



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: J. MOHAMMED, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 125 OF 2020

BETWEEN

JOHN AMALEMBA KIROLI.....1ST APPLICANT

JOSEPH MMEYWA AMALEMBA.....2ND APPLICANT

THOMAS MBOYA AMALEMBA.....3RD APPLICANT

AND

JOSEPH CHIBEIYA MAKAMU.....RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal, a memorandum of appeal and record of appeal from the Judgment of the High Court of Kenya at Kakamega (Matheka, J.) dated 9th April, 2019

in

E. L. C. No. 256 of 2017)

RULING

Background

1. This Notice of Motion dated 23rd October, 2020 is brought under **Rules 4 & 41** of the Court of Appeal Rules by **John Amalemba Kirol, Joseph Mmeywa Amalemba & Thomas Mboya Amalemba** (the applicants) seeking the following orders:

“a) the Honourable Court be pleased to grant the applicants an extension of time for filing and serving a Memorandum of Appeal and a Record of Appeal.

b) the costs of and incidental to this application do abide the result of the said appeal.”

Joseph Chibeiy Makamu is the respondent herein.

2. The application is premised on the grounds that the judgment of the Environment and Land Court (ELC) was delivered on 9th April, 2019 while the notice of appeal was filed on 18th April, 2019; that the applicants applied for certified copies of proceedings and judgment; that as a result of the Global Covid-19 pandemic, the Court Registry did not issue the certified copy of the proceedings and judgment until 13th October, 2020; that the certified copies of the proceedings and judgment were ready for collection on 16th October, 2020; that the applicants have an arguable appeal with overwhelming chances of success; and that the respondent will not suffer prejudice if the orders sought are granted.

3. From the record, the respondent has not filed any replying affidavit or written submissions despite notice.

Submissions

4. The application was disposed of by way of written submissions. The applicants counsel submitted: that the delay in filing is not inordinate or deliberate but is excusable and was occasioned by the Corona Virus Pandemic and the Court’s Registry in issuing the certified copy of the

proceedings and judgment; that the applicants should not be denied access to the seat of justice or penalized for circumstances beyond their control; and that the respondent has never occupied the suit property and will not suffer any prejudice if the orders sought are granted. Counsel urged the Court to allow the application.

Determination

5. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. **Rule 82** of the **Court of Appeal Rules** provides that a record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal.

6. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4** of the **Court of Appeal Rules** which provides as follows:

“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.”

7. **Rule 4** of the **Court of Appeal Rules** does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

[Emphasis supplied].

8. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

9. This was reiterated further in the case of **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019** where it was explained that:

“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.”

10. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

11. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court stated:

“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 delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

12. Rule 82 of the Court of Appeal Rules provides:-

“(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

(i) a memorandum of appeal, in quadruplicate

(ii) the record of appeal, in quadruplicate

(iii) the prescribed fee, and

(iv) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

13. Accordingly, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party files and serves an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. Thereafter, the Deputy Registrar of the relevant court issues a Certificate of Delay for verification of the period to be excluded by the Court and the parties.

14. In the instant application, the notice of appeal was lodged on 18th April, 2019. The applicants applied for typed proceedings on the same date (18th April, 2019). This was within the stipulated 30 day period from the date of delivery of the impugned judgment.

15. According to the Certificate of Delay issued by the Deputy Registrar of the ELC at Kakamega on 16th October, 2020, a period of 538 days was taken to compile the proceedings. The instant application was filed on 23rd October, 2020. I therefore find that the period of delay is not inordinate and is well explained.

16. The applicants contended that they have an arguable appeal on the ground inter alia whether they were entitled to the suit property by way of adverse possession. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. In ***Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No. NAI. 356 of 1996***, this Court had the following to say as regards this Court's discretion under **Rule 4**:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.” (Emphasis supplied).

17. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time.

18. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in ***Leo Sila Mutiso*** (supra). The upshot is that the notice of motion dated 23rd October, 2020 is allowed.

19. Accordingly, I make the following orders:

- a) That leave is hereby granted to the applicant to file and serve a record of appeal out of time against the judgment and decree of the ELC at Kakamega (Matheka, J.) in ELC No. 256 of 2017;
- b) That the record of appeal be filed and served within fourteen (14) days from the date hereof;
- c) Costs of this application to abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 21st day of May, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR