



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 129 OF 2019

BETWEEN

GEORGE OWUOR OKAKA..... APPLICANT

AND

PAUL K. MURUGA.....RESPONDENT

(An application for extension of time to file a Record of Appeal and Memorandum of Appeal from the Judgement and Decree of the Environment and Land Court at Kitale (M.Njoroge, J) dated 29th May, 2017

in

Environment & Land Court No. 41 of 2008

RULING

The applicant, **George Owuor Okaka**, moved the Court by a Motion dated 18th October 2019, seeking the following orders;

- a) *THAT the application be certified as of utmost urgency and the same be heard on priority basis.*
- b) *THAT the Honourable court be pleased to grant leave to the applicant to file record and memorandum of appeal out of time.*
- c) *THAT the record and memorandum of appeal already filed be deemed to be properly filed and duly served.*
- d) *Costs of this application be provided for.*

This being a **Rule 4** application, the Court of Appeal Rules do not provide for the factors to be considered. However, this Court has, over the years, devised appropriate principles to be applied to achieve a just decision in the circumstances of each case. Thus, in the exercise of my discretion, which is free and unfettered, I shall be duly guided by those principles. In **MURINGA COMPANY LTD v ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES [2020] eKLR**, they were stated thus;

“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.”

This matter dates back to 9th June 2017 when a notice of appeal was duly lodged following delivery of judgement on 29th May 2017. Thereafter the applicant’s former learned Counsel, **George Wambura** wrote to the Deputy Registrar Kitale Law Courts on 9th June 2017 and again on 20th April 2018 requesting for certified copies of proceedings and the ruling. The certified copies of

proceedings and the ruling were eventually availed to the applicant's current learned Counsel **Joseph Kaptich** and a certificate of delay dated 2nd May 2019 was issued indicating that the period between 9th June 2017 and 12th April 2019 was required for preparation and delivery of the certified copies of proceedings and the ruling. The applicant avers that the delay in filing the record of appeal and memorandum of appeal was occasioned by the delay in the supply of certified copies of proceedings and the ruling.

The applicant further deposes that the delay in filing the application for extension of time arose due to the fact that he had been unwell and was undergoing medical treatment. Copies of the medical documents were attached to the application. The applicant submitted that the medical treatment involved admission to hospital and undisturbed bed rest that included avoidance of phone calls. Due to his health condition at the time, the applicant submitted, he could not be reached by his advocates, hence he was not able to execute the supporting affidavit on time.

On the other hand, the respondent, **Paul K. Muruga**, through a replying affidavit sworn on 13th December 2019 opposed the application. The respondent stated that his advocates on record **M/S Kiarie & Co. Advocates** were served with the notice of appeal on 15th June 2017, but they were never served with the letter addressed to the registrar of the court before requesting for certified copies of proceedings and the ruling. The respondent further averred that after 60 days elapsed from the date of filing the notice of appeal, under rule 83 of the Court of Appeal Rules the notice of appeal was deemed to have been withdrawn, and consequently there is no valid notice of appeal on record. And that since the applicant had not prayed to file and serve a fresh notice of appeal, a record of appeal would equally be invalid and incompetent.

In addition, the respondent attested that since the medical documents produced by the applicant showed that he was admitted in hospital on 24th April 2019 and discharged on 28th April 2019, the applicant had time up to 11th June 2019 to lodge the appeal but did not do so. The respondent urged the court to dismiss the application with costs for lack of merit.

Although there is no maximum or minimum period of delay set by the law, anyone seeking this relief must plausibly explain the cause of the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**. In many cases, parties do blame court registries for delay in preparing court proceedings. These registries are often overwhelmed with work. It is in appreciation of this that the time taken in preparing such proceedings is excluded from the computation of the stipulated 60 days. **Rule 82 (1) of the Court of Appeal Rules** states;

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.” (My emphasis)

The applicant having availed a certificate of delay from the deputy registrar of the High Court in Kitale, time taken to compile the proceedings would be exempted from the computation of 60 days within which an appeal is to be lodged. It is contended by the respondent, however, that even if **Rule 82(1)** applied to the applicant, the proceedings were availed on 12th April 2019, and therefore the applicant should have lodged his appeal by 11th June 2019. And he would have sought extension of time earlier than 15th August 2019.

The applicant explained that his failure to lodge the appeal earlier following the availability of proceedings was caused by his hospitalization and being under undisturbed bed rest. However, I find this explanation peculiar especially because the applicant never raised this ground of his health condition in the application for extension of time dated 15th August 2019. Rather he chose to rely predominantly on the delay in provision of certified proceedings and the certificate of delay. Coupled with the fact that the medical report shows that the applicant was hospitalized for a few days only, from 20th April 2019 to 28th April 2019, I find the explanation by the applicant to be an afterthought hence not plausible.

Moreover, **Rule 82 (2)** introduces a condition precedent to accessing the time-exemption in **Rule 82 (1)** as follows;

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

This has been upheld by this Court in many cases including **MISTRY PREMJI GANJI (INVESTMENTS) LIMITED V KENYA NATIONAL HIGHWAYS AUTHORITY [2019] eKLR**;

“In other words, the computation of the 60-day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent.... It is common ground that the letter bespeaking proceedings was never served upon the

respondent in this case. The appellant therefore was obliged to file the record of appeal 25th strictly within sixty uninterrupted days of filing the Notice of appeal, this period lapsed on April, 2017.”

The respondent swore in his replying affidavit that his advocates on record were never served with a letter bespeaking proceedings. Without proof of service on the respondent of the letter bespeaking proceedings, the certificate of delay is impotent and inefficacious as the 60 days as prescribed by **Rule 82(1)** ran uninterrupted. The delay is therefore inordinate and inexcusable.

In the result the prayer to extend time to file the Record of Appeal and Memorandum of Appeal is unmerited and is accordingly dismissed with costs. In consequence the record of appeal is incompetent and is struck out with costs.

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

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR