



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

KISUMU CIVIL APPLICATION NO. 149 OF 2019

BETWEEN

JOHN WAFULA MAKOKHA APPLICANT

AND

BENJAMIN KISAKA MUYALARESPONDENT

(An application for extension of time within which to lodge an Appeal against the Judgment of the

Environment and Land Court at Bungoma (Boaz, J) dated 09th April, 2019 in

ELC No. 99 of 2001(OS)

RULING

John Wafula Makokha, the applicant herein, has filed a Notice of Motion dated 22nd November 2019 seeking, in the main, the following orders;

- 1. THAT the time within which to file a Notice of Appeal be extended and leave be and is hereby granted and the Notice of Appeal filed in Court on 11th April 2019 be deemed as properly on record.**
- 2. THAT leave be and is hereby granted to the Appellant to lodge (sic) Memorandum of Appeal and Record of Appeal and serve same out of the time.**

I have considered the application, the grounds in support thereof and the law. This being a **Rule 4** application, there is nothing novel about it and the applicable law is old hat. In **MURINGA COMPANY LTD V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES, Civil Application No. 190 of 2019** the factors I would consider, in the exercise of my discretion, which is free and unfettered, were stated as;

“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.”

The applicant deposed that the “Boaz, J.” (he must mean Olao, J.!) delivered the judgment against him on 09th April 2019 and he immediately instructed the firm of Kimanga & Company Advocates to file an appeal on his behalf. That firm promptly filed a Notice of Appeal on 11th April 2019. It also sought and paid for typed proceedings on the same date. The typed proceedings were subsequently collected on 8th August 2019. However, the applicant’s Counsel faced challenges in his efforts to compile the Record of Appeal due to lack of essential documents and exhibits which were in the applicant’s possession.

The applicant lamented that he could not trace the said documents on time and that is what caused the delay in filing the Memorandum and Record of Appeal. He argued that the delay was not inordinate and that the appeal raises meritorious arguable grounds.

There was no response to the application from the firm of E.O Kweyu & Company Advocates who are on record for the respondent. Instead, through an email sent to the Court dated 9th December 2020, the firm indicated that they would not oppose the application, leaving it to the discretion of the Court.

This Court has pronounced itself numerous times on the issue of delay. It is commonplace that there is no set minimum or maximum time period of delay. The only prerequisite is for the Court to be satisfied that such delay has been reasonably explained. As we have had occasion to say before, a plausible and satisfactory explanation is the key that unlocks the Court's flow of discretionary favour. See, **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR.**

I have considered the reasons proffered for the delay and found them to be plausible and satisfactory. This, coupled with the fact that the respondent's Counsel did not object to the motion, goes to show that the respondent will not suffer any prejudice, which is one of the factors to consider in a **Rule 4** application, if the same is allowed. Grant would be in the interest of justice, bearing in mind that the subject matter is land which the applicant stands to lose if not given afforded the opportunity to ventilate his appeal.

I accordingly grant the prayer that the Notice of Appeal be deemed to be properly on record. The applicant has 21 days within which to file and serve the Memorandum and Record of Appeal.

Costs shall be in the appeal.

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