



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA, (IN CHAMBERS))

CIVIL APPEAL NO. 144 OF 2019

BETWEEN

PAUL MULWA LUNGUI.....APPLICANT

AND

KANINI KATILI MWENGI (*Sued as the Legal administrator of the Estate of*

KITILI MWENGI MWAI (Deceased).....RESPONDENT

(An application for extension of time to file and serve Record of Appeal out of time

in an intended appeal from the judgment of the Environment and Land Court

at Machakos (O.A. Angote, J.) dated on 2nd March 2018

in

ELC Case No. 175 of 2014)

RULING

[1] Before me for consideration is a motion on notice dated 29th April 2019 by the applicant predicated under **Section 7** of the **Appellate Jurisdiction Act** and **Rule 4** of the Court of Appeal Rules. The applicant seeks an order of extension of time within which to file and serve the record of appeal out of time following the judgment of the ELC Machakos by Angote, J., dated the 2nd March, 2018/

[2] A brief synopsis of the dispute that was before the trial Judge was over a parcel of land known as **Kyangwithya/Tungutu/1124** (the suit property). The respondent sued the applicant claiming that there was no valid sale agreement; that the suit property was in the name of her late husband and she had not obtained a grant of letters of administration and therefore any purported sale agreement was null and void in law. The applicant countered this suit with a defence and counterclaim seeking a refund of KShs. 2,100,000 which he had paid towards the purchase price. Upon weighing the evidence, the Judge found for the respondent and dismissed the applicant's counter-claim and issued consequential orders for the applicant to vacate the suit property.

[3] Aggrieved by the said outcome the applicant intends to appeal and hence this motion which is supported by his affidavit that was sworn and dated 29th April 2019. In it the applicant claims he had entered into a sale agreement with the respondent over the suit property but the respondent reneged on the terms thereto and filed suit on 19th November 2014 (**ELC 175/2014**) seeking to invalidate a sale agreement. The applicant in turn counterclaimed for a declaration that the sale of the suit property was valid and in the alternative counterclaimed for a refund of the purchase price. The trial Judge delivered a judgment in favor of the respondent whose effect was that the sale agreement was invalidated and revoked with the result that the applicant was ordered to be evicted from the suit premises. The applicant contends that the appeal is arguable because he had mounted a counter-claim for the refund of the purchase price.

[4] As far as the delay in filing the appeal is concerned the applicant's explanation is that it was occasioned by his previous advocate on record who did not obtain the requisite proceedings from the trial court as the file was held in the Judge's Chamber while handling an auxiliary matter regarding an application for stay of execution. That even with the change of advocate, the applicant was unable to file and

serve the record of appeal within the prescribed time as per the rules of this Court.

[5] The motion was opposed by the respondent vide her replying affidavit sworn on 22nd May, 2019. According to the respondent, the application for extension of time lacks merit because even the notice of appeal was served upon her advocate outside the time provided, and the letter bespeaking the proceedings was not copied to her advocate as required by the Court of Appeal Rules. Moreover, it is the contention of the applicant that the appeal is not arguable as it was determined on a fine point of law that a sale agreement that is entered into over a property registered in the name of a deceased person in the absence of a grant of letters of administration is null and void.

[6] Pursuant to the directions given to the parties to file and serve written submissions for consideration in determining this motion without appearance by parties to mitigate the spread of COVID - 19 Global Pandemic the applicant filed submissions which I have dully considered against the laid down parameters as provided under **Rule 4** of the Court of Appeal Rules which gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. The principles are elaborated by the Supreme Court in **Nicholas Kiptoo Korir Arap Salat vs IEBC [2014] eKLR** clarified as follows: -

“i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.

iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.

iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.

v. Whether there will be any prejudice suffered by the Respondent if extension is granted.

vi. Whether the application has been brought without undue delay.

vii. Whether in certain cases public interest should be a consideration for extension of time.”

[7] That said, the issue remains whether the applicant has satisfied the above criteria. As alluded to above, the applicant attempted to explain the delay which is attributed to his previous advocates. The applicant has demonstrated that he acted and changed representation as evidenced by a letter dated 10th April, 2019 annexed to his supporting affidavit. Upon considering all the matters, I am persuaded that it is more probable than not, that the applicant was unable to beat the deadline in filing the appeal due to a mistake and/or omission of counsel which ought not to be visited on the client as it was stated in the case of **Catherine Njoguini Kenya & 2 Others vs Commercial Bank of Africa Civil Appeal No. Nai. 366 of 2009** .

[8] The respondent has argued that the intended appeal has no chance of success which may or may not be so because that is the province of the Bench that will hear the appeal. It is not the role of a single judge to determine the merits of the Appeal. Having found as I have, that the reasons for the delay appear reasonable, I would give the applicant a benefit of doubt. In the event I allow the application for extension of time. The applicant is given thirty (30) days from the date of this Ruling to file and serve the Notice and Record of Appeal. Costs of this application will abide the outcome of the intended appeal.

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

M. K. KOOME

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR