



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 65 OF 2020

BETWEEN

HASS PETROLEUM (K) LIMITED.....APPELLANT/APPLICANT

AND

NYANZA ENTERPRISES LIMITED 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

(Being an application for extension of time for filing and service of the Notice of Appeal from the Judgment of the Environment and Land Court at Kisumu (S.M. Kibunja, J.) delivered on 6th March, 2020

in

ELC No. 825 of 2015)

RULING

In the Motion brought under **rule 4** of the **rules of this Court** (amongst other provisions) it is prayed that time within which Notice of Appeal from the Judgment of the Environment and Land Court (“**ELC**”) delivered on 6th March, 2020 be extended; that Notice of Appeal filed on 12th June, 2020 and served on 16th June, 2020 be deemed to have been filed and served on time; that similar leave be granted in respect of letter bespeaking proceedings and the letter dated 12th June, 2020, filed on the same day and served on 16th June, 2020 be deemed to have been filed and served on time. There are no grounds in support of the application, it being merely stated that the application “... is grounded on the facts set forth in this appeal, the amended affidavits of DAVID OTIENO & SHEM AKULA WAGUDA other grounds to be adduced at the hearing hereof”.

It is deposed in the affidavit of David Otieno, an advocate having the conduct of the matter on behalf of the applicant that the respondent had filed suit against the applicant claiming to be entitled to a leasehold interest over **Kisumu Municipality Block 6/461** and further that the applicant’s property known as **Kisumu Municipality Block 6/351** be declared to be a nullity; that the matter had been heard and fixed for mention on 9th October, 2019; that the trial Judge was transferred to Eldoret before Judgment was delivered; that the lawyer followed up on the matter but Judgment was delivered without notice to him; that he obtained a copy from the lawyers for the respondent; that he had not been served with draft decree for approval; that the Deputy Registrar of that Court sent him Judgment notice which had been signed by his court clerk who had not indicated the same in their diary.

In the affidavit by **Shem Akula Waguda**, a Senior Clerical Officer in the firm of **Owiti, Otieno & Ragot Advocates**, he says, *inter alia*, that he, indeed, received the notice from court and signed it on 3rd March, 2020 but he forgot to make an entry in their diary. He later misplaced the document and forgot about it until the matter was raised in June, 2020.

I have perused the applicant’s written submissions where the history of the dispute before the ELC is given. It is submitted that the mistake of the clerk has been explained as an oversight; that counsel for the respondent should have disclosed to the applicant’s counsel that Judgment had been delivered and the situation was complicated by the temporary shut down of lawyers Chambers due to COVID-19 pandemic. The applicant cites the case of **Pullin Harakchand Shah v Southern Credit Banking Corporation Limited [2016] eKLR** for the proposition that **rule 4** of the **rules of this Court** gives a single Judge unfettered discretion to extend time. Also cited is the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. 255 of 1997)** where in a replying affidavit by Chris Maganga, an advocate, he says that the Motion is frivolous and vexatious as the applicant has not laid a basis for the same; that Judgment was delivered on 6th

March, 2020; that there was no explanation for delay and I should disallow the application.

The principles that govern applications under **rule 4** of the **rules of this Court** were set out in the case of *Leo Sila Mutiso* (supra) as follows:

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

Looking at the record before me it is clear that a notice of Judgment was served on the lawyers on record for the applicant but it is stated that the same was received by a clerk who did not enter the same in the lawyer’s diary.

I note that it is admitted by the respondent’s lawyer that upon being contacted by the applicant’s lawyer he provided to them a copy of the Judgment. It is also not denied by the respondent’s lawyer that they did not send a copy of draft decree to the applicant’s counsel for approval, contrary to procedure. It is not, then, available to them to term the application “frivolous and vexatious” when they ignored procedure. In those circumstances I would have been sympathetic to the applicant and would have used my discretion in their favour.

What disturbs me is a different matter. The first prayer in the Motion is that I extend time within which to file and serve notice of appeal and that I deem the notice of appeal filed on 12th June, 2020 as filed and served on time. The second prayer is that I similarly extend time for applying for copies of proceedings and Judgment. There is no prayer in the Motion for extension of time to lodge a Record of Appeal. Judgment was delivered on 6th March, 2020 and the time for filing a record of appeal from that Judgment is now past.

Even if I were to deem notice of appeal which was filed and served outside the timelines in the rules to have been properly filed it would be of no practical assistance to the applicant where no prayer is made on the fate of the appeal itself, which was not filed and there is no prayer for extension of time. It is for this reason that I am unable to exercise my discretion in favour of the applicant and the motion fails and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR