



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 177 of 2019

BETWEEN

JOHN ODHIAMBO ROCHE.....APPLICANT

AND

CYPRIAN LAURA ROCHE.....1ST RESPONDENT

FREDERICK ONGONDO ROCHE.....2ND RESPONDENT

(An application for leave to file an appeal out of time against the Judgment and Decree of the Environment and Land Court at Migori (Ong’ondo, J.) delivered on 20th March 2019

in

Migori ELC Case No. 311 of 2017)

RULING

Background

1. This application is brought pursuant to **Rule 4** of the Court of Appeal Rules. **John Odhiambo Roche** (the applicant) seeks orders that the record of appeal dated 8th August, 2019 in Civil Appeal No 117 and filed on 21st August, 2019 be deemed as validly before the Court; and that costs of the application be in the intended appeal. **Cyprian Laura Roche & Frederick Ongondo Roche** are the respondents herein.

2. The application is premised on the grounds on the face of the application and supported by an affidavit filed by the applicant. The grounds are: that judgment was delivered in Migori ELC Case No. 311 of 2017 on 20th March, 2019; that the applicant is desirous of lodging an appeal against the judgment but time within which to lodge a notice of appeal lapsed; that the delay was occasioned by the court’s delay in issuing the applicant with copies of certified proceedings and the financial inability of the applicant to finance the lodging of the appeal; and that consequently the applicant did not timeously give instructions to his advocates to file a notice of appeal; and that the respondent will not be prejudiced in any manner in the event that the record of appeal is deemed as validly filed in this Court. The respondents had not filed a reply and none of the parties has filed submissions by the time I considered the application.

Determination

3. I have considered the application, the affidavits, the authorities cited and the law. The applicant is urging the Court to extend the time to file an appeal out of time. This discretion is provided for under **Rule 4** of the **Court of Appeal Rules**:

“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.”

4. The principles guiding this Court in the exercise of that discretion are set out in **Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997**:

“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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

5. This Court in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR 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.”

6. This Court in Raphael Musila Mutiso & 3 others v Joseph Ndava Nthuka & another [2019] eKLR also stated:

“In an application for the extension of time, the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation. There are, on the other hand, many decisions where delays of many months and even years have been excused because the applicant in those applications provided plausible explanation.”

7. In the instant application, the judgment was delivered on 20th March, 2019. The applicant ought to have filed a notice of appeal by 3rd April, 2019 and lodged an appeal within 60 days of that date. According to the Certificate of Delay on record, a certified copy of the proceedings was made available to the applicant on May, 2019. The applicant filed the record of appeal 3 months later on 21st August, 2019, inexplicably failing to file a notice of appeal first as provided by **Rule 75** of the Court of Appeal Rules. The instant application was filed after a further 2 months on 16th October, 2019.

8. On the issue of filing a notice of appeal, this Court in Bi- Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR this Court held *inter alia* that:

“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.”

9. The applicant contended that his inability to finance the appeal was the reason for the delay in lodging an appeal. **Rule 115 (1)** of the Court of Appeal Rules makes provision for an appellant to demonstrate that he lacks the means to pay the requisite fees to lodge an appeal without prior payment of such fees. As was stated in Francis Mwai Karani v Robert Mwai Karani [2007] eKLR, lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal.

10. Further, as the applicant has not filed a draft memorandum of appeal, the Court has no means of considering the possible chances of the intended appeal’s success. In the circumstances, the applicants have not placed material before me to exercise my discretion in their favour. The upshot is that the application has no merit and is dismissed with no order on costs.

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