



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 11 OF 2014

BETWEEN

EDITH GICHUGU KOINE.....APPLICANT

AND

STEPHEN NJAGI THOITHIRESPONDENT

(An application for extension of time to file and serve notice of appeal, memorandum of appeal and record of appeal out of time against the judgment of Justice Sergon in Nyeri High Court Civil Appeal No. 41 of 2008 delivered on 21st February, 2014.

in

H.C.Civ. Appeal No. 117 of 2009)

RULING

1. By a Notice of Motion dated 21st May, 2014, the Applicant Edith Gichugu Koine seek two orders under rule 4 of the ***Court of Appeal Rules 2010*** (the rules) that:-
 - a. ***That the Honourable Court do deem that the Notice of Appeal filed on 13th March 2014 and lodged on the 17th March 2014 at Nyeri High Court in Civil Appeal No. 41 of 2008 being an appeal against the judgment of Hon. Justice J. K. Sergon delivered on 21st February 2014 be deemed to be properly on record and or alternatively the time for lodging and serving the Notice of Appeal be extended***
 - b. ***That the costs of the application be provided for.***
2. The grounds upon which the application for extension is based is deposed in the affidavit of the applicant wherein it is stated that the applicant was not aware of the judgment date of 21st February, 2014, as she did not receive notice for the date of delivery of the judgment. The applicant deposed that initially the judgment date was given as 16th December, 2013, but judgment was not delivered on the date. That upon inquiry the applicant was informed that the judge who heard the matter had not succeeded in the vetting process and the parties would receive notices when judgment was to be delivered. That judgment was later delivered on 21st February, 2014, and by the time the Notice of Appeal was filed on 17th March, 2014, the 14 day period for filing the notice had lapsed.
3. The respondent filed a replying affidavit opposing the application for extension of time. The gist

of opposition is that the applicant has not been truthful and the applicant was aware of the date of judgment as 21st February, 2014. That on 16th December, 2013, the applicant's son a one Joseph Wachira Kiome was in court and contrary to what the applicant deposed, the Hon. Justice Serгон was present in court and the learned judge indicated that judgment shall be delivered on 21st February, 2014. That the applicant's son was present in court when the Honourable judge made the decision. That the applicant upon filing the Notice of Appeal was expected to lodge the record of appeal within 60 days and this has not been done.

4. Upon being served with the replying affidavit, the applicant filed a supplementary affidavit wherein she agreed with the respondent that indeed her son, Joseph Wachira, was present in court when the judgment date was given as 21st February, 2014; that her son informed her that the judgment was read but he did not understand the contents. That she learnt of the contents of the judgment on 7th March, 2014, when her advocate on record obtained a copy of the judgment from the registry and a Notice of Appeal was filed. That the said Notice of Appeal was filed out of time and the delay was occasioned by her failure to get her then advocate to enable her give instructions. The applicant urged this court not to punish her for the failures or mistakes of her then advocate on record. The applicant deposed that she has an arguable appeal with a high chance of success. Attached to the supplementary affidavit is a draft memorandum of appeal.
5. At the hearing of the present application, the applicant was represented by learned counsel Ms Anne Thungu while the respondent was represented by learned counsel Ms Kiragu.
6. Counsel for the applicant relied on the grounds stated in the application and the contents of the supporting and supplementary affidavit deposed by the applicant. It was submitted that the applicant was not present in court when judgment was delivered on 21st February, 2014, and the present application for extension was filed on 21st May, 2014. That the delay of 2 months and 8 days in filing the application for extension was not inordinate. That the applicant had instructed her former advocate on record to file the appeal and this was not done. This Court was urged not to punish a client for the mistakes or failures of counsel. It was submitted that the dispute in this case relates to land and the respondent was given 4 out of 7 acres of family land; that no prejudice will be suffered by the respondent if extension for time to file and lodge the record of appeal was granted.
7. Counsel for the respondent opposed the application emphasizing that the applicant had not been candid before this Court. That the applicant in her supporting affidavit stated she was not aware of the judgment date of 21st February, 2014, and that the Honourable Judge was not present in court on 16th December, 2013, and only changed her story when she read the replying affidavit which contradicted her averments. Counsel submitted that the applicant seeks to argue the appeal on matters of fact yet **Section 72** of the **Civil Procedure Act** states that no appeal can lie on an error of fact. It was submitted that the applicant was aware of the judgment date by the High Court and no reasonable explanation had been given for delay in filing the record of appeal.
8. 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 not require establishment of "*sufficient reasons*". Nevertheless, it ought to be guided by consideration of 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.
9. It is not unheard of for lawyers, even experienced ones, to overlook or fail to file appeal on time and in this case, I would not condemn unheard the applicant's former advocates on record. The issue before me is not to determine whether the applicant's former advocate on record was professionally negligent or not or whether they made a mistake or failed in their duty.
10. I note that the application before me was filed on 21st May, 2014 after a period of 2 months and 8 days delay from the date of judgment by the High Court. I pose the question whether 2 months 8 days delay amount to an inordinate delay. The initial explanation given by the applicant is that she

was not aware of the judgment date of 21st February, 2014, and that the judge who heard the case was not sitting on 16th December, 2013. I find that the applicant is not candid in her initial explanation of reasons for delay. The replying affidavit clearly showed that the applicant was aware of the judgment date and I do not see any good reason why the applicant introduced the assertion that the judge who heard the case did not succeed in the vetting process. This is an extraneous and irrelevant matter as far as the present application is concerned. The impression created is that the applicant by whatever means is trying to put across the message that she was not aware of the judgment date. This effort dismally failed given the deposition in the replying affidavit and the credibility of the applicant is put to question. It is apparent that after reading the replying affidavit, the applicant shifted the explanation for delay and now blames her former advocate on record. The applicant is keen to blame anybody and everybody except herself for the delay. This conduct should be condemned as abhorring.

11. I have taken into account that the period for delay is 2 months and 8 days. With great reluctance, noting that the applicant's explanation for delay is not convincing, I find the delay is not inordinate taking into account that a Notice of Appeal had been filed. I emphasize the fact that the respondent did not indicate the nature of prejudice, if any that he stands to suffer if the present application is granted. I have considered the overriding objective principles that bind this Court and that the **2010 Constitution of Kenya** requires this Court to administer justice without undue regard to technicalities.

12. The applicant feels aggrieved by the decision of the learned judge. Whether or not she will succeed in the intended appeal is a matter for the appellate court to decide. At this stage, I should not delve into the merits of the intended grounds of appeal and the issues to be raised in appeal. I find that the respondent shall not be prejudiced if the applicant gets her day in court to challenge the judgment of the learned judge. The respondent can be compensated by an order for costs in the event intended appeal is not successful. For these reasons, I hereby exercise my discretion in favour of granting leave to file a fresh Notice of Appeal and record of appeal out of time. The new Notice of Appeal shall be filed and served within seven (7) days of this ruling and the record of appeal shall be filed and served within sixty (60) days of filing the Notice of Appeal. Failure to comply with any of the time limits stipulated heretofore, the Notice of Motion application dated 21st May, 2014, shall stand dismissed with costs. Although leave is hereby granted to file a fresh Notice of Appeal and record of appeal, given her abhorrent conduct of shifting blame game for the delay, the applicant shall pay the costs of the present application to the respondent. Orders accordingly.

Dated and delivered at Nyeri this 9th day of July, 2014.

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR