



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: F. SICHALE, J.A IN CHAMBERS]

CIVIL APPEAL (APPLICATION) NO. 12 OF 2020

BETWEEN

JOHNSON NYAMOKO ABUGA.....APPLICANT

VERSUS

OTISO ONDICHO.....RESPONDENT

(Being an application for extension of time within which to Appeal against the “Ruling” of the

Environment & Land Court of Kenya at Kisii (J.M. Mutungi, J) dated 19th July, 2019

in

ELC Cause No. 175 of 2014)

RULING OF THE COURT

The Applicant’s Notice of Motion dated **20th January 2020** brought pursuant to Rule 1 (2) and 4 of the Court of Appeal Rules, 2010 seeks the following orders:

“a) Time limited within which to file a Notice of Appeal against the “Ruling” of the superior court delivered on 19th July 2019 in Kisii ELC No. 175 of 2014 be extended.

b) Costs of this application be in the cause”.

The Notice of Motion is based on the following further grounds:

“1. A “ruling” (a judgment in all respects though titled “ruling” hereinafter referred to as “decision”) was delivered in Kisii ELC No. 175 of 2014 on 19th July 2019.

2. The Applicant instructed his then advocates, G. J. Masese & Company Advocates to lodge appeal against the said decision.

3. The Applicant’s said advocates did not lodge a Notice of Appeal against the said decision.

4. The Applicant is desirous of appealing against the said decision.

5. Prescribed time within which to lodge a Notice of Appeal has long lapsed.

6. The Appellant requires and is desirous of being granted leave by this Honourable Court to lodge a Notice of Appeal.

7. The omission to lodge Notice of Appeal by the Applicant’s erstwhile advocates impedes the Applicant from pursuing an

appeal the said decision.

8. The Applicant only came to learn that a Notice of Appeal had not been filed after several visits to his erstwhile advocates and false promises given to him. The non-filing of the Notice of Appeal was established only after the Applicant consulted his advocates herein sometime in November, 2019.

9. The aforesaid omission, on the part of the Applicant's erstwhile advocates to lodge an Appeal should not be visited against the Applicant.

10. In the premises, it is in the interest of justice to grant this application.

11. The Respondent shall not be prejudiced in the event that this application is allowed.

12. The Applicant has an arguable appeal which he ought to be allowed to pursue”.

The Notice of Motion is supported by the affidavit of **Johnson Nyamoko Abuga**. Therein he deposed that; he filed Kisii ELC 175 of 2014 annexed and marked J-01. He further deposed that the Respondent filed a Defence to his claim, the copy is annexed and marked J-02. The superior Court on the **17th of April 2018** made an order as follows:

“1. THAT Court directs the Land Registrar together with the Surveyor to visit land parcels NYARIBARI MASABA/BOGUCHE/1341 & 1345 and demarcate their boundaries on the ground.

2. That the Land Registrar to avail all documents relating to creation of the two parcels of land and in case, there were subdivisions the Mutation Forms of copies of transfer and Land Board.

3. That the Surveyor to avail a certified copy of the current (RIM) where these parcels of lands are shown.

4. That the Land Registrar and Surveyor's Report to be filed within 90 days. Mention 30th July 2018 for further direction”.

The Applicant swore that after the visit a report was filed, the same is annexed and marked J-04. The parties thereafter filed their submissions marked J-05 (a) and J-05 (b) respectively. The superior court delivered its ruling on **19th July 2019**, hereto annexed and marked J-07. The gist being that firstly, the trespass and/or encroachment by the Respondent onto parcel 1341 had not been established by the Plaintiff, the Court dismissed his suit and each party to bear its costs and secondly, parties to honour the boundaries set. The firm of **Messrs G. J. Masese & Company** that represented the Applicant wrote to the Court on **22nd July, 2019** to be furnished with typed proceedings and a decision of the Court. A copy is marked J-08. He paid the Advocate Kshs 3,000/=, which was not receipted, to institute the appeal process. On **19th August, 2019**, he paid Kshs 15,000/= in legal fees, a copy of the receipt is marked J-09. The Appeal was not instituted and no substantive response was given to him on the status of the Appeal. The present advocates perused the file and found no Notice of Appeal filed. Attached hereto is the typed proceedings and ruling marked J-10.

The Applicant further deposed that his current advocates advised that a Notice of Appeal ought to have been filed 14 days after the decision and failure to which there was need to seek leave first. He swore that it would be just to be allowed to pursue his appeal as he stands to lose his proprietary rights over a substantial portion of land parcel Nyaribari Masaba/Boguche/1345. He concluded that he was an innocent litigant, the Respondent would not be prejudiced should his application be granted and he was willing to make amends if only to ameliorate, prejudice if any which the Respondent would suffer by reason of his application.

Analysis and determination:

Rule 4 of this Court's Rules (the Rules) provides as follows:

“R.4 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”.

Therefore, by dint of Rule 4 of the Rules, this Court has wide discretionary powers in its consideration of applications for extension of time.

In the case of **Donald O. Raballa v Judicial Service Commission & another [2018] eKLR** the Court of Appeal seated in Nairobi held as follows:

“From a long line of authorities including *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997* the single judge has unfettered discretion to consider an application for extension of time and generally the matters taken into account are 'the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted”

Those factors are not exhaustive, and indeed the Supreme Court, in the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR** laid out some general principles in matters of extension of time thus:-

"As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat* case, it was thus held:

"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time". [emphasis supplied].

But the circumstances disclosed in this case do not amount to a mistake of counsel but inaction after receiving instructions to act in the matter. In the case of *Rajesh Rughani vs Fifty Investment Ltd. & Another (2005) eKLR* this Court held:

"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 excusable mistake which the Court may consider with some sympathy".

Similarly in *Bains Construction Co. Ltd. vs John Mzare Ogowe (2011) eKLR* the court observed:

"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences".

In the absence of any affidavit from the applicant's erstwhile advocates to explain their failure to file the appeal for a lengthy period, it can only be surmised that they were guilty of inaction. The learned Judge was vilified for questioning why the applicant himself, who, having been a Resident Magistrate and was knowledgeable in court procedures, did not make personal follow-up to mitigate his advocates' inaction. But this was a relevant factor to consider as stated in *Habo Agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR*, thus:

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".

It would not matter whether the party was schooled in legal procedures or was a functional illiterate.

In *Abdul Azizi Ngoma vrs. Mungai Mathayo [1976] Kenya LR 61, 62*, the Court of Appeal held:

"We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."

In the case of *Bi-Mach Engineers Limited V James Kahoro Mwangi [2011] eKLR* the Court of Appeal seated in Nairobi held:

"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. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above."

It is clear from the cases above that the Court has discretion to extend time to file an appeal however the factors to be considered before an extension of time is granted were laid down in the case of ***Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR.***

It is my view that the Applicant by making payment to the Advocate shows that he was willing to follow the case. He entrusted the matter on his then erstwhile advocate who failed to put into effect the instructions of the applicant. The inaction on the part of the applicant's counsel cannot be visited on the applicant.

It is in view of the above that I grant the orders sought in the motion dated 20th January, 2020.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR