



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KOOME, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 114 OF 2020

EVANS MAIRURA OMWENGA.....APPLICANT

AND

DANIEL CHEPKAIROR CHEBET.....RESPONDENT

(Being an application seeking leave to file an appeal out of time from the judgment and order of the

Environment and Land Court at Eldoret (Munyao Sila, J.) dated 5th November, 2014

in Eldoret ELC Case No 256 of 2013)

RULING

[1] Before me is a notice of motion by *Evans Mairura Omwenga* (the applicant) where he is seeking an extension of time within which to file a Notice and Record of Appeal from the judgment by the Environment and Land Court sitting in Eldoret in Case No 256 of 2013 delivered on 5th November, 2014 by Munyao J. The application is supported by his affidavit sworn on 3rd September, 2020 as well as the grounds stated in the body of the motion.

[2] According to the applicant, he was not supplied with the proceedings to enable him lodge an appeal until the 22nd of July, 2020 when he was issued with a certificate of delay by the Deputy Registrar. Prior thereto, he had filed a notice of appeal dated 12th November, 2014 which was deemed as withdrawn following an application by the respondent before this Court differently constituted in a Ruling delivered on 7th December, 2017 in the Court of Appeal at Eldoret **CA No. 86 of 2017 (Githinji, Okwengu & J. Mohammed, JJ. A)**. The applicant insists that he has an arguable appeal and he failed to attend Court during the hearing of the aforesaid application because his lawyer did not inform him nor did the lawyer file an affidavit to explain the delay in filing the record of appeal.

[3] The application was opposed by the respondent, relying on a replying affidavit sworn on 1st February, 2021 and written submissions. It is the respondent's case that the applicant failed miserably to demonstrate why he failed to follow the procedure set out in the law for a period of seven (7) years since the judgement was delivered in November, 2014 to file an appeal if indeed he was aggrieved by the said judgement; that the applicant never took any steps at all, such as serving the respondent with a letter bespeaking the proceedings, and even after the applicant was notified the proceedings were ready for collection in October, 2019 no action was taken as this application was filed nine (9) months later.

[4] Moreover, the notice of appeal was deemed withdrawn since the applicant filed it and never filed the appeal even after the proceedings were ready. The respondent argued that a notice of appeal which was withdrawn by a full bench cannot be revived by an application made under Rule 4. The respondent cited many decisions by this Court that set the parameters within which this Court has exercised judicial discretion to extend time within which to file an appeal out of time and stated that the instant application fell below the threshold as he termed the delay inordinate and prejudicial to the respondent who has settled to enjoy the fruits of his litigation seven (7) years down the line.

[5] This application was listed for hearing before me by consideration of the record and submissions without appearance by parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. I have considered the motion, the replying affidavit and submissions as per the above summary of the salient matters raised therein. An application for enlargement of time, is provided under **Rule 4 of the Court of Appeal Rules**: -

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

See also Fakir Mohamed vs. Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR), thus: -

“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 the 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.”

[6] What the above guidelines portend is that, for an applicant to be found deserving the exercise of discretion, he/she must offer reasonable and cogent explanation for the delay. The judgment that the applicant wishes to appeal against was delivered on 8th November, 2014 and the instant application was filed on 3rd September, 2020. This is after a delay of about six (6) years. Although I note and appreciate the proceedings also took a long time to prepare, it is clear from the certificate of delay that is exhibited by the applicant that the said proceedings were ready for collection from the registry from 22nd October, 2019 but the applicant collected them almost nine (9) months later on 22nd July, 2020.

[7] That delay of nine (9) months is not explained and as it has been ruled before, every delay, even of a few days must be explained by the applicant demonstrating a genuine reason that prevented him from filing the appeal within the time provided in the Rules. That is not the only problem facing the applicant, as the letter bespeaking the proceedings was never served upon the respondents as required by the Rules. But even more glaring is the fact that the notice of appeal that the appellant had filed was deemed withdrawn by a full Bench of this Court under **Rule 83** of the Court of Appeal Rules. The applicant merely states that his advocate failed to attend court or to file a replying affidavit. If that was the case, the applicant should have filed an application seeking to reinstate the notice of appeal but what he is seeking now is an order to circumvent the order withdrawing the appeal.

[8] With respect, I am not persuaded merely placing a blame on the applicant’s advocate without demonstrating what efforts the party employed to follow his own matter for so many years is a plausible and excusable reason for the delay of almost nine (9) months which is compounded by other procedural errors cited above.

[9] In conclusion, I think I have said enough to demonstrate that I am unable to exercise judicial discretion in favour of the applicant. That being my view of the matter, the application is dismissed with no order as to costs.

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

M. K. KOOME

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR