



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CIVIL APPLICATION NO. 94 OF 2018

BETWEEN

HENRY CHEPWONY LANGAT

(Suing through PATRICH KIPNGETICH CHEPKWONY

vide a power of attorney).....APPLICANT

AND

ELIZABETH AKINYI MUTAI.....RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time against the

ruling and Order of the Environment and Land Court at Kericho by (J. M. Onyango J.,) dated 10th October, 2017

in

Kericho ELC No. 83 of 2013)

RULING

[1] **Henry Chepkwony Langat** (the applicant) brings the Notice of Motion dated 19th July, 2018. He is seeking extension of time within which to file and serve a Notice and Record of Appeal. According to the grounds in support of the application and the matters deposed to in the supporting affidavit, the ruling that the applicant wishes to appeal against was delivered on 10th October, 2017. The ruling determined an application by the applicant which was seeking to review an order made on 14th March, 2017.

[2] The present application was filed on 23rd July, 2018 which is after a delay of about eight (8) months. The applicant blames his Advocate for filing the Notice of Appeal on 6th November, 2017 which was out of time and pleads that the mistake of his counsel should not be visited on him. The said Notice of Appeal was filed about ten (10) days late. Further the applicant states that the intended appeal is arguable as per the annexed draft memorandum of appeal. In addition, counsel for the applicant filed detailed submissions to support the aforesaid grounds.

[3] In brief, the applicant had filed suit being **Kericho ELC No. 83 of 2013** on

22nd November, 2013 claiming a parcel of land known as KERICHO/GETWARWET/702. The said suit was met with a preliminary objection by the respondent claiming that the issue was *res judicata* having been determined in **Kericho HCC Misc. No 40. of 1998** and **Kericho PMCC No. 50 of 1984**. Upon considering the application the learned Judge ruled in favour of the respondent that the applicant's suit was *res-judicata*. That is the ruling the applicant wishes to appeal against. Counsel also cited several cases that guide the court in determining whether to grant leave such as **Mwangi vs. Kenya Airways Ltd [2003] eKLR**, **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Appl. No. Nai. 255 of 1977** (unreported) among others.

[4] This application came up for hearing on 9th November, 2020 by considering the application and written submissions without appearance of parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID 19 Pandemic. The record shows the respondent was duly served with the hearing notice but did not file any written submissions. Nonetheless this does not lessen the duty placed upon me when dealing with this kind of application which falls within the realm of **Rule 4** of the Court of Appeal Rules.

[5] That is to say, the orders sought are discretionary but the discretion, as always must be exercised based on cogent reasons and not caprice. There is no uniform manner in which such applications are considered as each case is always different from the other. For that reason, the factors relevant for consideration are never closed. **Rule 4** on which the motion is principally premised provides as follows: 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.”

In this regard, I may also mention the duty imposed on the Court under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

[6] Has the applicant given cogent reasons for the delay? Although the applicant blames his previous Advocate for not filing the Notice of Appeal on time, the said Notice was filed by the same firm of Advocates who are on record for the appellant. However, the instant application seeking leave for extension of time was made after an inordinate delay of about 272 days which delay has not been explained. The applicant did not even disclose the steps they took to follow the matter with his previous Advocates or even the present ones who filed the instant application after such an inordinate delay. Too often, litigants find it easy to heap blame on their own Advocates whom they chose to represent them. A case belongs to a litigant and if an Advocate is in breach of his/her professional duties, there are avenues to seek remedy. The applicant also does not disclose what steps he took against his counsel, both the former and the present. For that reason, I find the explanation for the delay fell short of the threshold for exercise of judicial discretion.

[7] On the argument that the appeal has reasonable chances of success, I am not entirely persuaded. I nonetheless do this with caution as it is not my role to go into the merit of the intended appeal. However, a cursory glance of the matters disclosed in the application as disclosing an arguable appeal, do not convince me. This is because it is common ground that there was no appeal in regard to the substantive ruling dated 14th March, 2017 and what was dismissed was an application for review on the grounds that there was an error on the face of the ruling. All in all, I find there is no explanation offered at all for this delay to support the exercise of my discretion in favour of extending time.

[8] In conclusion, I think I have said enough to demonstrate that I am unable to exercise my 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 5th day of February, 2021.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR