



IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 12 OF 2014

BETWEEN

NGUGI NJURUMBE APPLICANT

AND

DINAH WAIRIMU NJOGU RESPONDENT

(An application for extension of time within which to file an appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 21st February, 2014

in

H.C.C.A No. 107 of 2009)

RULING

1. Before me is an application brought pursuant to **Rule 4** of the **Court of Appeal Rules** (the Rules) seeking *inter alia*
 - **Leave to file an intended appeal from the judgment of the High Court dated 21st February, 2014 out of time.**
 - **Costs of the application abide the outcome of the intended appeal.**
2. The grounds upon which the applicant relies on in support of his application are that, the judgment was delivered on 21st February, 2014 without notice to his advocates; the delivery of the said judgment had been postponed on several occasions. The applicant's advocate learnt about the said judgment on 17th March, 2014 when he was in Nyeri law courts attending to other matters. The applicant's intended appeal is arguable; it is in the interest of justice for the extension sought to be granted.
3. In opposing the application, the respondent filed a replying affidavit. She deposed that the applicant and his advocate were aware of the judgment date because it was given in court. The applicant had not served the respondent's advocate with the Notice of Appeal or the letter requesting for certified proceedings. According to the respondent, the draft memorandum of

- appeal does not disclose an arguable appeal. The respondent deposed that the application was brought with inordinate delay. He urged this Court to dismiss the appeal.
4. The genesis of this application is that the respondent filed suit against the applicant seeking *inter alia* a declaration that the applicant was holding a portion of 0.875 acres of parcel No. Loc.6/Gikarangu/963 (suit land) in trust for the respondent. The applicant and respondent are brother and sister respectively. After considering the matter, the subordinate court entered judgment in favour of the respondent. Aggrieved with the said decision, the applicant preferred an appeal in the High Court which was dismissed vide a judgment dated 21st February, 2014. The applicant seeks leave to file an appeal out of time against that judgment.
 5. Mr. Njoroge, learned counsel for the applicant, reiterated the grounds in support of the application for extension of time. Mr. Mbuthia, learned counsel for the respondent, in opposing the application, relied on the affidavit sworn by the respondent. He submitted that no explanation was given for the delay in filing the application for extension of time.
 6. I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. There is no doubt that the discretion that I am being called upon to exercise in this application is under **Rule 4** of the Rules which provides:-

“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 doing any act authorized or required by these Rules, whether before or after 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.”

7. The discretion under **Rule 4** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and interested parties if the application is granted, and whether the matter raises issues of public importance. In **Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004**, this Court held: -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

“It is now well 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.”

8. It is not in dispute that the judgment subject of the intended appeal was delivered on 21st February, 2014. The current application seeking extension of time was filed before this Court on 27th May, 2014, 3 months after delivery of the judgment. In my view whether this delay was unreasonable ought to be determined with the explanation for the delay. It was the applicant's contention that his advocate only learnt of the delivery of the judgment on 17th March, 2014 and filed the Notice of Appeal on 19th March, 2014. I am inclined to give the applicant the benefit of doubt and find that delay in filing the appeal up to 17th March, 2014 was excusable. This leaves two months delay in filing the current application. No reasons were adduced by the applicant for the said delay.

9. I have perused the draft Memorandum of Appeal and I find that the intended appeal is arguable. K.M'inoti, J.A in **Joseph Wanjohi Njau –vs- Benson Maina Kabau –Civil Application No. 97 of 2012** held,

“The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed, but is one which ought to be argued fully before the Court.”

10. Taking into consideration that the subject matter herein is land and the dispute involves family members, I am inclined to exercise my discretion in favour of the applicant. This however does not sanction the two months unexplained delay in filing the current application. I am of the view that the extension of time will be in accordance with the requirements of the overriding objective of this Court. All in all I find that the demands of justice will be better met by allowing the application so as to enable the parties to ventilate their respective positions on merit.

11. The upshot of the foregoing is that I allow the applicant's application and extend time within which he can file an appeal from the judgment of the High Court dated 21st February, 2014. Accordingly, I direct the applicant to serve the Notice of Appeal filed on 19th March, 2014 upon the respondent within seven days from the date of this ruling. I also grant the applicant leave to file the Record of Appeal within 30 days from the date of this ruling. The respondent shall have the costs of this application.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR