



IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPLICATION NO. 122 OF 2020

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

BETWEEN

DAVID MWECHER CHANGWONY.....APPLICANT

AND

JAMES KIKECHI.....RESPONDENT

(An application for extension of time to file an appeal out of time against the Judgment of the Environment and Land Court at Bungoma (B. Olao, J.) delivered on 26th May 2020

in

Civil Case No. 101 of 2004)

RULING

Background

1. This application is brought under a certificate of urgency and is pursuant to **Rules 4, 45 and 47** of the **Court of Appeal Rules**. **David Mwecher Changwony** (the applicant) seeks leave to file an appeal out of time or, alternatively, orders extending time for lodging a Record of Appeal against the Judgment of the Environment and Land Court at Bungoma (ELC) (**Olao, J.**) delivered on 26th May, 2020 in **Bungoma Civil Case No. 101 of 2004**. **James Kikechi** is the respondent herein.

2. Although the application refers to the judgment as emanating from the High Court. According to the annexed certified copy of proceedings in **Bungoma Civil Case No. 101 of 2004**, the suit was partly heard in the High Court at Bungoma before being transmitted to the ELC at Bungoma on 31st January, 2013.

3. The application is premised on the following grounds on the face of the application: that the trial Court delivered judgment in favour of the respondent and upon receipt of the judgment, the applicant applied for certified copies of the judgment and proceedings on 26th May, 2020 to enable him file an appeal against the judgment; that the applicant filed an application for stay of execution of the judgment, which was granted on condition that the applicant releases his original title in respect of the suit property to the Deputy Registrar; that the applicant complied with the orders on 2nd August, 2020. That the applicant received the certified copy of proceedings on 7th August, 2020 when the window of filing an appeal had already lapsed; that the applicant was prejudiced by the delay in receiving the certified copy of proceedings; that the appeal raises serious questions of law and fact; that the applicant is apprehensive that the respondent will move to execute the orders granted in the impugned judgment on the mistaken belief that the applicant is not interested in pursuing the appeal thus rendering the appeal nugatory; that the applicant has moved diligently and expeditiously in bringing this application, and is willing to abide by any conditions set by this Court for the grant of the orders sought; and that it is in the interest of justice and fairness that the prayers sought be granted.

4. The applicant filed an affidavit in support of the application reiterating the grounds on the face of the application. In written submissions filed by the applicant's counsel, it was submitted that the applicant had made a diligent efforts to secure the material which would enable him appeal against the decision of the Court. Counsel also attributed the delay in filing the Memorandum of Appeal and Record of Appeal to the scaling down of court operations due to the Corona-virus pandemic and the applicant instructing new advocates on record. Counsel submitted that the application was unopposed and that the respondent had not indicated how he would be prejudiced should the application be allowed. Counsel contended that the intended appeal has high chances of success and that it would be in the interest of justice for this Court to grant leave as prayed.

The respondent has not filed any reply or written submissions in response to the instant application.

Determination

5. I have considered the application, the grounds in support thereof, the supporting affidavit, the authorities cited and the law. The applicant filed a Notice of Appeal within 7 days of the delivery of the judgment in compliance with **Rule 75 (2)** of the **Court of Appeal Rules**. The applicants are urging this Court to exercise its discretion and extend the time for filing and serving a Memorandum of Appeal and Record of Appeal.

6. **Rule 4** of the **Court of Appeal Rules** 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 time shall be construed as a reference to that time as extended”.

7. The principles guiding this Court in the exercise of that discretion are set out in **Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997**:

“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 takes into account 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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”.

8. This Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** also stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”.

9. When considering the possible chances of the appeal’s success, this Court in **Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR** stated:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

10. In the instant application, the applicant has satisfactorily explained the reason for the delay in lodging the Memorandum of Appeal and Record of Appeal. The circumstances surrounding the delay in receiving the certified copy of the proceedings were out of the control of the applicant. The conduct of the applicant indicates that he was keen on pursuing the appeal.

11. In the circumstances of this case, the intended appeal also raises arguable issues touching on, *inter alia*, the ascertainment of when the respondent’s rights accrued and when they were extinguished; and the competency of the respondent’s witnesses for the claim of adverse possession. Further, the respondent has not filed any replying affidavit or written submissions in opposition to this application and has therefore demonstrated any prejudice that he would suffer should this application be granted.

12. Accordingly, I find that this application has merit and I allow it. The applicant is granted thirty (30) days within which to file and serve the memorandum of appeal and record of appeal. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

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

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR