



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, J.A – IN CHAMBERS)

MISC. CIVIL APPLICATION NO. 69 OF 2020

BETWEEN

OBADIA SHIBOCHE ISALIA.....1ST APPLICANT

JOSEPH MUNG'AYA MAKOTSI.....2ND APPLICANT

AND

JAMES ATEMA.....RESPONDENT

(Being an application for leave to file and serve record of appeal out of time from the

judgment of the High Court of Kenya (N. A. Matheka, J.) dated 23rd October, 2018

in Kakamega ELC No. 60 of 2013)

RULING OF THE COURT

Before me, is a notice of motion dated 17th March, 2020 under **sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Rule 4** of the **Court of Appeal Rules** under the **Appellate Jurisdiction Act, Cap 9 Laws of Kenya**, substantively seeking orders that time within which to file the record of appeal be extended and applicants be granted leave to file an appeal out of time together with an attendant order that costs be provided for.

It is supported by grounds on its body, a supporting affidavit sworn by **Joseph Mung'aya Makotsi**, the 2nd applicant, on his own behalf and on behalf of the 1st applicant together with annexures thereto. It has been opposed by a replying affidavit sworn by **Simeo Mugalavai Keyonzo** an advocate, on behalf of the respondent together with an annexure thereto and a reply to applicants' submissions. It was canvassed through rival pleadings, and written submissions of the respective parties without oral highlighting.

Supporting the application, applicants contend that the respondent filed a suit against them vide Kakamega High Court, Environment and Land Court (ELC) Case No. 60 of 2013 whose merit disposal resulted in the judgment delivered on 23rd October, 2018. Applicants were aggrieved with the outcome of the said judgment and timeously filed a notice of appeal simultaneously with an application bespeaking certified copies of proceedings both lodged on 26th October, 2018. It took time for them to be supplied with certified copies of proceedings for appellate purposes. They variously made follow up to the registry to no avail. By the time these were supplied to them, time for lodging the record of appeal had lapsed hence the filing of the application under consideration to validate that process.

It is also their assertion that their appeal has overwhelming chances of success. They are not to blame for the delay in accessing typed proceedings which were supplied to them on 24th February, 2020 and a certificate of delay issued to that effect. They could not however file the application under consideration as soon as capacitated due to the onset of Covid-19 pandemic which impacted negatively on the Court operations hence the filing of the application on 17th March, 2020.

To buttress the above submissions, applicants rely on the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231; Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited [2020] eKLR**, and **Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & Another [2020] eKLR** all for the threshold to be applied in the determination of an application of this nature.

In rebuttal, the respondent avers that they were served with the application under consideration online on 29th January, 2021. They confirm that: judgment was delivered on 23rd October, 2018 but were not aware of applicants intended appellate process against the said judgment as

applicants have never served their firm with any notice of appeal expressing intention to appeal against the said decision. They contend that the judgment was delivered in a typed form while the proceedings were ready for collection on 1st October, 2019. Counsel is a stranger to the second certificate of delay issued to applicants' on 24th February, 2020.

It is, therefore, counsels averments that although they do not dispute the fact that the Court has unfettered discretion to grant the relief sought reasons advanced by applicants as reason for seeking the Courts indulgence to initiate their intended appellate process out of time, do not warrant the exercise of that discretion in their favour, as they have been less than candid to disclose when they accessed typed proceedings for appellate purposes especially when the certificate of delay dated 24th February, 2020 is not certified by the Deputy Registrar of the Court. It is, therefore their contention that no valid explanation for the delay in complying with the requisite rules governing limitation of an appellate process has been given.

To buttress the above submissions, the respondent relied on the case of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and submitted that the authentic certificate of delay with regard to matters subject of the application under consideration is the one exhibited by them indicating clearly that it was certified and dated 30th October, 2019 and not the one fronted by the applicants purportedly dated 24th February, 2020; and on that account urged the Court not to exercise its discretion in favour of applicants, but dismiss the application.

My invitation to intervene on behalf of applicants has been invoked under provisions of law cited in the heading of the application. **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act** do not fall for consideration in an application of this nature. They are accordingly struck out. The appropriate provisions of law falling for interrogation in the application is Rule 4 of the Court of Appeal Rules. It provides:

“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.”

The principles that guide exercise of the Courts mandate under the said Rule have been crystalized by case law. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, and **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others.

The principles distilled from the above case law and the numerous others may be enumerated *inter alia* as follows: *The mandate under Rule 4 of the Court of Appeal Rules* is discretionary and unfettered. Factors for exercise of the Court's unfettered discretion under the said Rule include but are limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; orders under **Rule 4** of the Court of Appeal Rules should be granted liberally and on terms that are just; determination of the degree of prejudice to the respondent entails balancing the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, public interest issues implicated in the appeal or intended appeal also fall for consideration; 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 a delay is the key that unlocks the court's flow of discretionary power; there has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.

The above principles were restated by the Supreme Court of Kenya (**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.*

I have considered the record in light of the above rival position of the respective parties and principles of case law that guide the Court in the exercise of its mandate under the **Rule 4** of the **Court of Appeal Rules** already set out above. The factors I am enjoined to bear in mind in the determination of an application of this nature albeit not exhaustive are the length of the delay, reasons for the delay, possibly arguability of the appeal, and prejudice to be suffered by the opposite party if the relief sought were granted.

Starting with the length of delay, it is common ground that the judgment was delivered on 23rd October, 2018. Applicants were aggrieved and expressed their desire to appeal against the said judgment by lodging a notice of appeal dated 26th October, 2018 but lodged on 9th November, 2018. **Rule 75** of the **Court of Appeal Rules** required applicants to lodge the said notice of appeal within fourteen (14) days of the date of the delivery of the judgment which fell on 6th November, 2018. The notice of appeal was, therefore, lodged three (3) days out of time and will therefore require validation. However, since it is on record and has not been struck out it forms sufficient anchor for merit determination of the application under consideration.

In terms of **Rule 82(1)** of the **Court of Appeal Rules**, applicants ought to have filed their record of appeal within sixty (60) days of that date but failed to do so. This is the default applicants intend to cure through the application under consideration. Reasons advanced for the delay are as highlighted above. They have exhibited a letter bespeaking proceedings dated 26th October 2015. It is, therefore, my finding that indeed applicants timeously applied for a typed copy of proceedings to capacitate them progress their appellate process. There is no assertion

from the respondent that they were never served with a copy of the letter bespeaking proceedings. Applicants are, therefore, entitled to benefit from the proviso to **Rule 82(1)** of the Court's **Rules** subject to obtaining a certificate of delay indicating that the period of time taken to prepare the record of appeal fell outside the sixty (60) days period provided for in **Rule 82(1)** of the Court's **Rules**. In which case the sixty (60) days period would start running from the date of the certificate of delay.

Applicants have exhibited a certificate of delay issued on 24th February, 2020 and on the basis of which the application is supported. They have also exhibited correspondences to the registrar of the court appealed from dated 7th November, 2018 and 5th February, 2019 complaining about the delay in supplying them with a typed copy of the proceedings applied for by them. There is a reaction from the registrar dated 13th February, 2019 regretting the delay.

The respondent has taken issue with the certificate of delay relied upon by applicants alleging that it is fake and in lieu thereof exhibited one dated 8th October, 2019 asserting that the one exhibited by them is the authentic certificate of delay. Neither party, took any initiative with the Deputy Registrar concerned for purposes of verification as to which of the two opposing certificates of delay is the authentic one, a process beyond the scope of this ruling. The above being the position on the record, there is no way I can bar applicants from relying on the certificate of delay exhibited by them as basis for seeking the Court's intervention. The same was issued on 24th February, 2020 while the application under consideration was filed on 13th March, 2020 a period of less than one month since capacitation which in my view is not inordinate.

As for arguability of the intended appeal, applicants have neither specified the grounds they intend to raise on appeal in their supporting documents nor annexed a draft memorandum of appeal. The position in law is that in instances where these have not been specifically spelt out like in the instant application, it is not fatal to the application that may be under consideration. Principles of case law governing the exercise of the Court's mandate under the said rule which I have extensively highlighted above gives leeway to the Court seized of the matter to discern these from the supportive documents, one of which is the judgment/ruling intended to be appealed against. The judgment intended to be impugned is on record. Applicants indicate they want to appeal against the entire decision which ruled that they acquired title to the substratum of the intended appeal through fraud hence the Court's direction in the said judgment that three (3) of the acres comprised in the suit title should be registered in favour of the respondent. A desire to challenge the whole of that decision is in itself arguable as definitely it will invite a response from the respondent and interrogation by the appeal court to determine whether the conclusions reached by the Superior Court were well founded both on the law and fact.

On prejudice to be suffered by the opposite party if the relief sought were granted, none has been pointed out by the respondent in their supporting documents. I, therefore, rule that there was none.

In the result and on the basis of the above assessment and reasoning, I find merit in the applicants' application and proceed to make orders as follows:

- 1. Applicants have thirty (30) days from the date of the ruling to file and serve a record of appeal.**
- 2. Costs of the application to abide the outcome of the intended appeal.**

DATED AND DELIVERED AT NAIROBI THIS 5TH 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