



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 16 OF 2014

JAMES MWANGI MATHENGE

(Suing as the Legal Representative of the Estate of MOSES KINYUA MWANGI)
**APPLICANT**

-VS-

CHARLES MWAI1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(In the matter of an application for leave to file and serve notice and record of appeal out of time from the judgment and order of the High Court of Kenya at Nyeri (Khamoni, J.,) dated 14th February, 2005

in

Civil Case No. 180 of 2000)

RULING

This is an application under **Rule 4** of the **Court of Appeal Rules**. James Mwangi Mathenge (*applicant*) is seeking for extension of time to file an appeal out of time. This application is predicated on the grounds stated on the body of the application and the matters deposed to in the applicants’ supporting affidavit sworn on the 12th day of June, 2014.

Briefly stated, it is the applicants’ case that after the judgment was pronounced by the High Court on the 14th day of February, 2005, the outcome was communicated to him by his Advocate. He was aggrieved by the said judgment and consequently he instructed an advocate to file the appeal. To his utter disappointment, no appeal was filed. The applicant admitted there was inordinate delay in filing the appeal but he contended that was due to the fact that he relied on his advocate who failed to act diligently.

During the hearing of this appeal, the applicant who was acting in person reiterated the above ground and emphasized that he was unable to file an appeal due to lack of resources. He also submitted that the appeal is arguable because he was pursuing a claim for damages in respect of the death of his son

who was shot dead by the police. In addition to the loss of life of his son, he was ordered to pay the costs of the suit to the respondents who had allegedly taken away the life of his son. When I enquired from the applicant why it took him close to 9 years to file the instant application from the date of the judgment, his response was that he was inspired by the **Constitution of Kenya 2010** to seek a remedy for the loss of his son.

This application was opposed; Mr. Makori learned counsel for the respondents submitted that the instant application did not meet the threshold to warrant the exercise by this court's discretion. Firstly, it was submitted that the applicant was guilty of material non-disclosure that a similar application seeking for leave was filed in **CIVIL APPEAL NAI 265/2005 (NYERI 16/05)**. That application was dismissed by a single Judge (**Tunoi JA**) (as he then was) on the 3rd November, 2005. The applicant filed a reference before a full Bench which was also dismissed on the 19th May 2006. On the merits of the application, counsel for the respondents submitted that the application is made after 9 years. The applicant has not even disclosed the name of the advocate he instructed to file an appeal. For those reasons counsel urged the application be dismissed.

The prayers sought in the instant application call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; - **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)**:

“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.”

The above list is of course not exhaustive as held in the case of; - **Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-107**, where the Court again cited **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 unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. ... To limit such issues only to the grounds set out in the above 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”.

With the above principles in mind, I now approach the application before me. The first issue to determine is whether this application is an abuse of the court process, a similar one having been dismissed by a full bench as stated above. The applicant did not make this disclosure; which is a fundamental error, a party seeking the exercise of court's discretion must make full disclosure of all relevant matters that torch on the issue under consideration. This was material information that ought to have been disclosed. Secondly, this application is made after a lapse of 9 years since the judgment sought to be appealed against was pronounced. That is inordinate period of delay that the applicant has not bothered to explain. Even the facts deposed to in his supporting affidavit did not disclose the name of the advocate who failed to file an appeal on his behalf. A mere blanket allegation against an advocate's failure is of no evidential value. Thirdly, although the applicant states that he was inspired by the provisions of the **Constitution of Kenya 2010**, this **Constitution** has been around from August, 2010. It also does not help the applicant as the application is made after almost 3 years since the **Constitution** was promulgated; moreover, the applicant does not cite any particular provision in the said **Constitution** that allows a party a leeway to re-

open a matter after so many years.

In conclusion, although I do this with a lot of sympathy to the applicant, my hands are tied for reasons stated; I have no basis howsoever to exercise my discretion in favour of the applicant. Accordingly, this application is dismissed for lacking in merit. As the applicant was acting in person, I make no order as to costs, each party to bear their own costs.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JULY, 2014.

MARTHA KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR