REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 214 OF 2017

NASSIM ATHUMANI ALI.....APPEALLANT

VERSUS

SWALEH MOHAMED FAMAU.....RESPONDENT

RULING

1. The appellant has by the Notice of motion dated 3.7.2028 sought and prayed that he be granted an extension of time to file the appeal and that the Memorandum of Appeal dated the 3.3.2016 be deemed duly filed. The application was supported by the Affidavit sworn by the applicant. The grounds disclosed on the face of the application and in the affidavit to support the application are that being aggrieved by the impugned decision, it sought and did so albeit late by some four days owing to the time needed to obtain copies of the proceedings. There was also advanced a ground that no prejudice would be occasioned to the respondent if time was extended and that it was in the interests of justice to allow the application.

2. In opposing the application, the Respondent filed what he called **Notice of Grounds of preliminary objection/opposition.** In that document the Respondent took the position that the motion was abusive of the court process having been brought too late in the day after the parties had filed and exchanged submission on the substantive appeal, that it amounted to an admission that the appeal was incompetent and that to allow it would be to defeat the objection already taken against the appeal by the respondent. In support of such objections, counsel cited and availed a copy of the decision in **Mitchell vs Cheyo and others (2011)1EA, 293** for the proposition that time to remedy a defect in a record of appeal lapses the moment the notice of a preliminary objection is filed and hat such an objection cannot be preempted by an application to extend time.

3. Directions were initially given that the respondent's application to strike out the appeal for incompetence be argued together with that by the appellant to extend time by way of written submissions but such direction were later varied to the extent that the respondent's application be treated as an opposition to the application for extension of time. In line with such directions both parties filed submission on the application to strike out and argued the application for extension of time orally with.

4. For the applicant, Ms Wambani advocate, made submission invoking the provisions of Section 95 and Order 50 Rule 6 as well as the Supreme Court decision in Nicholas Salat Vs IEBC [2014]eKLR on the power to extend time and the principles to be considered. Counsel underscored the fact that the appeal was late by only four day which was neither inordinate nor unreasonable and could that visit no prejudice upon the respondent.

5. On the position by the respondent that his application ought to have been heard first, counsel submitted that once the court directed the order of hearing, the order remained valid until and unless set aside or varied and relied on the decision in Rep vs KSL ex-parte Juliet wanjiru [2015]eKLR.

6. For the respondent, Mr kimani advocate, maintained that the application for extension of time was an abuse of the court process for exhibiting kneejerk reaction and that it could not be taken seriously in its attempts to preempt the preliminary objection and an application challenging the appeal for being incompetent.

7. Counsel cited to court **Mitchell vs Cheyo (supra), silverstain vs chesoni [2002]1EA 296 at 301** as well as **Tana Teachers coop vs Andriano Muchiri , Mbs CACA 64 of 2016 (unreported),** all supporting the argument that that application was bad for having been filled too late and intended to preempt the challenge on the appeal.

8. On the strength and merits of the appeal challenging jurisdiction, counsel pointed out that that the relevant statutes, being the rating Act, Valuation for Rating Act and Land Adjudication Act all vested the magistrates court with jurisdiction over the matter and further that the magistrates court was a land court even before section 26, Environment and Land Court Act and the decision in **Law Society of Kenya, Nairobi Branch vs Malindi Law Society and others [2017] eKLR** came into being. Counsel therefore urged that the request for extension

of time be refused and that the appeal be struck out for having been filed out of time.

9. In her rejoinder to the submissions by the respondent, MS Wambani submitted that at the time the decision subject of the appeal was made the petition on jurisdiction of the magistracy was pending and the trial court should have waited for the outcome or just struck out the suit.

10. The only issue for determination in this matter is whether or not material has been placed before the court to merit the exercise of courts discretion in favour of the applicant. Since the decision in **Nicholas Salat's case, (supra)** the law was restated and reiterated that; the discretion is entirely upon the court provided that the delay or default is explained to the satisfaction of the court, no prejudice is visited upon the respondent by the extension and the application is not brought after undue delay. Those principles are the same established in innumerable previous decision and essentially underscoring the law that every litigant should not be impeded in having his dispute, when demonstrated to be arguable, litigated before the court but ought to be facilitated. The underlying consideration remains that a blunder, be it by negligence, mistake or inadvertence should never be the only reason to lock out a party from the seat of justice. The flip side is however that, timeliness must be observed, deliberate and reckless default designed to obstruct and delay must not be countenanced or rewarded.

11. I have had regard of the positions taken by both sides in this appeal and I do note that the delay was just for some 4 days. That to this court cannot be termed inordinate or unreasonable. On that basis I have no hesitation in finding that the delay was not unreasonable. I also find that the explanation given for delay is plausible and that to extend time so that the appellant is given his day in court will not visit any prejudice to the respondent incapable of remedy by an award of costs. For those reasons, I do allow the application dated 3.7.2018, extend the time for lodging the appeal and deem the memorandum of appeal filed on 15.3.2016 duly filed.

12. However in the course of preparing this ruling it has come to my notice that the impugned decision was made upon a preliminary objection and the record does not reveal that any leave was ever sought or granted. This was a matter that that ought to have come up at the hearing of the appeal but was not brought out. Having not been brought out for the parties to be heard upon it, I direct that it be dealt with at the first opportunity the appeal comes before the court, before any other business is taken.

13. On costs even though the appellant has succeeded, the application was necessitated by its default and he cannot be rewarded for just default by an award of costs. In terms of the proviso to order 50 Rule 6, the appellant shall pay to the respondent costs of the application in all events.

Dated and signed this 4th day of April 2020

P J O Otieno

Judge

Dated, signed and delivered at Mombasa this 23rd day of April 2020

E Ogola Judge