



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 102 OF 2017

**J. P. MACHIRA T/A MACHIRA & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**WACHIRA WARURU.....1<sup>ST</sup> RESPONDENT**

**THE STANDARD LIMITED.....2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to serve Record of Appeal out of time in an Appeal from the Judgment of the High Court of Kenya at Nairobi ( Sergon, J) delivered on 16<sup>th</sup> August, 2016*

*in*

**HCCC NO. 2002 OF 2000)**

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**R U L I N G**

**J. P. Machira T/A Machira & Co. Advocates** (applicant) sued **Wachira Waruru** and **The Standard Limited** (1<sup>st</sup> and 2<sup>nd</sup> respondents respectively), for among other reliefs general, aggravated and exemplary damages for defamation and libel.

The respondents defended the suit and after hearing the parties, in a judgment rendered on 16<sup>th</sup> day of August, 2016, the learned Judge (Sergon J), dismissed the suit with costs to the defendants (respondents herein). The applicant, being dissatisfied with the judgment lodged a notice of appeal before the High Court on 19<sup>th</sup> August, 2016.

The memorandum and record of appeal was subsequently filed timeously on 20<sup>th</sup> April, 2017. Under **Rule 90(1)** of the **Rules of this Court**, the record and memorandum of appeal was supposed to be served on the respondents before or within seven (7) days after the lodging of the appeal and the record. This was not done and service was effected on the respondents on 2<sup>nd</sup> May, 2017 which was outside the seven days prescribed by the said Rules.

The applicant has therefore moved to this Court, vide the notice of motion dated 4<sup>th</sup> May, 2017 seeking extension of time to serve the said record. He prays for an extension of fourteen (14) days to serve the record of appeal. Since however, the record has already been served on the respondents albeit out of time,

the applicant prays that the said service be deemed to have been served within time. The application is supported by the affidavit of John Patrick Machira, the applicant sworn on 4<sup>th</sup> May, 2017.

Basically the reason given for the delay in service is that when the appellant's clerk was on the way to go and serve the record, he met some "Nasa Group Supporters" who had barricaded the road, and being apprehensive about his safety, he retracted back to the office. There is no explanation given as to why the clerk did not attempt to effect service later the same day or the following day. According to Mr. Machira, there will be no prejudice occasioned to the respondents, and further that the delay involved was a very short one.

The application was served on the respondents on 5<sup>th</sup> May, 2017, as per the affidavit of service presented to the Court by Mr. Machira. The application did not elicit any reply from the respondents. They were also served with the hearing notice for the hearing of this application but they did not appear in Court to oppose it and the application is therefore not opposed.

I have considered the application, the grounds on its face and the contents of the affidavit in support. I have also considered the oral submission by Mr. Machira which was essentially expounding the contents of the supporting affidavit.

The Court's power to enlarge time under **Rule 4** of this Court's Rules is discretionary. That discretion though unfettered, must be exercised judicially and there are some established principles which guide the Court in deciding on whether or not to extend time. In **Mwangi -v- Kenya Airways Limited**, [2003] **KLR 486** at page 487, this Court stated of this discretion and the manner it ought to be exercised as follows: -

***"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 -v-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'.***

***These in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words "in general". Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".***

Applying the above criteria to the present application, first and foremost, the Court must consider the reasons advanced for failure to comply with the timelines provided for in the Rules. In this case the delay was only a few days, 5 days to be precise. Is that delay inordinate? In my view, in the circumstances of this case, the delay was not inordinate. Were the reasons for the delay plausible? Unfortunately I don't think so. There was no evidence adduced to show that the roads in question were barricaded and that no alternative route was available for the process server to access the Respondent's offices.

However, on the issue of prejudice, I note that the Record of Appeal has already been served on the respondents. They did not decline service, nor have they opposed this application. It is evident therefore that they have no problems with the service albeit having been effected out of time. The respondents do

not therefore stand to suffer any prejudice whatsoever if this application is allowed. I don't find it necessary to consider the other criteria pertaining to whether or not the applicant's appeal has good chances of success. I will leave the entire question of merit to the bench that will ultimately hear the Appeal itself.

For the foregoing reasons, I am satisfied that the application should succeed. I allow the same with no order as to costs.

As the Record of Appeal has already been served on the respondents, I allow prayer three of the application and order that the said record be and is hereby deemed as having been served within time.

***Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2017.***

**W. KARANJA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**