



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 125 OF 2014

BETWEEN

RICHARD THAIRU GACHAGUA GACHIGI.....APPLICANT

AND

SETTLEMENT FUND TRUSTEES.....1ST RESPONDENT

NAFTALI RUTHI KINYUA2ND RESPONDENT

(Application for extension of time to lodge a Notice of Record of Appeal out of time from the Judgment of the High Court at Nakuru (Waithaka, J) Dated 4th October, 2013

in

H.C. ELC No. 273 of 2012

RULING

Before me is an application by way of notice of motion dated and lodged in this Court's Registry on the 16th day of May, 2014. It is predicated on Rule 4 of this Court's Rules. It seeks leave of court to extend time within which to file a notice of Appeal; to extend time within which to lodge and serve a record of Appeal; to extend time within which to file the appeal. It is grounded on the grounds in the body of the application and the supporting affidavit deposed by **James Kamande Mwaura Gichachi**.

On the date fixed for the hearing of the application only **Mr. Gichachi J.K. Mwaura** for the applicant was in attendance. There was no appearance for all the respondents. **Mr. Gichachi** informed me that the first respondent the **Settlement Fund Trustees** never participated in the High Court proceedings though served with the plaint. The 2nd respondent who was served through an advertisement in a newspaper also never participated in the proceedings in the High Court.

(3) I being satisfied that in the circumstances displayed above, the respondents will not be prejudiced in any way if the matter proceeded *ex parte* subject to an ultimate order that these respondents be served with all the court processes that may result from the ruling on the application under review should the applicant ultimately succeed in the application under review, allowed the applicant to proceed *ex parte*.

(4) In his submissions to me, **Mr. Gichachi** placed reliance on the content of the grounds in the body of the application and the supporting affidavit. In summary, the applicant filed an originating summons No. 301 of 2010 in the High Court of Kenya at Nakuru; the respondents were duly served as stated above but they never entered appearance or participate in the proceedings in the High Court. The matter proceeded by way of formal proof resulting in the judgment of **L.N. Waithaka, J** of 4th October, 2013. **Mr. Gichachi** stated that the learned Judge had reserved the judgment with directions that it be delivered on notice. The first notice allegedly vindicated that the judgment was to be delivered on 4th September, 2013, but on which day it was adjourned to 17th September, 2013 for delivery but was not so delivered. Directions were allegedly given that a fresh notice for the delivery of the pending judgment would be given. None was allegedly given. The applicants' advocate thereafter made efforts to trace the file to know the position. It was not until 25th March, 2014 that the applicant's advocate's representative traced the file in the learned judge's chambers and upon perusal is when the applicant learned that judgment had in fact been delivered on the 4th day of October, 2013. By the 25th day of March when the applicant learned of the delivery of the judgment, the time line stipulated in rule 75(2) of this Court's Rules for the lodging of a notice of appeal had lapsed. The said rule reads:-

“Rule 75(2) Every such notice shall subject to rule 84 and 97, be so lodged within fourteen (14) days of the date of the decision against which it is desired to appeal”

On the basis of the above, the applicant contends that he is not at fault for not moving to comply with the above rule; the fault lay with the court in failing to notify him of the subsequent date set for the delivery of the judgment after it had been rescheduled; he is genuinely aggrieved by the High Courts judgment and he should therefore be accorded an opportunity to ventilate his grievances to the appellate forum; he has an arguable appeal as demonstrated by the content of the draft memo of appeal exhibited herein and lastly that he has given a reasonable explanation for the delay to warrant me to grant him the relief sought.

My jurisdiction has been invoked under Rule 4 of this Court's Rules. It reads:-

“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 of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the 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.”

The parameters on the applicability of this rule have now been crystallized by case law. See the case of **Githiaka Versus Nduriri [2004] KLR67** wherein it was held *inter alia* that:-

1. ***Under rule 4 of the Court of Appeal Rules, the Court is vested with a perfectly clear and unfettered discretion to extend the time limited by the Rules or its own decisions.***
2. ***The Court's discretion under rule 4 of the Court of Appeal Rules, like all judicial discretions, is to be exercised judicially, that is to say, on sound reason rather than whim, caprice or sympathy.***
3. ***In the exercise of its discretion, the Court's primary concern should be to do justice to the parties. The Court should, among other things, consider:-***
 - . ***The length of the delay in lodging the notice and record of appeal;***
 - . ***Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;***
 - . ***Whether or not the intended appeal is arguable;***

. The prejudice to the respondent if the application is granted;

.The public importance, if any, of the matter; and

.Generally the requirements of the interest of justice in the case.

I have applied the above principles to the sole argument of the applicant herein, and I proceed to make the following findings in the disposal of the application under review.

(1) The application is uncontested. The general rule is that whether contested or not an applicant seeking relief under rule 4 of this Court's Rules has to bring himself within the threshold set by the case law set out above before earning a relief under this Rule.

(2) The applicant has placed blame onto the court for failure to notify him of the subsequent date for the delivery of the judgment. It has been the applicants' argument that in fact delivery of judgment had been reserved for 4th September, 2013 then for 17th September, 2013. On which day there was no delivery but directions given that further notice would be given. There is however no backup facts to support this assertion. This could have been achieved by the applicant exhibiting a record of the proceedings to show when the judgment was reserved for delivery; when the judgment was rescheduled a second time for delivery on notice; documents to show that the applicant had been diligent and infact made frantic efforts from 17th September, 2013 to 25th March, 2014 to know when the judgment was to be delivered next on the one hand and on the other hand that he had been making efforts to trace the court file and lastly that indeed the file was traced on the 25th day of March, 2014 in the learned trial judge's chambers. There is no letter of protest either to the Registrar or the trial judge at the failure to notify him first of the rescheduled date of the delivery of the judgment and secondly the delivery of the judgment.

(3) A letter of protest to the Registrar of the court regarding matters mentioned in number 2 above would have yielded information to confirm the veracity of the above applicant's allegations.

(4) The applicant has admitted from the bar that no seeking a supply of the record of proceedings for purposes of appeal has been addressed to the Deputy Registrar as demonstration of the applicants serious intention to appeal against the decisions in respect of which he seeks an extension of time within which to comply. When brought to his attention, learned counsel for the applicant **Mr. Gichachi** intimated that this will be rectified as soon as the applicant is given the leave sought and to lodge his appeal out of time.

(5) The arguability or otherwise of the intended appeal is merely a possible consideration. It is not a mandatory requirement. There is therefore no need for me to determine at this juncture as to whether the appeal is arguable or not.

(6) It is a period of eight (8) months and twelve (12) days from the 4th day of October, 2013 to the 16th day of June, when the application under review was filed; and four (4) months twenty one (21) days to the date of the alleged discovery of the delivery of judgment; it is a period of two (2) months and twenty two (22) days. From the 25th day of March, 2014 when the discovery of the delivery of the judgment was made to the 16th day of June, 2014 when the application under review was lodged.

The question I wish to pause to myself is whether the applicants application has met the threshold set by Rule 4 of this Court's Rule to warrant me to grant to him the relief sought. The applicants failure to exhibit the record of the proceedings; lack of proof of efforts made to keep track of the delivery of the judgment; to protest at the court's failure to notify him of the delivery of the judgment; failure to demonstrate that indeed it was not until 25th March, 2014 when he learned of the delivery of the judgment and failure to explain why it took two (2) months to present the application under review as well as failure to apply for proceedings as a show of an intention to seek a second opinion on appeal, all go to negative the applicant's assertion that he is a genuinely aggrieved and serious seeker of appellate justice.

In the result, I find no merit in the application dated 16th June, 2014. The same is dismissed with no

order as to costs.

Dated and Delivered at Nairobi this 28th day of November, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.