



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, JA, (IN CHAMBERS))

CIVIL APPLICATION NO. NAI E334 OF 2020

BUNDI BARUTHI.....APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU

(formerly MUNICIPAL COUNCIL OF THIKA).....1ST RESPONDENT

THIKA WATER SEWARAGE.....2ND RESPONDENT

BENSON KINYANJUI MUIRURI.....3RD RESPONDENT

DANIEL KINYANJUI MUIRURI.....4TH RESPONDENT

BIBIYANA WAMBUI (sued as legal representative of

the Estate of KARIUKI WAITITU).....5TH RESPONDENT

SABINA WANJIRU IRUNGU.....6TH RESPONDENT

NJUGUNA MWANGI.....7TH RESPONDENT

LYDIA NJERI MAINA.....8TH RESPONDENT

(Being an application for extension of time to file the memorandum and record of appeal out of time from the Ruling of the High Court of Kenya at Nairobi (Obaga, J.) given on 25th October 2018

in

ELC No. 346 of 2010)

RULING OF THE COURT

1. By notice of motion dated 22nd October 2020 brought under **Section 3A and 3B of the Appellate Jurisdiction Act and Rules 4, 41, 42 and 43 of the Court of Appeal Rules (2010)**, the applicant seeks an order to file his memorandum and record of appeal out of time against the ruling of the Honourable Obaga, J in Environment and Land Court Case No. 346 of 2010 issued on 25th October 2018 and that the notice of appeal dated 30th October 2018 lodged in the Environment and Land Court be deemed as duly filed.
2. Prior this application, the trial court issued a decree on 18th May 2017 dismissing the Applicant's suit for non-attendance pursuant to the provisions under Order 12(3) of the Civil Procedure Rules. Consequently the applicant by way of chamber summons dated 18th May 2017 moved the court to reinstate the same. The trial court in the impugned ruling dated 25th October 2018 found that it lacked jurisdiction to question the manner in which it exercised its own discretion and hence dismissed the application made on 18th May 2017 in favour of the

2nd 3rd, 4th 5th and 6th respondents.

3. The applicant filed his Notice of Appeal on 1st November 2018 and attributed his delay in filing his memorandum of appeal together with the record of appeal to his ill health as he could not furnish his advocates with further instructions on the intended appeal.

4. It is deponed in the Affidavit dated 22nd October 2020 in support of the present application that during the period of 24th May and 9th November 2018, the applicant was undergoing treatment for his spinal cord and hence was unable to pursue his intended appeal until the time the Applicant engaged the firm of **Messrs. Gikunda Miriti & Company Advocates** to proceed with collecting the Certificate of Delay issued in 19th June 2020 and pursue the appeal. In his submissions, the Applicant relied on the observations made by the late Honourable Mr. Justice Odek, JA (as he was then) in his decision in ***Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR*** where the Court noted that the discretion it has to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted,

5. The applicant further relied on the Court’s observations in ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*** where the Court observed that the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. Hence the applicant urged the Court to grant the orders sought.

6. The application was opposed by the 2nd respondent on grounds that the reasons adduced by the Applicant are not sufficient or reasonable to warrant the orders sought under Rule 4 of this Court’s Rules as the Applicant failed to explain why he took over 2 years to pursue the Appeal. To buttress this view the 2nd respondent referred to ***Daphne Parry v. Murray Alexander Carson [1963] EA 546*** as cited in the case of ***Dilpack Kenya Limited v. William Muthama Kitonyi [2018] eKLR*** where the superior court observed that if the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

7. Having considered the material placed before me. The principles applicable in an application for extension of time were stated in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** where the Supreme Court of Kenya pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. (See. ***National Hospital Insurance Fund Board of Management v Kenya Union of Commercial Food and Allied Workers [2020] eKLR***).

8. In the present Application, the delay in filing the intended appeal is attributed to a prolonged case of illness, that the Applicant explains he would suffer an on and off basis. I note that the Applicant instructed the firm of **Messrs. Gikunda Miriti & Company Advocates** on 22nd October 2020, 2 years after the date of the impugned ruling which was delivered on 25th October 2018 and did not make any effort to pursue the intended appeal during the time he was undergoing treatment. As was well noted by this Court in ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR***, a plausible and satisfactory explanation for delay is the key that unlocks the court’s power of discretionary exercise. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. That is the missing link in the application under my determination. In my view it was incumbent upon the application to discharge that responsibility, which is blank and unsatisfactory.

9. The Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat, (supra)** stated that that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court why the court’s discretion should be exercise in his favour and delay should be explained to the satisfaction of the court.

10. Consequently, I am not persuaded that this is a proper case for the court to exercise its discretion in favour of the Applicant. I decline to grant the prayers sought in the application dated 22nd October 2020. It is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 5th day of February, 2021.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

