good appeal, that the delay is not inordinate, and is explained and therefore, urged me to exercise my discretion in her favour.

4. The application is opposed by way of a Replying Affidavit sworn by the respondent on the 19<sup>th</sup> November 2013. His main assertion is that the applicant is guilty of delay because the application to strike out the Notice and Record of Appeal was served on the 20<sup>th</sup> September 2013, yet the applicant only brought the present application a month later, on the 23<sup>rd</sup> September 2013. He states that this delay is inordinate and unexplained, and that the applicant did not act diligently in engaging a competent advocate quickly enough, yet she was well aware that time was running out. The respondent considers this application an attempt by the applicant to prolong unnecessarily the dispute between them, and therefore would have it dismissed with costs.
5. When the application came up for hearing, **Mrs. Ng'arua** for the applicant submitted that the delay of one month, between the time that the applicant discovered her previous advocate's status and the bringing of the present application, cannot be said to be inordinate or unreasonable.
6. **Mr. Mwaniki** opposed the application, by stating that the applicant has failed to demonstrate why there was a delay of over a month.
7. The principles regarding applications for extension of time have followed a well beaten path. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997** the Court set out those principles in the following manner:

***“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 on 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 the application is granted.”***

8. These factors are, of course, not exhaustive, and the Court is free to exercise its discretion to extend time after considering all the relevant factors when deciding the matter before it. This was stated by Waki, JA. in **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))** thus:

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, 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.”***

9. The applicant avers that her appeal, arising out of a dispute over land is a good one, which ought to be canvassed before, and determined by, this Court. She has annexed to her affidavit a memorandum showing the grounds in the intended appeal. My perusal of the same reveals that these grounds raise arguable issues against the judgment of the trial court, which ought to be ventilated at full hearing.
10. It took the applicant one month to instruct another advocate and file the present application. In the persuasive authority of **Agip (Kenya) Limited v Highlands Tyres Ltd. [2001] KLR 630**, Visram, J. (as he then was) stated that:

***“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The Court must also consider whether the defendant has been prejudiced by the delay.”***

11. I do not think that this delay is so long as would be considered inordinate. In any event, the applicant appears to be keen on having her appeal heard and determined, as evidenced by her instructions to her previous advocate. As **Visram, J.** stated, it is important to look at not only the reason for the delay, but also whether there has or will be any prejudice to the respondent should

the extension of time be granted. I fail to see how the respondent herein would be prejudiced if the orders sought in this application are granted, and the matter goes on appeal on its merits.

12. In *Wasike v Khisa & Another* [2004] 1 KLR 197, Githinji, JA. stated at 201 that:

***“It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable. And whether or not delay is unreasonable will largely depend on the circumstances of each case.”***

13. Bearing in mind the circumstances of this case, I hold the view that the delay of a month is not inordinate, and is excusable. The applicant is deserving of my unfettered discretion which I hereby exercise by allowing this application, with the order that the applicant will file and serve the Notice and Record of Appeal within fourteen (14) days of the date of this ruling. The costs of the application will abide the outcome of the appeal.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of May, 2014.**

***P. KIHARA KARIUKI (PCA)***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**