



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 99 OF 2020

BETWEEN

JOHN OMWARE RONGA.....APPLICANT

AND

OPEYO AGUTU.....RESPONDENT

(Being an application for extension of time within which the applicant shall file an appeal out of time against the decision of the Environment and Land Court at Kisumu (Ombwayo, J.) delivered on 22nd May, 2020

in

ELC Case No. 802 of 2015

(formerly HCC Case No. 22 of 2008))

RULING

1. In his application dated 20th August 2020 filed through the firm of Ben Aduol Nyanga & Co Advocates, John Omware Ronga the applicant seeks an order for extension of time within which to file his appeal and for the notice of appeal filed on 2nd July 2020 be deemed as duly filed. He intends to challenge the judgment of the Environment and Land Court (ELC) ***Ombwayo, J.*** which he claims was delivered electronically without notice to the parties on 22nd May 2020.

2. The other reason given by the applicant is that courts were shut down on account of the Covid-19 pandemic making it difficult for the appeal to be filed within the stipulated period. He says that he learnt from his neighbours that judgment had been delivered whereupon he contacted his lawyers who applied for typed proceedings and judgment by a letter dated 25th June 2020 and subsequently filed the notice of appeal on 2nd July 2020 and thereafter presented this application on 20th August 2020. Relying on the ruling of this Court in ***Imperial Bank Limited (in receivership) & 2 others vs. Alnashir Popat & 17 others [2018] eKLR***, it was submitted for the applicant that this is a proper case for the exercise of the court's discretion in his favour.

3. The application was placed before me for consideration on basis of written submissions without appearance of counsel in accordance with Practice Directions. I have not seen a replying affidavit or submissions from the respondent.

4. I have considered the application and the arguments. As the Supreme Court of Kenya stated in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. Similarly, in ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR, Waki, J.A*** had earlier expressed that:

“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

5. Although the Court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. On the one hand, the applicant claims that the judgment was delivered without notice to the parties. He deposed that, “*I got word from the neighbours that the judgment in my land case had long been delivered and that I had lost and I immediately instructed my advocate to confirm the rumours*”; that on confirming that it was true, he requested, through his advocates for copy of the proceedings and judgment by a letter dated 25th June 2020 delivered to the ELC on the same date and thereafter filed the notice of appeal on 2nd July 2020. He does not say when he got that information from the neighbours. On the other hand, he says, without explaining, that “*the resultant effects of the pandemic...rendered it difficult for the appeal to be filed within the stipulated statutory period*”.

6. Whatever the case, it is clear that by 25th June 2020, the applicant was well aware that judgment had been delivered on 22nd May 2020. What the applicant has not explained at all, is why the present application was not filed until 20th August 2020, a delay of almost two months from 25th June 2020.

7. Furthermore, in the judgment of the ELC (which the applicant did not bother to attach to his application or exhibit to his affidavit, but which is fortunately reported), the ELC found that the boundary dispute the subject of the suit was resolved by the Kisumu Land Dispute Tribunal and the applicant’s recourse would have been to appeal to the Appeals Committee or seek judicial review of that decision. Beyond stating that the intended appeal has great probability of success, there is no indication or mention of the proposed grounds of appeal.

8. The applicant has not discharged his burden to lay a basis to the satisfaction of the Court for extension of time.

9. The application dated 20th August 2020 is hereby dismissed. I make no orders as to costs as the respondent did not file submissions or a replying affidavit.

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

S. GATEMBU KAIRU, (FCI Arb)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR