



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL (APPLICATION) NO. 312 OF 2010**

**BETWEEN**

**PETER GATAHI KAMAITHA .....APPLICANT**

**VERSUS**

**THE SECRETARY**

**PUBLIC SERVICE COMMISSION..... 1<sup>ST</sup> RESPONDENT**

**THE TOWN CLERK**

**NYERI MUNICIPAL COUNCIL..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

***(An application for extension of time to file an application to re-instate Civil Appeal No. 312 of 2010 which was dismissed for non-attendance on 19<sup>th</sup> June, 2013 (Visram, Koome & Odek, JJ.A.)***

**RULING OF THE COURT**

1. By Notice of Motion dated 28<sup>th</sup> March, 2014, the applicant is seeking leave for extension of time to file an application to reinstate ***Civil Appeal No. 312 of 2010***, which appeal was dismissed for non attendance on 19<sup>th</sup> June, 2013, by ***Hon. Justices Visram, Koome & Odek JJ.A.***
2. The application is brought under ***Rules 4, 41, 42 and 43*** of the ***Rules*** of this ***Court*** and ***Sections 3A and 3B*** of the ***Appellate Jurisdiction Act*** and ***Section 59*** of the ***Interpretation and General Provisions Act, Cap 2*** of the ***Laws of Kenya***.
3. It is evident from the application that a period of over 9 months has elapsed since delivery of the ruling dismissing the appeal for non attendance. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension.
4. The issue in this application is whether the applicant has given a satisfactory explanation for the 9 month delay in bringing the present application. Of relevance is whether there are any extenuating circumstances that can enable this Court to exercise its discretion in favour of the applicant. Before delving into the merits of the application, it is important to emphasize that the instant application is for leave to extend time to file an application to set aside the order made on 19<sup>th</sup> June, 2013, dismissing the appeal. The reasons for seeking leave to extend time should be distinct from the reasons for seeking the setting aside of the order dismissing the appeal for non attendance. Reasons for extension of time are matters within the jurisdiction of a single judge

- while reasons for setting aside the dismissal order are matters for consideration by a three judge bench.
5. Two affidavits were filed in support of the present application one deposed to by the applicant Peter Gitahi Kamaitha and the other deposed by his counsel on record Mr. Stephen Musalia Mwenesi. The grounds in support of the application are that the applicant and his advocate failed to attend court on 19<sup>th</sup> June, 2013, when **Civil Appeal No. 312 of 2010**, was dismissed for non attendance; that on 19<sup>th</sup> June, 2013, learned counsel for the applicant Mr. Mwenesi was engaged in **High Court Election Petition No. 3 of 2013** at Homa Bay (**Prof. E. A. Oyugi – v- IEBC & 2 Others**); that when the hearing notice for **Nyeri Civil Appeal No. 312 of 2010**, was served upon the offices of Mr. Mwenesi on 18<sup>th</sup> June, 2010, he had left for Homa Bay; that the applicant had 30 days under **Rule 102 of the Rules of this Court** to apply to restore the appeal and failed to do so; that no party shall be prejudiced by extension of time to file an application to set aside the dismissal order; that mistake of counsel should not be visited upon a client. In his supporting affidavit, learned counsel Mr. Mwenesi deposes that he did not make an application to restore the appeal under **Rule 102** because he became overwhelmed by exigencies of office and matters in other courts that were by their nature of greater priority and **Civil Appeal No. 312 of 2010** was inadvertently overlooked.
  6. The 2<sup>nd</sup> respondent filed a replying affidavit deposed by Ms Wambui Kimathi. It is deposed that the present application for extension of time is misconceived, incompetent, and defective and is an afterthought. That the applicant has not candidly explained why he did not set in motion the process of restoring the appeal within 30 days as required by **Rule 102 (1) and 102 (3) of the Court of Appeal Rules**. That there is unexplained and unacceptable delay from 19<sup>th</sup> June, 2013, to 1<sup>st</sup> April, 2014, when the present application was filed. That both affidavits in support of the application contravene the mandatory provisions of **Sections 6 and 17 of the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya** as they do not disclose the source of information that is deposed to. That the applicant does not explain why he never followed up his case when he learnt of the dismissal of his appeal. The 2<sup>nd</sup> respondent deposed that there must be an end to litigation; that there are various warrants of arrest against the applicant issued by this Court and that is why the applicant failed to attend court and has failed to disclose this fact in his present application.
  7. During the hearing of this application, learned counsel Asa Omwoyo holding brief for Mr. Mwenesi appeared for the applicant, while learned counsel Wahome Gikonyo appeared for the 2<sup>nd</sup> respondent. There was no appearance for the 1<sup>st</sup> and 3<sup>rd</sup> respondent save that a State Counsel had written a letter to this Court dated 27<sup>th</sup> May, 2014, seeking adjournment of the matter on the ground that counsel assigned the matter was on leave. Noting that no formal application for adjournment was made by any party and hearing notices having been duly served, this Court directed the instant application to proceed for hearing.
  8. Counsel for the applicant elaborated on the grounds in support of the application. He emphasized that delay in bringing the application was not intentional but due to oversight and exigencies in the office of counsel on record for the applicant. It was submitted that learned counsel S.M. Mwenesi who has the conduct of this matter on behalf of the applicant was engaged in **Election Petition No. 3 of 2013** at Homa Bay on 19<sup>th</sup> June, 2013, and was unable to attend Court in Nyeri when **Civil Appeal No. 312 of 2010**, was called scheduled and out for hearing. Counsel submitted that hearing notices for **Nyeri Civil Appeal No. 312 of 2010**, were attached to the supporting affidavit of the applicant. Counsel urged this Court to consider the deposition in Mr. Mwenesi's affidavit where he states that owing to exigencies of office and pressing engagements at the High Court, Supreme Court and Court of Appeal in Nairobi, Kisumu and Kisii relating to election petition matters, he was unable to attend to the Nyeri Court of Appeal; and that election petition matters in Kisumu and Kisii took priority. Counsel submitted that under Article 48 of the Constitution, the applicant had a right of access to justice and he should be given an opportunity to prosecute his appeal that was dismissed on 19<sup>th</sup> June 2013.
  9. Counsel for the 2<sup>nd</sup> respondent opposed the application and relied on the replying affidavit deposed to by Wambui Kimathi. It was submitted that the applicant is seeking exercise of discretion by this Court and it is incumbent upon the applicant to place material before the Judge

that can lead to the exercise of that discretion. Counsel submitted that the applicant has been economical with truth and has failed to candidly explain reasons for delay in bringing the application in accordance with **Rules 102 (1) and (3)** of this **Court's rules**. That the applicant has not explained the 9 month delay between 19<sup>th</sup> June, 2013, and 1<sup>st</sup> April, 2014, when the present application was filed. That the 9 month delay is hopelessly and belatedly unexplained. Counsel emphasized that the two affidavits in support of the present application violate the provisions of the **Oaths and Statutory Declarations Act**; that when the applicant in his affidavit states that he learnt that his appeal had been dismissed he does not indicate the source of this information; neither does he give the source of information that he learnt his advocate Mr. Mwenesi had travelled to Homa Bay nor does he give the date when he obtained the ruling in **Nyeri Civil Appeal No. 312 of 2010**, dated 19<sup>th</sup> June, 2013. It was submitted that even if it were true that counsel for the applicant Mr. Mwenesi was handling election petitions at Homa Bay, the cause list for 19<sup>th</sup> June, 2013, for election petitions at Homa Bay have not been attached to the supporting affidavit to show that the petition was listed for hearing. Further, it was submitted that counsel for the applicant Mr. Mwenesi did not depose in his affidavit whether the election petition at Homa Bay was heard on the said 19<sup>th</sup> June, 2013; that there was nothing to prevent the applicant from annexing the cause list or hearing notices for the Homa Bay election petition. Counsel further submitted that it was incumbent upon the applicant as a litigant to follow his case whether he was represented by counsel or not. That equity does not aid the indolent but the vigilant; that **Rule 4** of the **Rules of this Court** is intended to assist accidental mistakes not deliberate delays where no sufficient material is placed before the Court; that the applicant does not tell this Court where he was on 19<sup>th</sup> June, 2013, and he has not disclosed to Court that there are warrants for his arrest. Counsel submitted that the respondents stand to suffer prejudice if litigation does not come to an end. Counsel cited various authorities in opposition to the present application.

10. I have considered the Notice of Motion and the grounds cited in support thereof. I have also taken into account the supporting and replying affidavits and submission by both counsels and the list of authorities submitted by the 2<sup>nd</sup> respondent. What is before me is an application for extension of time under **rule 4** of this Court's Rules. The requirements under rule 4 is captured in the case of **LEO SILA MUTISO v ROSE, C.A. NAI 255 of 1997 (unreported)** as follows:-

***"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 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"***.

7. The other beacon concerning the exercise of a single judge's discretion was given by this Court in the case of **MONGIRA & ANOTHER v MAKORI & ANOTHER, [2005] 2 KLR 103 at pp 106-107** where the Court again cited the case of LEO SILA MUTISO (supra) and went on to state:-

***"Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general," Rule 4 gives the judge an 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 in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way"***.

8. Applying the criteria for exercise of discretion to the circumstances before me in this application, a delay of over 9 months is inordinate and requires satisfactory explanation. The explanation given by the applicant is that his counsel on record was engaged in an election petition at Homa Bay on 19<sup>th</sup> June, 2013, when his appeal in Nyeri was scheduled for hearing. I

have examined the supporting affidavits and no hearing notice or cause list for the Homa Bay court for 19<sup>th</sup> June, 2013, has been attached to these affidavits. I do find that no material has been placed before me to support the averment that on 19<sup>th</sup> June, 2013, the applicant's counsel was indeed before the election court at Homa Bay. I note that counsel for the applicant in his supporting affidavit states that due to exigencies at his office he was unable to attend court on 19<sup>th</sup> June, 2013. At this stage, I would not go into the merits or demerits of this averment as this is a matter to be considered by a three judge bench when considering the application to set aside the order made on 19<sup>th</sup> June, 2013. Counsel for the 2<sup>nd</sup> respondent in opposing the present application raised issues pertaining to violation of the **Oaths & Statutory Declarations Act** and failure to annex the cause list and or hearing notices for the Homa Bay election petitions. It is my considered view that these issues are relevant and are to be canvassed in the main application for setting aside the dismissal order.

9. As to the prospects of prejudice to the respondents, the replying affidavit indicates that there must be an end to litigation. I entirely agree with this submission. However, litigation must come to an end when all parties have been heard and substantive justice has been administered. Whereas **Rule 102 (2) and (3)** of the **Rules of this Court** provide for a 30 day period within which to make an application for restoration, the rules of this Court allow me to exercise discretion and extend time. **Article 159** of the **Constitution** enjoins this Court to administer substantive justice. I note that **Sections 3A and 3B** of the **Appellate Jurisdiction Act**, through the overriding objective principles mandate this Court to act justly and fairly. The applicant and the respondent are both entitled to fair and expeditious hearing through the overriding objective principle. The overriding objective principle is not aimed at giving justice to one party at the expense of another.

10. I do consider that the present application is for extension of time to file an application seeking orders to set aside dismissal of the appeal. The 2<sup>nd</sup> respondent in its submissions has combined reasons for opposing extension of time and reasons for opposing the setting aside of the order made on 19<sup>th</sup> June, 2013. Due to this combination, it is my considered view that if extension is granted, no prejudice shall be suffered by the respondents who shall have an opportunity before a three judge bench to oppose the application for setting aside the dismissal order made on 19<sup>th</sup> June 2013. The need for expeditious disposal of the case between the parties hereto dictates that a three judge bench is better placed to hear the merits of the application to set aside the dismissal order rather than prevent the applicant from accessing the three judge bench. For the foregoing reasons, the application to extend time vide Notice of Motion dated 1<sup>st</sup> April, 2014, is hereby allowed. The applicant shall pay the costs of the application to the 2<sup>nd</sup> respondent.

The applicant has 10 (ten) days from the date of this ruling to file the application seeking to set aside the order of 19<sup>th</sup> June, 2013; in default the Notice of Motion dated 1<sup>st</sup> April, 2014, shall stand dismissed with costs.

***Dated and delivered at Nyeri this 3<sup>rd</sup> day of June, 2014.***

***OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**