



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E399 OF 2020

BETWEEN

MARGARET WAIRIMU KAIRU.....APPLICANT

AND

MICHAEL NJAU WANGO.....1ST RESPONDENT

SUPER MACRO VENTURES CO. LTD.....2ND RESPONDENT

(Being an application for extension of time within which to file and serve a record of appeal from the judgment of the High Court of Kenya at Nairobi (Okong'o, J.) delivered on 5th May, 2020 in Nairobi High Court Civil Case No. 1135 of 2013)

RULING

1. The applicant, Margaret Wairimu Kairu, by an application dated 26th October 2020 seeks an order for extension of time within which to serve the notice of appeal and to file the record of appeal arising out of a judgment of the Environment and Land Court (*Okong'o, J.*) delivered on 5th May 2020. She also prays that the notice of appeal filed and lodged on 15th May 2020 be deemed to have been served within the extended period, and that the record of appeal filed on 26th October 2020 be deemed to have been filed and served within the extended.
2. At the center of the dispute is a property known as Title Number Ruiru Kiu Block 2/ 9041. By the said judgment, the ELC declared the Michael Njau Wango, the 1st respondent to be the owner of the said property; restrained the applicant from entering, interfering or dealing with the property; and granted the applicant 240 days to find alternative residence and vacate the property.
3. Aggrieved by that decision, the advocates for the applicant promptly filed a notice of appeal dated 11th May 2020 lodged on 15th May 2020 but did not serve the same within the stipulated time. The memorandum and record of appeal were subsequently filed on 26th October 2020.
4. In an elaborate affidavit sworn on 26th October 2020 in support of the application, Cynthia Nyabuto, an advocate in the firm of AGN Kamau Advocates acting for the applicant deposes that the impugned judgment was delivered virtually through video link on 5th May 2020; that on 11th May 2020 she forwarded the notice of appeal to the court and applied for proceedings and decree; that although the court indicated that the notice and the judgment were available for collection at Milimani Law Courts, it was not until 26th May 2020 when they were availed at the customer care desk from where she collected them, scanned and served the notice of appeal via email on the 27th May 2020.
5. The advocate for the applicant has in the said affidavit set out in considerable detail the follow up she made to obtain the certified judgment and proceedings culminating with certificate of delay dated 6th October 2020 and the impact the Covid Pandemic had in the operations of the court registry and that the record of appeal was filed on 26th October 2020. The present application was made on the same day.
6. Beyond the notice of appointment of advocates filed by the firms of Ndungu Mwaura & Co Advocates for the 1st respondent, I have not seen either a replying affidavit or submissions on behalf of the respondents.

7. Counsel for the applicant has made reference to decisions of the Court in relation to the applicable principles in considering an application of this nature. The case of Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 for instance was cited. Waki JA captured the principles in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... 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.”

8. In Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR the Supreme Court of Kenya stated 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.

9. Having considered the application, the grounds in support, and the applicant’s written submissions within those legal principles, I am satisfied that this is a proper case for the Court to exercise its discretion in favour of the applicant. It is clear to me, that counsel for the applicant have been diligent, despite the challenging Covid pandemic environment, in the pursuit of the appeal.

10. I accordingly allow prayers a), b) and c) of the application dated 26th October 2020. Costs of the application shall be in the appeal.

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

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR