



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 168 OF 2019

BETWEEN

HUMPHREY OLWISI MURANDA.....1ST APPLICANT

EVERLYNE OMUSINDE OMUNGO.....2<sup>ND</sup> APPLICANT

VERSUS

SHERRY WAMUKOYA WABUKO.....RESPONDENT

*(Being an application for extension of time to file a Notice of Appeal and an intended Appeal against the Judgment and Decree of the Environment and Land Court at Kakamega (N.A. Matheka,J) dated 26<sup>th</sup> September, 2018*

*in*

*ELC Cause No. 50 of 2016)*

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**RULING OF THE COURT**

The Applicants' Notice of Motion dated **2<sup>nd</sup> December, 2019**, seeks the following orders:

“

*a) Spent*

*b) That the time within which to file notice/ record of appeal be extended and the Applicants be granted leave to file their appeal against the Respondent out of time.*

*c) That upon prayer (b) above, the Applicant be allowed to file his Appeal against the Respondent within fourteen (14) days from the date hereof.*

*d) That the costs of this application be provided for”.*

The Notice of Motion is supported by the affidavit of **Humphrey Olwisi Muranda**. Therein he deposed that the delay in filing this suit was occasioned by the delay of the Court proceedings; that the Respondent will not be prejudiced if the application is allowed and that it is just and fair that this application be allowed. Annexed to the Affidavit in support of the Application is the Notice of Appeal dated **5<sup>th</sup> October 2018** and a copy of the judgment dated **26<sup>th</sup> September 2018**.

The Applicants in their submissions dated **17<sup>th</sup> January 2021** stated that the time within which to file the Appeal had lapsed due to unavoidable circumstances and that to show good faith they had filed the Notice

of Appeal in good time. They concluded that the delay is excusable and it is in the interest of justice that they are granted an opportunity to ventilate their intended appeal.

In a replying affidavit sworn on **25<sup>th</sup> January, 2021** by **Sherry Wamukoya Wabuko**, the respondent herein, it was deposed firstly, that judgment in ELC No. 50/2010 was delivered on **26<sup>th</sup> September 2018**; secondly, that the applicants requested for the typed proceedings on the **2<sup>nd</sup> October 2018**; thirdly, that typed and certified proceedings were ready, having been certified on **13<sup>th</sup> March, 2019**; fourthly, that copies of typed proceedings were prepared and were available for collection within time but the Applicants chose to sleep on their right to appeal on their own volition; fifthly, that the proceedings being ready by **13<sup>th</sup> March, 2019**, the 60 days lapsed on the **13<sup>th</sup> of May, 2019** and that the applicants have not demonstrated any reasonable explanation for the inordinate delay of seven months and finally, that the applicants have not demonstrated an arguable case neither have they shown the prejudice likely to be suffered if no Appeal is preferred. They concluded that the intended Appeal is an afterthought designed only to defeat the ends of justice by prolonging litigation unnecessarily as this matter was before the Court of Appeal Kisumu vide Civil Appeal No 44 of 2002 touching on the same parties and the subject matter but was mischievously sneaked back to Court. The respondent urged the Court to dismiss the application with costs.

The Respondent in the submissions dated **25<sup>th</sup> of January 2021** chose to place reliance on the Replying Affidavit.

In *Karny Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018*, Koome, JA stated:

*“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal”.*

In *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015*, this Court stated thus, on that issue:

*“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.*”

Similarly, 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.”*

It is not denied that the impugned judgment was delivered on **26<sup>th</sup> September, 2018** and that on **2<sup>nd</sup> October, 2018**, the applicant applied for a certified copy of the proceedings. According to the respondent, the proceedings were ready and available for collection by **13<sup>th</sup> March, 2019**.

The instant motion was lodged on **2<sup>nd</sup> December, 2019**. What about the period leading to its filing?

What were the intervening circumstances? The delays were not explained. In view of the above and in my opinion, the motion herein is bereft of merit. It is hereby dismissed with costs to the Respondent.

It is so ordered.

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

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**