



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 515 OF 2019

BETWEEN

ANNE WAITHERERO KABERERE.....APPLICANT

AND

OPEN HIRE LIMITED.....1ST RESPONDENT

MINJU KARIUKI.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE (HON) ATTORNEY GENERAL.....4TH RESPONDENT

(An application for extension of time to file and serve a notice of appeal and record of appeal out of time from the Judgment of the Environment & Land Court of Kenya at Nairobi (K. Bor, J.) delivered on 6th November, 2018

in

Nairobi High Court ELC No. 2486 of 1997)

RULING

Background

[1] This is an application brought under **Rule 4** of this Court's Rules and all other enabling provisions of the law. The applicant seeks extension of time to file and serve a record of appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (ELC) (K. Bor, J.) delivered on 6th November, 2018 in **Nairobi ELC No. 2486 of 1997**.

[2] The application is premised on the grounds, *inter alia*, that the applicant was one of the defendants in the suit in the ELC; that the impugned judgment was delivered on 6th November, 2018; that the applicant's advocates applied for a copy of the judgment together with typed proceedings to enable them file the notice of appeal and the intended appeal; that the applicant was unable to file the notice of appeal in time and hence filed **Civil Application No. Nai. 369 of 2018** in which **Ouko (P), J.A.** allowed the applicant to file the notice of appeal out of time vide a ruling dated 5th July, 2019; that the applicant filed the notice of appeal; that the applicant was unable to file the record of appeal within time as the proceedings from the ELC were not ready; that the delay in filing the appeal was occasioned solely by the ELC registry as proceedings have taken nearly a year to be ready and issued to the applicant; that there is no order for stay of execution in force and hence the applicant is at great risk of losing her property where she resides with her children and grandchildren; that the applicant took over the case from her late husband and if the appeal filed against the impugned judgment is not heard on its merits, the applicant stands to suffer irreparable damage as **Title No. Nairobi/Block 82/2380** (the suit property) is all the property that she has left; and that the applicant has already filed and served the notice of appeal, record of appeal and memorandum of appeal.

[3] In **Civil Application 369 of 2018**, the applicant herein sought an extension of time to file the notice of appeal and the record of appeal out of time. On 5th July, 2019, **Ouko (P) J.A.** allowed the application for extension of time and directed that the notice of appeal be filed and served within seven (7) days from the ruling date. The President of the Court of Appeal further directed that the appeal be filed and served within thirty (30) days from the date of filing and serving of the notice of appeal. In effect, the notice of appeal ought to have been filed on or before 12th July, 2019. However, the notice of appeal was filed on 16th July, 2019, that is, 4 days late.

[4] The applicant's advocate, **Mr. Walter Owaga**, in an affidavit supporting the instant motion, deposed that he was not in good health on the date of the aforementioned ruling; that **Ms Ndungu**, who held his brief, informed him that this Court had directed that the notice of appeal be filed within 14 days and the record of appeal within 21 days. That the notice of appeal was filed on 16th July, 2019; that on receipt of a copy of the aforementioned ruling, he noticed that the directions in respect of filing of the notice of appeal and the record of appeal were different from what **Ms Ndungu** had informed him; that the notice of appeal was filed out of time due to an inadvertent mistake occasioned by the fact that **Ms Ndungu** did not hear the Court's directions well; that it took him some time to recuperate before following up on the copy of the ruling; that he filed the notice of appeal before he read the ruling and once he realized that he had filed the notice of appeal outside the stipulated time, he filed the instant application.

Determination

[5] I have considered the application, the grounds in support thereof, the supporting affidavit and the law. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** as follows:

“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”.

[6] This Court in the *locus classicus* case of **Leo Sila Mutiso v. Hellen Wangari Mwangi** [1999] 2 EA 231 aptly set out the guiding principles for determining such an application 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”.

[Emphasis supplied].

[7] The factors that the court may take into consideration in deciding whether or not to extend time are not exhaustive. In this respect, this Court in **Fakir Mohammed v. Joseph Mugambi & 2 others** (2005) eKLR, held that:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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, (possible) 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 factor.”

[8] In the same vein, this Court in **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees**, Civil Application No. 190 of 2019 expounded that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity”.

[Emphasis supplied].

[9] As previously indicated, the notice of appeal was filed 4 days late. I find that the period of delay is not inordinate. However, of more concern is that a satisfactory explanation has been given for the delay. In this respect, this Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet** [2018] eKLR held that:

“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.”

[10] The applicant's counsel partly attributed the delay to a mistake in recording the stipulated time for filing by the counsel who held his brief at the delivery of the ruling. Counsel on record filed the notice of appeal on the basis of the information he received from counsel who as he could not obtain the typed ruling before then because he was sick. He has exhibited medical evidence thereof in his supporting affidavit. In my analysis, the reasons for the delay are plausible. In the case of **Belinda Murai & 9 Others vs. Amos Wainaina** [1979] eKLR Madan, JA, posited that:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought

to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”.

[11] It was contended that the applicant has an arguable appeal. The draft memorandum of appeal reveals that one of the grounds in the intended appeal is that the learned Judge misdirected herself on the facts and law relating to the lodging and removal of the caution placed by the applicant. Hence, I am satisfied that the intended appeal is arguable and indeed, deserving of this Court’s discretion. In **Muchugi Kiragu v James Muchugi Kiragu & Another** Civil Application No. NAI. 356 of 1996, this Court had the following to say as regards this Court’s discretion under **Rule 4**:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

[Emphasis supplied].

[12] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties. It is clear that the applicant was aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. Conversely, there may be prejudice to the respondent in granting an extension. Nevertheless, the applicant has already filed and served the record of appeal, albeit out of time. Therefore, I am of the considered view that an expedited hearing of the intended appeal would ameliorate any prejudice to the respondent.

[13] From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). Accordingly, I hereby allow the application and order that the notice of appeal and the record of appeal shall be deemed as properly filed and be served on the respondents (if not already served) within fourteen (14) days from the date hereof.

[14] The costs of the application shall abide by the outcome of the appeal.

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

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR