



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 124 OF 2018

DAVID M. MEREKA.....APPELLANT

=VERSUS=

KENYA COUNCIL OF CATHOLIC BISHOPS.....1ST RESPONDENT

DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND RESPONDENT

RULING

Section 16A (1) of the Environment and Land Court Act, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within a period of 30 days from the date of the decree or order appealed against. Section 16A (2) of the said Act provides that:

“An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

The proceedings before the court came about as a result of the Environmental Impact Assessment Licence (“the Licence”) that was issued by the 2nd respondent to the 1st respondent on 15th December, 2016. The development which was the subject of the licence has since been completed and the licence spent.

Although the licence was issued on 15th December, 2016 as aforesaid, it was not until 22nd March, 2017 that the appellant moved the National Environment Tribunal (“NET”) to challenge the same. The appellant’s appeal to the NET was filed out of time. On 23rd March, 2017, the appellant filed an application before the NET seeking extension of time within which to appeal. Before the NET, the appellant had contended that he was not aware that the 2nd respondent had issued a licence to the 1st respondent. The appellant’s application for extension of time before the NET was opposed on several grounds. In a ruling delivered on 11th May, 2018, NET dismissed the application. The ruling by the NET was delivered in the presence of the advocates for all the parties and the appellant was supplied with the typed copies of the proceedings on 11th June, 2018. The appellant did not file an appeal to this court within thirty (30) days of being supplied with the copies of typed proceedings.

What is now before the court is the appellant’s application brought by way of Notice of Motion dated 30th July, 2018 seeking extension of time within which to appeal against the decision of the NET that was made on 11th May, 2018. The application was brought on the grounds that the appellant received copies of the typed proceedings of the NET after the time limited for filing appeal to this court had lapsed. The appellant contended that failure to file the appeal within the prescribed time was excusable and beyond his control. The appellant contended further that he had been out of the office for some time and when he went back, the file relating to the dispute with the respondents escaped his attention.

The appellant’s application was opposed by the respondents. The 1st respondent opposed the application through a replying affidavit sworn by Very Rev. F.R. Daniel Kimutai Rono on 28th September, 2018 while the 2nd respondent opposed the application through a replying affidavit sworn by Prof. Geoffrey Wahungu on 12th September, 2018. The 1st respondent contended that the appellant was guilty of indolence and that the intended appeal was an afterthought meant to waste precious judicial time. The 1st respondent contended that the appellant requested for copies of the typed proceedings 2 days before the lapse of the time within which he was to file appeal to this court and as such failure to obtain proceedings timeously was not a reasonable excuse for not filing the appeal in time. The 1st respondent contended further that in applying for typed copies of the proceedings 28 days after the ruling sought to be appealed, the appellant had demonstrated lack of interest on filing the appeal. The 1st respondent averred that since the project that was the subject of the proceedings before the NET had been completed, the appellant’s intended appeal had been overtaken by events.

On its part, the 2nd respondent contended that the appellant applied for copies of typed proceedings on Friday, 8th June, 2018 and obtained the same on Monday, 11th June, 2018. The 2nd respondent averred that the proceedings were delivered to the appellant within a reasonable time and as such the same could not be an excuse for not filing the appeal within time. The 2nd respondent contended further that the intended appeal had been overtaken by events and that the application if allowed would cause prejudice to the person in whose favour the licence in dispute was issued who was not a party to the proceedings before the NET and had not been joined in the appellant's present application.

The application was argued on 25th February, 2019 when the advocates for the parties reiterated the contents of the affidavits that I have referred to above and cited a number of authorities in support of their respective cases. I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the respondents in opposition to the application and the submissions by the parties' advocates. Section 16A (2) of the Environment and Land Court Act, 2011 is very categorical on the grounds upon which extension of time within which to appeal against decisions of subordinate courts and tribunals can be granted. The court can only extend time when the applicant for such extension satisfies it that he had a good and sufficient cause for not filing the appeal within time. The appellant herein has put forward two (2) reasons for not filing the intended appeal within time. First, the appellant has contended that he was not provided with copies of the typed proceedings timeously and secondly, that he was out of his office for some time and when he came back the matter escaped his mind.

On the issue of the typed proceedings, the proceedings of the NET attached to the appellant's affidavit in support of the application show that the appellant applied for the proceedings on 11th May, 2018 when the ruling of the NET sought to be appealed was made and the NET made an order that the proceedings be typed urgently and supplied to the appellant. A copy of the appellant's advocates' letter dated 8th June, 2018 received by the NET on 11th June, 2018 attached to the appellant's affidavit in support of the application shows that it was not until 11th June, 2018; 30 days after the delivery of the ruling by the NET that the appellant went back for the proceedings. The appellant admitted that he was supplied with the proceedings on 11th June, 2018. In essence, the appellant received copies of the typed proceedings on the same day he went for the same. The time within which the appellant was to file the appeal started running on 11th June, 2018 when he received the proceedings meaning that he was supposed to file the appeal by 11th July, 2018. It was not until 1st August, 2018 that the appellant came to this court for extension of time. I am not satisfied that the time it took the NET to supply the appellant with copies of the typed proceedings had anything to do with the appellant's failure to file the intended appeal within time.

The appellant had also contended that he was out of the office for several days attending to a sick relative. I have noted from the proceedings before the NET that the dispute between the appellant and the respondents was not being handled by the appellant alone. The proceedings show that a number of advocates in the appellant's law firm appeared for the appellant before the NET and made submissions in the matter. The absence of the appellant in the office could not therefore be an excuse for not filing the appeal within time.

For the foregoing reasons, the appellant has not satisfied me that he had a good and sufficient cause for not filing the appeal within time. The threshold for granting extension of time has in the circumstances not been met. The appellants Notice of Motion application dated 30th July, 2018 fails and the same is dismissed with costs.

Delivered and Dated at Nairobi this 31st day of October 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Kuria h/b for Mr. Mereka for the Appellant

Ms. Kanyara for the 1st Applicant

N/A for the 2nd Respondent

C.Nyokabi-Court Assistant