



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, J.A. – IN CHAMBERS)

CIVIL APPLICATION NO. 286 OF 2018

BETWEEN

REGINA MWIKALI KITAVI ..... APPLICANT

AND

ONGATA WORKS LIMITED ..... RESPONDENT

*(Being an application for leave of court for extension of time to file an appeal out of time of the intended appeal from the judgment of the High Court of Kenya (M. M. Gitumbi, J.) dated 10th April, 2015*

*in*

*Nairobi HCCC No. 253 of 2009)*

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RULING OF THE COURT

Before me is a Notice of Motion dated 3rd October, 2018 under **Rules 1(2), 5(2)(b), 41 and 47** of the Court of Appeal Rules and **sections 3A and 3B** presumably of the **Appellate Jurisdiction Act**. Substantive prayers are prayer 2 and 3. Prayer 2 seeks stay of execution of any proceedings in an undisclosed matter pending hearing and determination of the intended appeal. While prayer 3 seeks leave to extend time for the applicant to file her appeal out of time.

In the absence of a valid notice of appeal in place on the basis of which to anchor prayer 2, that prayer has no legs on which to stand. It is a proper candidate for striking out. It is accordingly struck out. That leaves prayer 3 for merit consideration. This prayer is supported by grounds on the body of the application and a supporting affidavit of **Regina Mwikali Kitavi** together with annexures thereto. It is not opposed as I have traced no response on record either to the application or to the deputy registrar's hearing notice served on to the respective parties electronically on Wed. Feb, 24, 2021 at 2.56pm notifying parties of today's hearing date and at the same time inviting them to file written submissions. I am therefore satisfied the respondent had due notice of the application herein. Lack of response from the opposite party notwithstanding, I am in law obligated to render a ruling on merit.

Supporting the application, it is applicant's averments that she was aggrieved by the decision of the High Court of Kenya in Nairobi HCCC No. 253 of 2009 (**M. M. Gitumbi, J.**) delivered on 10th April, 2015. In furtherance of her desire to pursue the intended appellate rights, she timeously filed a notice of appeal on 14th April, 2015 within the timelines provided for in the rules. The delay in progressing her appellate right as provided for in the rules was occasioned by reason of change of advocates necessitating the incoming advocate to seek leave of court to come on record for her before the High Court before progressing the appellate process. She also applied for a certified copy of the proceedings which took time to be availed. She has an arguable appeal borne out by contents of the draft memorandum of appeal with overwhelming chances of success. Lastly, that it is only in the best interest of justice that her application is allowed.

My invitation to intervene on behalf of the applicant is basically under **Rule 4** of the **Court of Appeal Rules** which was not cited. Failure to so cite is not fatal to the application. There is a saving reprieve in the inherent power of the Court enshrined in **Rule 1(2)** of the **Court of Appeal Rules** which donates mandate to correct such non prejudicial procedural lapses in the Court process; and **Article 159(2)(d)** of the **Constitution of Kenya 2010** which enjoins the Court not to render justice based on technicalities. Instead it should do so based on substantive justice. The application therefore falls for merit consideration.

Principles that guide the Court in the exercise of its mandate under **Rule 4** of the Court's **Rules** have now been crystalized by the Court itself and the Supreme Court. I take it from (**M.K. Ibrahim & S.C. Wanjala SCJJ**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others** [2013]eKLR as follows:- *extension of time is not a right of a party. It is an equitable*

*remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

The factors to be considered in deciding either way are the length of the delay, the reason for the delay, possibly arguability of the intended appeal and the degree of prejudice to be suffered by the opposite party should the relief sought be granted.

On the length of the delay, the judgment was delivered on 10th April, 2015. The application under consideration is dated 3rd October, 2018 a period of close to three (3) years and five (5) months and about twenty-one (21) days. The reason for the delay in progressing the appellate process before this Court was on account of the need for a new advocate to come on record for the applicant in the trial court. All I have on the record is an application presented before the High Court seeking leave for the firm of **Kalwa & Company Advocates** to come on record for the applicant dated 27th May, 2015. There is no attendant copy of the proceedings to show when the application for leave for the incoming advocate to come on record was granted.

On filing of a notice of appeal, although the applicant alleges to have filed a notice of appeal dated 14th April 2015 the copy on the record is dated 10th May, 2018. The letter bespeaking proceedings is dated 5th February, 2018 asking for proceedings issued on 25th January, 2018. **Rule 82(1) and (2)** of the Court's **Rules** required the letter bespeaking proceedings to be applied for and served on the opposite party within thirty (30) days of the date of the decision intended to be impugned a prerequisite not complied with herein.

In **George Mwende Muthoni vs. Mama Day Nursery and Primary School**, Nyeri C.A No. 4 of 2014 (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the threshold in the above highlighted cases, I am of the view that although the applicant has exhibited title in her names, she has been economical with supportive facts for determination of an application of this nature. Examples of these are failure to disclose when her advocate was granted leave to come on record for her in the trial court to progress her appellate rights, lack of exhibition of the notice of appeal allegedly dated 14th April, 2015 and lack of information as to whether it was served on the opposite parties; failure to exhibit a copy of the letter bespeaking a certified copy of the proceedings to demonstrate that these were timeously applied for and served on the opposite party. The only communication to the registrar I have traced on the record with regard to a typed copy of the proceedings is that dated 5th February, 2018 talking about proceedings issued on 25th January, 2018. There is nothing to show whether those proceedings were eventually supplied as requested for or not. Neither was there any effort made to exhibit a certificate of delay.

In light of the totality of the above assessment and reasoning, the delay of three years, five months and twenty-one days in my view has not been sufficiently explained to the required threshold as currently crystallized by case law to warrant the exercise of the Court's discretionary mandate in favour of the applicant herein.

Turning to the arguability of the intended appeal, the applicant has exhibited a draft memorandum of appeal intending to raise eleven (11) grounds of appeal. These may be paraphrased that the learned Judge failed to appreciate and consider the fact that the applicant was registered as owner of the suit property prior to the registration in favour of the respondent, acted on inconsistent evidence to rule in favour of the respondent, failed to consider the length of period applicant had been in occupation of the suit property since 1989 for a period of over twenty years, acting on a plan of the site by the respondent's architect which according to applicant was not sufficient proof of ownership, all of which I find arguable notwithstanding that they may not ultimately succeed. In law an arguable appeal need not ultimately succeed but must be one that raises bona fide issues for the oppose parties to respond to and second, for the Court to interrogate. I have no doubt all the above paraphrased grounds would invite a response from the opposite party who is the respondent herein and also for the Court to interrogate.

On prejudice, there is nothing to suggest any degree of prejudice the respondent is likely to suffer in the absence of a response to the applicant's application or the deputy registrar invitation to file written submissions.

The applicant's success on the last two factors namely, the arguability of the intended appeal as well as lack of demonstration of any prejudice likely to be suffered by the respondent should the relief sought be granted, is not sufficient to warrant granting of the reliefs sought. This has to be considered in conjunction with the first two factors namely, the length of the delay and reason for the delay which I have ruled above that a length of three years five, (5) months and twenty-one days not sufficiently explained is not only inordinate but also inexcusable going by the threshold in the case of **George Mwende Muthoni vs. Mama Day Nursery and Primary School** [supra].

In the result and on the totality of the above assessment and reasoning, I find the application unmeritorious. It is dismissed with no order as to costs since it was not defended.

**DATED and DELIVERED at NAIROBI this 19th day of March, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**