



IN THE COURT OF APPEAL

AT NYERI

(CORAM: GATEMBU, JA (IN CHAMBERS)) CIVIL APPLICATION NO. 96 OF 2018 BETWEEN

SOSPETER KIRATU MITHIORI.....APPLICANT

AND

BENSON MWANGI MITHIORI.....RESPONDENT

(Being an application for enlargement of time for filing and serving the record of appeal against the judgment of the Environment and Land Court at Nyeri (L. Waithaka, J.) delivered on 3rd October 2017 in ELC Case No. 143 of 2013 (O.S.))

RULING

1. The applicant, Sospeter Kiratu Mithiori, through the firm of C.M. Kingori Advocates, has by an application dated 31st July 2018 applied for enlargement of time for filing and serving the record of appeal. He intends to challenge a judgment delivered on 3rd October 2017 by which the Environment and Land Court (*L. Waithaka, J.*) dismissed his suit for a declaration that he is entitled to half share of a property known as Title Number Loc.8/Ngerere-Thombotho/565 registered in the name of his brother, Benson Mwangi Mithiori. He asserted, unsuccessfully, that his brother held title to that property under a customary trust. The Judge found no evidence to support that contention.

2. Although counsel for the applicant cited provisions of the Civil Procedure Act on the face of the application, it falls under Rule 4 of the Court of Appeal Rules in that an extension of time under the Court of Appeal Rules is sought. Such applications call for exercise of judicial discretion and although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Waki, JA articulated the applicable legal principles in the case of *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR* where he stated that:

“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.”

3. In the present case, the applicant deposed in his supporting affidavit that following delivery of the judgment on 3rd October 2017, a notice of appeal was filed promptly on 11th October 2017; that on the same date, he applied for certified copies of the proceedings and judgment which were issued on 5th April 2018 and a certificate of delay issued on 24th April 2018; that his advocates then prepared the record of appeal and presented it on 27th June 2018 but by then, the time for filing had lapsed three days earlier on 23rd June 2018; and that the lapse in filing the record of appeal in time was “due to an inadvertent miscalculation of time” and “is excusable.”

4. In opposition to the application, the advocates for the respondent in their opposing submissions referred to the replying affidavit of Jacinta Mwangi Mithiori, the wife of the respondent (who appears to have substituted her husband) in which she deposed that the letter bespeaking proceedings was never copied to her advocates; that no explanation has been given for that failure or for the procedural lapse alluded to; that there is also no explanation why the present application was not made until 3rd July 2018; and that the application is devoid of merit and should be dismissed. Reference was made to decisions of this Court in *Karyn Zaharya & another vs. Shalom Levi, Civil Application No. 80 of 2018* and *Julius Kamau Kitahka vs. Waruguru Waithaka & 2 others, Civil Application No. 14 of 2013* among others in support of the submission that failure to give explanation for delays should lead to failure of request for extension of time; that no plausible explanation for the delays and procedural lapses have been given.

5. Having considered the application, there is evidence that following delivery of the Judgment by the ELC on 3rd October 2017, the applicant filed a notice of appeal within the time prescribed. There is no complaint by the respondent that that notice was not served in a timely fashion. What the respondent complains about is that the letter bespeaking proceedings was never copied to them and there is no plausible explanation for the delay in filing the memorandum and record of appeal. The applicant’s advocates letter dated 11th October 2017

applying for certified copies of the judgment and proceedings bears the court stamp of the ELC of the same date. On the face of it, it was copied to H. K. Ndirangu Advocates even though it does not bear an acknowledgment stamp of that firm. Also exhibited is a copy of a letter dated 4th April 2018 addressed to the applicant's advocates notifying them that the proceedings "*are ready for collection*" and requiring them to pay court fees of Kshs.960. A certificate of delay was issued on 24th April 2018 certifying that the period between 11th October 2017 and 5th April 2018 was taken in the preparation and supply of the proceedings.

6. The applicant then says that the period between 5th April 2018 and 23rd June 2018, (approximately 80 days) was taken up in the preparation of the record of appeal which was presented for filing on 27th June 2018. Although the applicant states that his advocates were informed, upon presenting the appeal on 27th June 2018, that time for filing had lapsed on 23rd June 2018, it is not clear whether the record of appeal was rejected by the registry or what happened to it. That as it may, the advocates for the applicant prepared the present application dated 31st July 2018 and filed it on 3rd August 2018. The period between 27th June 2018 and 3rd August 2018 is 37 days. No attempt whatsoever has been made to explain why it took the applicant's advocates that amount of time to present the present application.

7. In the absence of any explanation as to the delay in presenting the present application, it is difficult to exercise the Court's discretion in favour of the applicant. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* 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.

8. The Supreme Court stated further 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. In the absence of any attempt to explain the delay in presenting the present application, the Notice of Motion dated 31st July 2018 fails and is hereby dismissed with costs to the respondent.

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

S. GATEMBU KAIRU, (FCI Arb)

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR