



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 116 OF 2020

BETWEEN

STACUS DHAGO DAMBA.....APPLICANT

AND

SAMWEL MARANGA CHACHA.....1<sup>ST</sup> RESPONDENT

WAMBURA CHACHA.....2<sup>ND</sup> RESPONDENT

SAMUEL AMUKUNA.....3<sup>RD</sup> RESPONDENT

NZOTO OTOGORO.....4<sup>TH</sup> RESPONDENT

*(Being an application for leave to file appeal out of time from the judgment of the Environment and Land Court at Migori (G.M.A. Ongondo, J.) delivered on 20<sup>th</sup> November 2019*

*in*

*Migori ELC Case No. 89 of 2017)*

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RULING

1. By his application dated 29<sup>th</sup> September 2020 made under Rule 4 of the Court of Appeal Rules the applicant Stacus Dhago Damba seeks “leave to file an appeal out of time against the Judgment...delivered on 20<sup>th</sup> November 2019” by the Environment and Land Court in Migori ELC. No. 89 of 2017.

2. In his affidavit in support of the application, he deposes that his advocate did not inform him of the date of delivery of judgment; that upon enquiry sometime in January 2020 the advocate informed him that judgment, which was unfavorable to him, had been delivered and that he instructed his advocate to challenge it on appeal; that during his next visit to his advocate in Migori he was informed that the same had not been filed; that he visited the court at Migori on 19<sup>th</sup> February 2020 when he was informed that he had to file a notice of appeal; that he did then file a notice of appeal and at the same time made a request for a copy of the judgment and typed proceedings which he has been waiting for since. His written submissions to a large extent replicate the contents of his supporting affidavit.

3. No replying affidavit or submissions in opposition have been drawn to my attention. Nonetheless, under Rule 4 of the Court of Appeal Rules, the applicant has the burden to lay a basis for the exercise of the Court’s discretion in his favour. 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; 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.

4. Although the applicant says that his advocate informed him in January 2020 that judgment had been delivered, and having visited the

registry in February 2020, he did not present this application until 29<sup>th</sup> September 2020. That is a delay of over eight months that is not explained. He further says that he applied for typed proceedings and was informed that he would be notified when ready and that it would take time because of the current Covid-19 pandemic situation. He has not however exhibited the letter by which he claims to have done so.

5. In my view, the applicant has not discharged his burden. He has not demonstrated his efforts in accessing the typed proceedings. As already stated, says that he requested for the typed proceedings which are yet to be issued but does not offer any evidence of communication between him and the court.

6. The applicant also blames his previous advocate but has not explained the steps and difficulties he has encountered in that regard. In **Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR** the court held *inter alia* that:

***“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”***

I respectfully agree.

7. All in all, the applicant has not given sufficient reasons on the basis of which I am able to allow his application. The application is hereby dismissed. I make no orders as to costs.

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

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**