



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELCA NO. 22 OF 2019**

**(FORMERLY NAKURU HCCA NO. 156 OF 2012)**

**JOHN KIRUL.....APPELLANT**

**-VERSUS-**

**RICHARD RONO.....RESPONDENT**

**RULING**

1. This ruling is in respect of the respondent/applicant's Notice of Motion made under Section 4 of the Appellate Jurisdiction Act Cap 9, Section 3, 3(1) of the Environment and Land Court Act, Section 3 and 3A of the Civil Procedure Act and Order 46 Rule 1 of the Civil Procedure Rules 2010. The applicant sought the following orders: -

1. *[Spent]*
2. *That this honorable court be pleased to give the applicant leave to file a notice of appeal out of time.*
3. *That this honorable court be pleased to issue a stay of execution of its judgment and decree issued on the 4<sup>th</sup> May 2017.*
4. *That costs of this application be provided for.*

2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by the applicant. He averred that on 14<sup>th</sup> September 2006, the appellant/respondent filed a suit against the respondent/applicant claiming ownership of land parcel No. **Nakuru Tinet Settlement Scheme/2296** which suit was dismissed on 8<sup>th</sup> August 2012 by the Principal Magistrate's Court. He averred that the appellant/respondent was dissatisfied with the said judgement and appealed to this court which appeal was allowed vide the judgement delivered on 4<sup>th</sup> May 2017.

3. The applicant averred that he was not aware that the appeal was heard and determined as his advocate never informed him. That he only became aware of the judgement when he was served with an eviction order issued on 1<sup>st</sup> December 2017. That after perusing the court file he stated he found out that judgement was delivered on 4<sup>th</sup> May 2017 and that the time allowed to appeal had run out and he therefore has sought for an extension of time to lodge the appeal.

4. The appellant/respondent filed a replying affidavit sworn on 13<sup>th</sup> February 2018 where he deposed that he personally saw the applicant outside the court on 4<sup>th</sup> May 2017 when the judgement was delivered. He deposed further that it was the respondent/applicant's duty to monitor the progress of his case and to follow up with his advocates to be advised of the progress of the case. The respondent asserted that the applicant was personally served with the decree on 27<sup>th</sup> May 2017 which he signed at the back in acknowledgment and he was therefore not being honest with the court when he stated he had not been aware of the judgment.

5. The application was canvassed by way of written submissions. On whether he should be granted leave to file and serve the notice of appeal out of time, the applicant submitted that the court has unfettered discretion to extend the time within which the applicant can file and serve the notice of appeal under Rule 4 of the Court of Appeal Rules 2010 and relied on the case of ***Kariuki Network Limited & Another versus Dally & Figgis Advocates: Civil Application No. Nai 293 of 2009.***

6. The respondent submitted that the applicant knew the outcome of the appeal on 27<sup>th</sup> May 2017 when he was personally served with the decree as per the affidavit of service on record. The respondent further submitted that the applicant was not honest and had not approached the court with clean hands and therefore the court should not exercise its discretion to extend time for the applicant to file the appeal out of

time. The respondent relied on the case of **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and submitted that the applicant had failed to show a reasonable cause for failing to file the notice of appeal within the time allowed and his application lacked merit and ought to be dismissed.

7. Upon reviewing the application, replying affidavit and the submissions filed by the parties, the singular issue for determination is whether the applicant had laid any reasonable basis to warrant the court to exercise its discretion in his favour and extend time to file a notice of appeal out of time.

8. Section 7 of the Appellate Jurisdiction Act provides that:

*7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired'*

9. Under Rule 75(1) and (2) the Court of Appeal Rules, 2010 anyone who wishes to appeal to the court of appeal ought to give a notice in writing within fourteen days of the date of the decision to be appealed from. The judgement in this matter was delivered on 4<sup>th</sup> May 2017 and the fourteen days within which the notice of appeal ought to have been filed lapsed on 18<sup>th</sup> May 2017. The present application was filed on 5<sup>th</sup> February 2018 which was a delay of 8 months and seventeen days.

10. The power to enlarge time is discretionary and it is upon the party seeking for the enlargement of time to give a good reason for failing to comply with the set timelines. The Court of Appeal in the case of **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR** determined the principles the court should consider in an application for extension of time and quoted with approval the case of **Mwangi V Kenya Airways Ltd, [2003] KLR 486** where it was stated that:

*"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge 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 so long as the factor is relevant to the issue being considered."*

11. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** set out the factors that a court should consider in an application seeking extension of time. The court stated as follows:-

*"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion that:-*

- 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- 2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;*
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
- 4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;*
- 5. whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. whether the application has been brought without undue delay; and,*
- 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

12. The applicant in the present matter has to satisfactorily explain the reason for the delay of eight months and seventeen days delay in filing the present application. The court has to satisfy itself that the delay was not inordinate and/or that the reason for the delay has been satisfactorily explained. The court in **Ratnam -v- Kumarasamy (1964) 3 All ER 933** stated as follows:

*"The rules of court must, prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise discretion. If the laws were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide for a time table for the conduct of litigation.*

13. The reasons for the delay given by the applicant are to the effect that he was not informed by his advocate on record about the delivery of the judgement and that he only came to learn of the judgement on 1<sup>st</sup> December 2017 when he was served with the eviction order. From the court record, counsel for the respondent/applicant was present when the court delivered its judgement. In the case of **Rajesh Rughani -v- Fifty Investment Ltd. & Another (2005) eKLR** the Court of Appeal held that:

*"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".*

14. The court in the case *Habo Agencies Limited –v-Wilfred Odhiambo Musingo (2015) eKLR* stated that;

*“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”*

15. In the present matter judgment was delivered on 4<sup>th</sup> May 2017 in the presence of both counsel for the parties. The record shows a bill of costs was filed on 28<sup>th</sup> June 2017, listed for taxation on 19<sup>th</sup> July 2017, and 27<sup>th</sup> July 2017 when both counsel attended. Ruling on taxation was made on 22<sup>nd</sup> November 2017. Application for execution was filed on 6<sup>th</sup> December 2017. It is evident therefore there was post judgment activity in which the applicant’s advocate was involved. The applicant would want the court to believe that his advocate was engaging in the taxation of the party and party bill of costs without notifying him of the outcome of the appeal. The court finds that improbable as the advocate is under a professional duty to keep his client apprised of the progress of his case and if he fails to do so that would constitute professional misconduct in respect whereof such advocate would be liable. It is noteworthy in the present matter the applicant never sought to obtain any affidavit from his previous advocate to explain the omission and/or delay in filing a notice of appeal within the prescribed period.

16. Besides, a case does not belong to the advocate and always belongs to the party who instructs the advocate. Such a party has a continuing obligation and indeed a duty to keep monitoring the progress of his case with the advocate until the case is finalized. It cannot be a sufficient reason that a party failed to take some important step in the prosecution of his case because his advocate failed to advise him of the status of the case. The advocate is the agent of the client and for as long as he is on record he is deemed to act for and in the interest of the client. If he takes or omits to take some necessary action, it is the party who bears the consequences and hence the necessity for party to keep a tap on the progress of his/her case.

17. In the instant application, I am not satisfied that the applicant has given any satisfactory reason for the delay in filing the Notice of Appeal and/or bringing the present application for extension of time within, which to file the Notice of Appeal. The application lacks any merit and the same is dismissed with costs to the appellant/respondent.

18. Orders accordingly.

**RULING DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.**

**J M MUTUNGI**

**JUDGE**