



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 284 OF 2012

BETWEEN

SUSAN WANGUI MWANGI.....APPLICANT

AND

GEOFFREY MWANGI KAARA.....RESPONDENT

(An application for extension of time to lodge notice and record of appeal out of time from the judgment of the High Court of Kenya at Nairobi (Majanja, J) dated 5th October, 2012

in

H.C. PETITION NO. 235 OF 2011)

RULING.

1. By a notice of motion dated 19th November 2012 under rule 4 of the rules of this Court, the applicant seeks the following orders:-

- “a) That this honourable Court be pleased to extend time within which to file and serve a notice of appeal.***
- b) That this honourable Court be pleased to extend time within which to lodge and serve a record of appeal.***
- c) That in any event and if need be this honourable Court be pleased to extend time within which to file the appeal.***
- d) That costs be in the cause.”***

2. The application is based on the grounds deposed to in the supporting the affidavit of the applicant, and on the grounds urged before me by Ms. Mwihaki Njuguna learned counsel for the applicant. The applicant deposes that the judgment intended to be appealed against was delivered on 5th October 2012; that the applicant’s advocates then on record failed, despite her instructions to them to do so, to file a notice of appeal; that she applied for copies of the proceedings on 25th October 2012 from the court; that

on receipt of the certified proceedings and judgment she instructed her current advocates to file a notice of appeal; that the failure to file the notice of appeal was not intentional and that she has a good appeal that has overwhelming chances of success which she should have an opportunity to prosecute.

3. Mr. Njenga Muchai, learned counsel for the respondent in opposing the application relied on the replying affidavit of Geoffrey Mwangi Kaara, the respondent, filed in opposition to the application and submitted that the application has no merit; that the applicant does not state when she instructed her former advocates who she blames for inaction; that she does not state when she discovered that a notice of appeal had not been filed and when she instructed her current advocates; that the delay in presenting the present application has not been satisfactorily explained; that the intended appeal has no merit and has no chances of success; that the respondent will suffer prejudice in terms of escalation of costs if the application is granted. Counsel for the respondent urged the Court to dismiss the application.

4. In an application under **rule 4** of the Rules of this Court, I am called upon to exercise my discretion. The guiding principles for the exercise of that discretion are settled. In the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi –Civil Application No. Nai. 255 of 1997 (unreported)** this Court stated:

“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 delay; secondly, the reason for 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.”

5. The delay involved in the presenting this application from the time judgment was delivered on 5th October 2012 and the time the present application was filed on 19th November 2012 is slightly over one month. The applicant says that she instructed her advocates then on record to file an appeal and trusted that they had done so only to discover later that a notice of appeal had not been filed. It seems that immediately on becoming aware that a notice of appeal had not been filed the applicant took matters on herself and applied for proceedings and judgment before instructing her current advocates to take over the conduct of the matter. I think the delay, which is not inordinate, is sufficiently explained.

6. There is however the question of chances of the appeal succeeding if the application is granted. The less I say on this the better. The applicant has in the draft memorandum of appeal indicated that the learned trial judge erred in finding that her rights to freedom of expression had not been violated and in failing to order provision of DNA to resolve the question of paternity. It is arguable whether the intended appeal can be said to be frivolous. The applicant will have the benefit of doubt and should have an opportunity to canvass the intended appeal.

7. As regards the question of prejudice to the respondent, I think an award for costs would compensate the respondent for any prejudice that he might suffer as a result of this application being allowed.

8. In the result, I allow prayer (a) and (b) of the application dated 19th November 2012. The applicant shall within forty five (45) days from the date of delivery of the ruling, file and serve a notice of appeal and record of appeal.

9. The respondent shall have the costs of the application.

Dated and delivered at Nairobi this 7th day of June, 2013.

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a copy of the original.

DEPUTY REGISTRAR