



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. 38 OF 2018

BETWEEN

EDWARD KINGS ONYANCHA MAINA.....APPLICANT

AND

ELIZABETH NYAMBURA NJUGUNA

(widow of the late NJUGUNA MWAURA MBOGO).....1ST RESPONDENT

FRANCIS KAMAU NJUGUNA

(being an administrator of the estate of the late Njuguna Mwaura).....2nd RESPONDENT

(Being an application for leave to extend time for the applicant to file and serve a

Notice and Record of Appeal out of time in respect of the judgment of the

High Court sitting in Nakuru (Mulwa, J.) on 21st September, 2017

in

H. C. ELC No. 43 of 2013 formerly Nakuru HCCC 181 of 2008)

RULING

[1] The Notice of Motion dated 17th April, 2018 is taken out by *Edward Kings Onyancha Maina* (the applicant). He is seeking leave to extend time within which to file and serve a Notice and the Record of Appeal against the Judgement of the High Court delivered on 2st September, 2017 and also 19th February, 2003.

[2] I wish to state at the outset that an application for leave before this Court is governed by the provisions of **Rule 4** of the Court of Appeal Rules. Which provides: -

“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.”

[3] The principles that guide the Court in exercise of this power have also been expounded in a long line of authorities but I will just refer to the oft’ cited cases

of Fakir Mohamed vs. Joseph Mugambi & Two Others Civil Application No. Nai. 332 Of 2004 thus: -

“The exercise of this Court’s discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of 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 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 by factors ...”

And Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (1999) 2 EA 231, which is the locus classicus, laid down the following parameters: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court considers in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

[4] I have taken time to recite the above parameters that guide the Court because the applicant has mentioned so many issues in support of the application which have no relevance to the matter at hand. For an application of this nature, the applicant has a duty to explain the reasons for delay and why the Court should extend time beyond what is provided in the Rules. The application is supported by many grounds but what is of significance to the instant application is a simple explanation for the delay. Unfortunately, the applicant has not given any reasons why he did not file the appeal within the time provided in the Rules.

[5] The applicant states that the intended appeal arises **“from the judgment of the High Court sitting at Nakuru on 21st September, 2017 (Mulwa, J.) in Nakuru ELC 43 of 2013 formerly Nakuru 181 of 2008”**. The applicant faults the judgement in Nairobi HCCC 935 of 2001 which was by (Hayanga, J.) and was delivered on 19th February, 2003 as the origin of the problems that led to what he terms as the fraudulent and illegal alienation of the suit property **LR 10581**.

[6] In the supporting affidavit, the applicant seems to be seeking several other orders which I am afraid are outside my scope as a single judge. For example, he seeks an order of joinder in the suit; he is also seeking a restraining the respondents from alienating or using the parcel of land known as LR 10581 (IR18437) now registered as Solai/Ndungiri Block 9 and leave to appeal against the judgment of Hayanga, J. dated 19th February, 2003.

[7] As pointed out, this is a kind of an omnibus application that is loaded with so many prayers. I will nonetheless focus on the singular issue of whether the applicant has satisfied the threshold of being granted leave to appeal out of time. The applicant has a duty to give cogent reasons why he was not able to file the appeal within the time provided by the law. As far as the judgment by Mulwa, J. is concerned, it was delivered on 21st September, 2017. Noting the instant application was filed on 17th April, 2018 there was a delay of about five (5) months. As regards the Judgment of Hayanga, J., was delivered in February, 2003 and leave to appeal against it is being sought after more than fifteen (15) years. Unfortunately, the applicant has not given any reasons why he did not file the notice of appeal within time. Even if the delay is of a few days, the applicant has a duty to provide cogent and sufficient reasons to justify the exercise of judicial discretion in his favor.

[8] On whether the appeal is arguable, this issue is further compounded by the fact that the applicant was not a party to the said proceedings. This therefore further casts some doubts on whether the applicant has an arguable appeal. For those reasons I am unable to exercise my discretion in favour of the applicant to grant him leave as sought.

[9] That being my view of the matter, the application is dismissed with no order as to costs as this matter was considered without appearance of the parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of the Covid 19 Pandemic.

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

M. K. KOOME

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR