



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: F. AZANGALALA J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. 23 OF 2012**

**BETWEEN**

**DISMAS OTANY OTANY..... APPLICANT**

**AND**

**JOHN OSONGA MIMBI ..... RESPONDENT**

*(Being an application for leave to file and serve Notice of Appeal & Record of Appeal out of time from the Judgment of the of the High Court at Kisumu (Aroni J.) dated 8th December, 2011*

**in**

***HC.SUCC. NO. 590 OF 1999)***

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**RULING**

The application before me dated 16th July, 2013 seeks only one order, a part from costs namely:-

***“That the Hon. Court be pleased to extend time to enable the applicant to file and serve Notice of Appeal out of time against the judgment and decree of the Honourable lady justice Ali-Aroni dated 8/12/2011.”***

The applicant is ***Dismas Otany Otany*** and the respondent is ***John Osonga Mimbi***. The applicant supported the application by his affidavit sworn on 16th July, 2012. Paragraphs 4, 5, 6 and 7 of the affidavit appear to be the only paragraphs of any relevance to the application for extension of time. They are expressed as follows:-

***“4. That when the judgment was delivered on 8th December, 2011 my Advocate who was on record did not notify me on time and only came to realize later that the judgment had been delivered.***

**5. That the delay in filing the Notice of Appeal was occasioned by the Advocate not informing me in time of the courts (sic) decision in order to instruct him further.**

**6. That my appeal has high chances of success.**

**7. That the Respondent will suffer no prejudice in the event that this Application is allowed.”**

There is nothing in this affidavit indicating who the advocate was and when the applicant came to know of the Judgment of the High Court. The alleged advocate has not sworn an affidavit explaining why he or she did not inform the applicant of the judgment of the High Court or if he did not do so when and why he delayed in so doing.

The application is brought pursuant to rule 4 of this Court's Rules. Under that rule the Court has unfettered discretion. The discretion however, like all judicial discretions must be exercised judicially upon reasons and not upon the Court's whims or caprice. The relevant guiding principles applicable in such an application have been well set out in many decisions of this Court including the case of Leo Sila Mutiso -Vs- Rose Hellen Wangari Mwangi – [Civil Application No. Nai. 251 of 1997] (UR). There, the Court stated *inter alia*, as follows:-

**“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.”**

The list of the matters to be considered as given in the above case is not exhaustive given the nature of the discretion exercisable by the Court. On the arguability of the appeal all I need to say is that save for stating in his affidavit that his appeal has high chances of success there is no basis upon which I can make a finding thereon. However, having perused the judgment of the High Court which the applicant exhibited to his affidavit in support of the application, I cannot say that the intended appeal is arguable.

As to delay, in my view, the same has not been adequately explained. The length of delay sought to be excused by the granting of an extension would appear to start 14 days from 8th November, 2011 when the High Court judgment was delivered and to end on the filing of this application for extension which application was lodged on 16th July, 2012 which is a period of about 235 days.

There was an intervening Christmas vacation which I should take into account to reduce the said period. The Christmas vacation is from 22nd December to 13th January which is about 24 days. If this period is deducted from 235 days the relevant length of delay is 211 days.

In my view a delay of that magnitude without a satisfactory explanation in the circumstances of this case is such that I do not feel inclined to exercise my unfettered discretion in favour of the applicant for extension of time even though the application was not opposed.

The application is therefore without merit and is dismissed. I make no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF December 2013**

F. AZANGALALA

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JUDGE OF APPEAL



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