



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. E006 OF 2020

(CORAM: OKWENGU, JA (IN CHAMBERS))

BETWEEN

DANIEL KIILU NGOMO.....APPLICANT

AND

SIMON NGAO MBITHE.....RESPONDENT

(Being an application for extension of time within which to file a notice and record of appeal,

from the Judgment of Environment and Land Court at Machakos (Angote, J.)

delivered on 25th May, 2018

in

Machakos ELC No. 313 of 2009)

RULING

[1] The applicant **Daniel Kiilu Ngomo** has moved this Court under sections 3, 3A, 3B of the **Appellate Jurisdiction Act** and Rule 4 of the **Court of Appeal Rules**, by way of a notice of motion dated 9th July, 2020 seeking to have time extended in order to validate the notice of appeal that he had lodged on 5th June, 2019, and also to file his record of appeal against the judgment of the Environment and Land Court (ELC) (**Angote, J.**), that was delivered on 25th May, 2018.

[2] In supporting affidavits sworn by the applicant and another sworn by his advocate, it is deposed that the notice of appeal was filed within time on 5th June, 2018, but the record of appeal has not been filed to date. This is because of a dispute between the partners in the firm of Mulondo, Oundo, Muriuki & Co. Advocates who were the advocates for the applicant in the ELC, which dispute resulted in the applicant's file among others, being taken to a mediator, and it was not until the applicant's current advocate, Muriuki Daniel Mwenda filed a suit in the High Court, that the file was released. The applicant therefore pleads that the delay was caused by factors beyond his control.

[3] The respondent opposes the application through a replying affidavit in which he contends that the applicant has not given a viable explanation for the delay in filing his appeal. This is because he has not explained the delay between the time the mediation process was closed, and 10th July, 2020 when the application was filed in Court. The respondent explains that he has already executed the decree, and the applicant has been evicted from the suit property, and the building that he had constructed on the suit property demolished.

[4] The respondent therefore maintains that the applicant's motion is simply an attempt to prolong the litigation unnecessarily and delay his full realization of the judgment. The respondent accuses the applicant of failing to disclose material information as he has not disclosed the period of the mediation process, or when the High Court proceedings ended, which information was necessary to enable the Court appreciate whether the delay in bringing his motion was inordinate.

[5] I have considered the applicant's motion, the replying affidavit and the written submissions filed by each party. It is evident that the applicant filed a notice of appeal within time but did not file a record of appeal within the required 60 days. The applicant has explained that this was due to the dispute and subsequent dissolution of the partnership in the firm of Mulondo, Oundo, Muriuki & Co. Advocates, and the difficulties that his current advocate, who was one of the partners in the firm, experienced in getting the applicant's file released to him by the mediator.

[6] The issue regarding the dispute between the partners and the dissolution of the firm has been well established through the affidavit of the applicant's advocate Muriuki Daniel Mwenda, and the annexures which includes a plaint dated 4th April 2019, and notice of motion dated 4th April, 2019, that were filed by the applicant's advocate seeking *inter alia*, an order for release of several files. However, no affidavits were annexed to show when the court dealt with these matters, nor was the court informed of the specific date when the applicant's file was released to the applicant or the applicant's advocate.

[7] In the circumstances, the applicant's motion having been filed on 9th July, 2020, there is nothing before the Court to explain how long the applicant took to file this motion after receiving the file. This was a crucial factor that ought to have been laid before the Court. Without that information, I am not able to tell the period of the delay, and whether there was inordinate delay after the receipt of the file.

[8] Under Rule 4 of the Court Rules, the Court has unfettered discretion to extend time for the filing of any documents. However, that discretion must be exercised judicially (**Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997**), and this requires the applicant to lay facts before the Court that would be relevant in the exercise of such discretion. (**Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others [2018] eKLR**). In this regard, the reasons for the delay are pertinent. The fact that the applicant has skillfully avoided giving the Court information regarding when his advocate received his file from the mediator, is an indication that the delay in filing the record of appeal may not have been entirely the result of the file being with the mediator.

[9] For these reasons, I find no basis upon which to exercise my discretion in the applicant's favour. The notice of motion dated 9th July 2020 is accordingly dismissed.

Dated and delivered at Nairobi this 19th day of February, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR