



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 332 OF 2017

IKUMBI INVESTMENTS LIMITEDPLAINTIFF

=VS=

JOHN MBOGO NYAMBURA.....DEFENDANT

RULING

1. The Applicant/Plaintiff filed a certificate of urgency along with a Chamber Summons and a Notice of Motion dated 27/8/18 and filed on 28/8/18. The Chamber Summons was brought under section 10 of the Judicature Act, Cap 8 laws of Kenya Rule 3(1) and (2) of the High Court (practice and procedure rules) seeking leave for the application to be heard during the summer vacation due to its urgency.
2. The Notice of Motion is brought under order 51 rules 1 of the Civil Procedure Rules section 1A and 3A of the Civil Procedure Act and all other enabling provisions of law seeking:
 - a. Spent
 - b. That this honourable Court be pleased to extend the time for lodging and serving the Notice of appeal by the Applicant.
 - c. That the costs of this application be provided for.
3. The application is premised on the following grounds; That this Honourable Court delivered a ruling on 31st July 2018 in this matter dismissing the Applicants application dated 26/3/18 with costs to the respondent, the Applicant intends to appeal against that ruling but did not file the Notice of Appeal within the stipulated period for reasons that a former employee of the Applicant's Advocate on record was given instructions to file the Notice of appeal but failed to do so. And avers that if the orders sought are not granted, the Respondent will continue to enjoy orders of this Honourable Court for an unknown period of time to the detriment and prejudice of the Applicant. That it is in the interest of justice and fairness that this Hon Court do grant the Applicant the orders as prayed
4. In his supporting affidavit of Mutundu W. Chege Advocate who is in conduct of the matter on behalf of the Applicant herein deposes that after the ruling was delivered on 31/7/18 they advised their client of the outcome, who then instructed them to file a Notice of appeal, which he prepared and instructed one Haran Mugweru who left employment at the firm on 15/8/18 without giving notice to file the same. That it was after he left that while perusing the files realized that the Notice of appeal was not filed. That the instant application is to seek leave for extension of time beyond the stipulated 14 days within which to file the Notice of appeal, which has since lapsed. That if the leave is not granted the respondent will continue to enjoy orders of this Hon Court indefinitely to the detriment and prejudice of the Applicant. That the appellants has a good and arguable appeal with high chances of success, the application was brought without undue delay and the Applicant is ready to abide by any orders given by this Court. He prays that the application be allowed in the interests of justice and fairness.
5. The Defendant/Respondent in his Replying Affidavit deposes that the application is intended to delay and obstruct the end of justice. That the orders sought cannot be granted by this Court. That the directions given by this Honourable Court on 31/7/18 vide its ruling are justified for the final determination of the suit herein. That it is in the interests of justice that the main suit herein be stayed as ordered pending the determination of Kangema SRMCC No. 33 of 1994. That the claim by the Applicant that they instructed a former employee to file the Notice of appeal is unsubstantiated. The Applicant's advocates are well aware of the procedure of lodging an appeal which they failed to comply to. He contends that the Applicant has failed to adduce sufficient grounds to warrant the orders sought. That the Applicant herein will not be prejudiced if the orders sought are not granted as the main suit and Kangema SRMCC No. 33 of 1994 case are still pending for fair determination.
6. In their submissions the Applicant's Advocates concedes that it was a mistake on their part for not filing the Notice of appeal in time whilst they already had instructions from their client and pray that their misdoings should not be visited to their client. That this Court has jurisdiction as per section 7 of the Appellate Jurisdiction Act and particularly rule 4 allows the Applicant to either apply to the High Court or the Court of Appeal, they thus believe that the application is proper before this Court.

7. Annexed to the application is a Notice of appeal that is undated.
8. The key issue for determination is whether the Applicant's application is merited.
9. Rule 4 appellate rules provides;

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court of for making or form making an application for leave to appeal of for a certificate that the case is it for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired”

10. My reading of this section is that the ELC Court has jurisdiction just like the High Court under section 7 of the Act.

11. This jurisdiction is similar section 41 of the Appellate Jurisdiction Act which states that;

“ the Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of the time for the doing of any act authorized or required by these rules, notwithstanding the fact that no application has been made in the first instance to the superior Court”.

12. In the case of **Mwangi V Kenya Airways Limited (2003) KLR 486** the Court set out the factors that a single judge should take into account when exercising its discretion under rule 4 above held;

“ the list of the 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 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”.

13. There are too many gaps unexplained in the supporting affidavit of the Applicant; The Applicant does not state when he informed the client about the ruling; he does not state when the client instructed him to appeal. Such that if he had been instructed earlier, he ought to have filed the notice of appeal before the 15/7/18. I have examined the draft Notice of Appeal which indicates that it is to be filed at the ELC Court, Murang'a. Indeed it appears that the Notice of Appeal had not been completed. This document is not capable of being filed in that state.

14. The Applicant states that instructions were given to an employee to prepare and file notice of appeal. When he discovered that the notice of appeal was not filed inter alia. These matters are not properly explain to necessitate the Court to exercise its discretion.

15. The ruling appealed against was delivered on the 31st July 2018. The Applicant was obligated to file its Notice appeal within 14 days from the date of Ruling meaning by the 15/7/2018. The Appeal ought to have been filed within 60 days from the date the notice may have been filed but excluding any time which is certified by the high Court to have been taken to type certify and deliver the proceedings and the rulings to him. For this to happen, he ought to have applied formally to the ELC Court to be supplied with the certified ruling and proceedings for purposes of filing an appeal to the Court of appeal. Such application and disclosure would have obligated the Deputy Registrar to issue a certificate of delay when he is supplying the documents to the Applicant. The Applicant did not make such application and therefore there has never fallen any obligation on the Registrar to type certify and deliver to him the proceedings and the ruling together with a certificate of delay. Again, that Applicant did not file a notice of appeal to the Court of appeal or in the ELC Court and therefore obligation has not risen on him to file the appeal. But notwithstanding the forgoing he is seeking leave to file the notice of appeal which if granted will obligate him to file the notice and perhaps jolt him to belatedly apply for the certified copies of the ruling and proceedings. These action if permitted now will create an opportunity for a reverse action by the Deputy Registrar in that although the Applicant has not applied for certified copies of the proceedings and the ruling, he is likely to do so if this application is granted. The period to be counted for purpose of filing the appeal will fall in the future. The totality of all these actions are matters necessitated by inaction in circumstances that can reasonably be described as negligent on the part of the Advocate of the Applicant. Infact, going by the affidavit in support, it is the Advocate for the Applicant who is actually the Applicant in the case.

16. I declined to exercise my discretion in favour of the Applicant. The application is unmerited and is dismissed.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF MARCH, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Situma HB for Muchoki for the Plaintiff

Defendant: Present in person

