



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E266 OF 2020

BETWEEN

ELDORET EXPRESS LIMITED.....APPLICANT

AND

MARGARET KINARO KIMERE..... RESPONDENT

(Application for extension of time to file and serve the Notice of Appeal and Record of appeal out of time in an intended appeal from the Judgment of the Environment and Land Court in Nairobi (**B. M. Eboso, J**) delivered on 18th February, 2020 in **ELC No. 787 of 2015**)

RULING

[1] The applicant, **Eldoret Express Limited** was the 2nd defendant in a suit that was filed in the Environment and Land Court (ELC) at Nairobi. In a judgment delivered on 18th February, 2020, the learned Judge (**Eboso, J**) gave judgment against the applicant. The applicant filed a notice of appeal dated 10th March, 2020 against the judgment, and also applied for certified copies of the proceedings and judgment.

[2] In accordance with the certificate of delay dated 25th August, 2020 that was issued by the Deputy Registrar of the ELC, the typed proceedings and judgment were availed to the applicant on the 24th August, 2020 and therefore a total of 167 days were required for typing the proceedings. By a notice of motion dated 27th August 2020, the applicant has moved this Court under Rule 4 of the Court of Appeal Rules, seeking orders for extension of time to enable it file its appeal. The applicant also seeks an order under Rule 5(2)(b) of the Court Rules for stay of execution pending the hearing of its appeal.

[3] Under Rule 53 of the Court Rules, an application for stay of execution is one that must be heard by a full Bench of the Court unlike an application for extension of time which is heard by a single Judge. It is not therefore proper to canvass the two prayers in one application. The application for extension of time should be brought first, and if successful, then another application can be brought for stay of execution pending appeal. With the extension of time there will be a proper appeal before the Court upon which the application for stay of execution can be anchored. I therefore reject the prayer for stay of execution, first, because I have no jurisdiction as a single judge to entertain it, and secondly, because it has been brought prematurely.

[4] As for the application for extension of time, the applicant through an affidavit sworn by its Operations Manager, **Joseph Ng'ang'a Thung'u**, and written submissions that have been duly filed by the applicant's advocate, explains that the delay in filing the appeal was due to the delay in typing the proceedings, and that the applicant has a solid appeal with a high probability of success, while the respondent will not be prejudiced if the extension of time is granted.

[5] The respondent objects to the applicant's motion through a replying affidavit sworn on 24th November, 2020, as well as written submissions that have been duly filed. The respondent swears that they have not been served with any notice of appeal by the applicant; that although the applicant filed his notice of motion on 27th August, 2020, it was only served upon her on 24th November, 2020; and that there is no excuse for the delay in serving the notice of appeal and the notice of motion.

[6] The respondent contends that the applicant is not deserving of the equitable relief it seeks as the delay is unconscionable and underserving. Further, that the application is not meritorious and is only meant to prevent the respondent from enjoying the fruits of her judgment.

[7] I have considered the motion, the contending affidavits and submissions. The issue is whether I should exercise my discretionary powers under Rule 4 of the Court Rules to extend time to enable the applicant file its appeal out of time. The principles which may be taken into

account in considering an application for extension of time are now well settled.

[8] In **Fakir Mohamed v Joseph Mugambi & 2 others** [2005] eKLR Waki JA put it as follows

The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38.

[9] In **County Executive of Kisumu vs County Government of Kisumu & 8 others** [2017] eKLR, the Supreme Court identified the principles as follows:

- “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 for 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. Whether there is a reasonable reason 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.”**

[10] Using the above principles, it behoves me first, to consider the period of delay and the explanation for the delay. The applicant has exhibited a notice of appeal which shows that it was received in the registry on the 18th March, 2020. This means that the notice was filed about 28 days after the judgment which was delivered on 18th February, 2020, and this is contrary to Rule 75(2) of the Court Rules that provides that a notice of appeal should be lodged within 14 days of the date of the decision against which it is desired to appeal. The applicant has not explained this delay.

[11] Secondly, the applicant has exhibited a certificate of delay duly signed by the Deputy Registrar of the Court showing that the applicant applied for typed copies of the proceedings and judgment on the 10th March, 2020, and that the same were supplied on the 25th August, 2020. Under the proviso to Rule 82(1) of the Court Rules, time required for the preparation and delivery of copies of the proceedings can be excluded from the computation of time, where there is a certificate from the Registrar of the court. However, under Rule 82(2) of the Court Rules, an appellant is not entitled to rely on Rule 82(1) unless his application for the proceedings and judgment was made in writing and a copy was served on the respondent.

[12] Neither the applicant nor the applicant’s advocate has stated anything about the letter bespeaking proceedings being served on the respondent. Nor has any copy been availed to the Court.

Therefore, the applicant has not satisfied this Court that any such letter was served on the respondent, or given any reason for such failure. This means that it cannot rely on Rule 82(1) to have time that was certified as necessary for typing of the proceedings and judgment excluded from the computation of time.

[13] Thirdly, although the applicant’s motion for extension of time is dated 27th August 2020, the motion was brought to Court under certificate of urgency in November 2020. No explanation has been given as to why no action was taken in the months of September and October, 2020.

[14] With regard to the possibility of the appeal succeeding, the applicant has not availed a copy of the judgment subject of the intended appeal, and an assessment cannot be made merely on the basis of the grounds of appeal intended to be canvassed. Of relevance is also the issue of prejudice likely to be caused to the respondent. It is obvious that the respondent suffers prejudice from the continued delay in filing the appeal as she cannot freely enjoy the fruits of the judgment delivered in her favour with the appeal hanging over her head.

[15] The upshot of the above is that there has been inordinate delay in filing the notice of appeal and the applicant’s appeal. This delay has not been adequately explained, and the applicant has therefore not laid an appropriate basis for the exercise of the Court’s discretion. In addition, the respondent will be prejudiced if the extension of time is granted after such an inordinate delay. For these reasons, I find that the applicant is not deserving of the exercise of this Court’s discretion.

The application dated 27th August, 2020 is accordingly dismissed with costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR