



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: W. OUKO, J.A)

CIVIL APPLICATION NO. NAI 42 OF 2013

BETWEEN

KEZIAH STELLA PYMAN & 2 OTHERS APPLICANTS

AND

PAUL MWOLOLO MUTEVU & 8 OTHERS..... RESPONDENTS

(Being an application to enlarge time within which the applicants can file and serve record of appeal against the judgment delivered by Honorable Justice J.R Karanja on 18th October, 2012

in

HIGH COURT CIVIL CASE NO. 93 OF 2011)

RULING

This is an application under **Rule 3A** of the **Appellate Jurisdiction Act** and **Rule 4** of the **Court of Appeal Rules, 2010** for extension of time to file and serve record of appeal out of time from the ruling of the High Court (Karanja, J.) dated 18th October, 2012. The application is supported by an affidavit sworn Keziah Stella Pyman on 31st January, 2013 on behalf of the 2nd and 3rd applicants.

After judgment was delivered on 18th October, 2012 the applicants duly filed a notice of appeal on 29th October, 2012. The applicants in their sworn affidavit claim that they were advised by their advocate M/s Chebii and Company Advocates that the proceedings and judgment were not ready for collection. They further alleged that upon making an application to the High Court for typed proceedings and judgment, they were informed, through their advocate that the proceedings were ready for collection on 17th November, 2012. The applicants averred that although they filed a notice of appeal, the delay to lodge an appeal was occasioned by reasons beyond their control. They asked the court to exercise its discretion to allow them file and serve the record of appeal out of time.

The respondents filed a replying affidavit dated 8th May, 2013 sworn by **Paul Mwololo Mutevu** on his behalf and on behalf of his co-respondents in which they have alleged that after the proceedings were availed on 17th November, 2012 no steps were taken by applicant's until 7th February, 2013, some eighty two (82) days which have not at all been explained. For this reason they asked the court not exercise its discretion in favor of the applicants and to dismiss the application.

When the matter came before me in chamber on 15th May, 2013 Mr. J. K. Chebii, learned counsel for the applicants explained that the delay was partly caused by preparation of the record of appeal as evidenced by a certificate of delay which was annexed to the application. Mr. Chebii further submitted that the notice of appeal was duly filed on 28th October, 2012, ten days after judgment was delivered this being a sign of the applicant's keenness in pursuing the appeal. He added that although the memorandum of appeal was not attached to the instant application, the same was ready awaiting leave of court before filing. On the issue of computation of time, Mr. Chebii submitted that December vacation holiday ought not to be taken into consideration as is the time taken by the High Court to prepare the proceedings. It was Mr. Chebii's view that if the same was taken into account, the delay in question would have been about seventeen (17) days. Finally, counsel urged that procedural rules should not override substantive justice as provided by the Constitution. Mr. Chebii highlighted two authorities in support of his application **George Mwangi Karanji & Peter Ndegwa Kamonde V. Nelious Wairimu Kiunjuri** Civil Application Nai 49 of 2000 and **Kiara & Kipkemei Songok V. Prisca C. Kiti Cheruiyot & Argos Furnishers Ltd** Civil application Nai. 227 of 2004.

Mr. P.K Kiarie, learned counsel for the respondents opposed the application and submitted that the application involved the exercise of the court's discretion which required that an explanation be given for the delay. Mr. Kiarie added that although the notice of appeal was filed on 29th October, 2012 with the Deputy Registrar at High Court at Kitale, the letter by the applicants requesting for proceedings was not served on them. Mr. Kiarie submitted that Rule 82 (1) of Court of Appeal Rules was not available to the applicants since the appeal had to be filed within sixty (60) days; that is from 29th October 2012 to 28th February, 2013 taking into consideration the December vacation period. He added that proceedings were availed on 17th November, 2012 and that is all that was needed for the applicants to lodge an appeal. The learned counsel faulted the applicants' reason for not lodging the appeal within time, namely that the delay was "beyond our control". On this account, Mr. Kiarie submitted that the court should not exercise discretion in favor of the applicants. The learned counsel cited the case of **William K. Too V. Simion K. Langat** Civil Application Nai. 6 of 2007, **Kiama Mucheke & another V. Maina Munyi** Civil Application Nai 33 of 1997 and the case of **Dorcus Kanongo V. Kenya Commercial Bank Ltd. & 2 others** Civil Application Nai. 369 of 1999.

The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has unfettered discretion whether to extend time or not. However in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** – Civil Application No. Nai 251 of 1997 where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

I have taken into account all the relevant factors as submitted and authorities relied on by counsel for the parties. The judgment was delivered on 18th October 2012 and subsequently, the applicants filed a notice of appeal on 29th October, 2012. Although the applicants allege that they applied for the proceedings of the court, a copy of the said letter has not been annexed to this application.

In addition, contrary to what is contained in the annexed certificate of delay from the Deputy Registrar dated 15th January, 2013 that the proceedings were ready for collection on 7th November, 2012, the applicants' supporting affidavit states that the proceedings were ready for collection on 17th November, 2012. This mistake is repeated by the respondent who reiterates the same in their replying affidavit dated 8th of May, 2013 and submissions by their counsel before me in chamber on 15th May, 2013.

In this regard therefore, the sixty days provided for the applicant to lodge the appeal under **Rule 82 (1)** of

the **Court of Appeal Rules** started running from 8th November, 2013 to 7th February, 2013.

Within this period of time, the following days shall be excluded from computation of time as provided for in **Order 50, Rule 4** of the **Civil Procedure Rules**.

“50 (4) Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) or the amending, delivering or filing of any pleading or the doing of any other act.

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

Rule 3 of the **Court of Appeal Rules, 2010** also provides that;

“Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions—

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;

(b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(e) unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”

Based on these provisions, and as earlier stated the period shall run from 8th November, 2012 to 7th February, 2013, the total number of days comes to (sixty nine) 69 days. The delay is therefore nine (9) days. Despite the fact that this delay has not been adequately explained by the applicants, I am inclined to exercise my unfettered discretion in their favour as no prejudice will be occasioned to the respondent except for a brief inconvenience. The time for filing and serving record of appeal is hereby extended by seven (7) days from the date hereof.

Dated and delivered at Nairobi this 17th day of October 2013

W.OUKO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR