



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J.A.)

CIVIL APPLICATION NO. 17 OF 2019

BETWEEN

JAMES NGIRINE MIKUARI.....APPLICANT

AND

MICHAEL KILEMI & 2 OTHERS..... RESPONDENTS

(Being an application for leave to file and serve Notice of Appeal out of time from the Judgment of the Environment and Land Court of Kenya at Meru (Njoroge, J.) dated 3rd October, 2018 in E.L.C No. 5 of 2015.)

RULING OF THE COURT

1. I must start this ruling by tendering my unreserved apology to the parties and their advocates in this matter for the inordinate delay in delivering this ruling. The reason for this delay is that in the course of my movement from Nyeri to Malindi, some files were misplaced, and this is one of them. That fact came to my attention late last year (2020), when one of the parties made an enquiry about the ruling. I requested for reconstruction of this file after all efforts to trace the original one bore no fruit.
2. The applicant's application dated 22nd February 2019 seeks extension of time to file an appeal against the judgment in
3. The application was supported by the applicant's affidavit where he stated, *inter alia*, that the impugned judgment was delivered without any notice; that he became aware of the judgment when he received a call from his advocate informing him that she had been served with a bill of costs by the 1st respondent's counsel; that by then the time for lodging an appeal had lapsed; that the intended appeal has high chances of success; that the delay is not inordinate and is not attributable to him; and that the respondents shall not suffer any prejudice if the application is granted.
4. The respondents opposed the application through a replying affidavit that was sworn by the 1st respondent, who denied the applicant's averment that notice of delivery of the judgment was not served.
5. The 1st respondent stated that all the parties were given notice of delivery of the judgment, and in addition, the court had put up notices on its Notice Board as there were several judgments for delivery on the material day. In his view, the delay had not been honestly and properly explained and urged that the application be dismissed.
6. Counsel for the parties made brief oral submissions in support of their respective positions. It is trite law that under **rule 4** of this Court's Rules the Court may, on such terms as it thinks just, extend the time limited by the Rules or by any of its decision or of a superior court subordinate to it, for the doing of any act authorized by the Rules. That discretion must however be exercised judicially.
7. Some of the considerations to be borne in mind in dealing with an application of this nature include the length of the delay; the reasons for the delay; the chances of success of the intended appeal; the degree of prejudice that the respondent(s) may suffer if time is extended; and the need to balance the interests of a party who has a decision in his favour against the interests of an applicant who desires to exercise his constitutional right of appeal. See *Fakir Mohamed v Joseph Mugambi & 2 Others [2005] eKLR*.
8. It is against these principles that I shall decide the application. The impugned judgment was delivered on 20th December 2018 and the application for extension of time was filed on 25th February 2019. The delay was not therefore inordinate.
9. The reason for the delay as stated by the applicant is that the judgment was delivered without any notice to the parties. The respondents dispute that, and state that notice was duly issued to all the parties. They did not however avail a copy of the notice that they allege was served. I am also unable to verify whether indeed there was such notice on the Court's Notice Board. But even if that was the case, such

notice may not be sufficient if a party and his advocate do not visit the Court's Notice Board and get to see it, unless it is demonstrated that their attention had been drawn to the Notice Board. I therefore find and hold that a good reason for the delay has been advanced.

10. I have perused the draft memorandum of appeal as well as the impugned judgment. Whereas I do not intend to address myself to the chances of success of the intended appeal, all I wish to state is that the intended appeal is not frivolous. I also do not think that the respondents shall suffer great prejudice if the order sought is granted. Though they are successful litigants, the applicant should not be denied his constitutional right of appeal for no fault of his.

11. Taking all the above into consideration, I choose to exercise my discretion in favour of the applicant. Consequently, I allow the application and hereby extend the time for filing the notice of appeal. The same should be filed and served within **fourteen (14) days** from the date of delivery of this ruling. The costs of this application shall be in the appeal.

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

D. K. MUSINGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR