



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 102 OF 2020

BETWEEN

MURIGI WANYOIKE.....APPLICANT

AND

SALLY J. KIBET.....1ST RESPONDENT

ESTHER J. KURUI.....2ND RESPONDENT

(Being an application for extension of time for the applicant to pursue an appeal against the Ruling of the High Court of Kenya at Eldoret (Githinji, J.) dated 5th March 2020 in Judicial Review Application No. 38 of 2011)

RULING

1. In his application dated 19th August 2020, made under Rule 4 of the Court of Appeal Rules, Murigi Wanyoike, the applicant seeks extension of time within which to appeal against the ruling of the High Court at Eldoret given on 5th March 2020 prohibiting the District Land Registrar from rectifying the register in respect of title number Pioneer/ Ngeria Block 1(EATEC)/9622.

2. The legal standard applicable in a matter such as this as articulated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* is that 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.

3. In the earlier case of *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR Waki, J.A* had stated the same principles thus:

“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.”

4. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. I have considered the present application, the affidavits and the submissions by Anassi Momanyi & Company advocates for the applicant and those of Wambua Kigamwa & Company Advocates for the respondents with those principles in mind. In his affidavit in support of the

application, the applicant deposes that his advocate only became aware of the ruling on 17th August 2020 when he was served with a bill of costs and promptly filed this application two days later; that notice of delivery of the ruling was not issued; that it is intended to challenge the ruling on grounds, inter alia, that the dispute fell within the jurisdiction of the Environment and Land Court and not the High Court.

5. The assertion that the ruling was delivered without notice is challenged in the replying affidavit of Sally Kibet, the 1st respondent who has deposed that the date for delivery of the ruling was given in court in the presence of counsel for the applicant, and it was therefore not necessary for further notice to be given.

6. In subsequent supplementary affidavits by Elijah Momanyi Mogona advocate for the applicant and Rachel Moraa Nyandieka advocate who held brief for the Mr. Momanyi on 17th December 2019 when the date for delivery of the ruling was fixed, it transpires that Ms. Nyandieka omitted to communicate with instructing counsel Mr. Momanyi that the ruling had been reserved for 5th March 2020 with the consequence that he was not aware of that date.

7. Mr. Momanyi is not without blame. Having instructed Ms. Nyandieka to hold his brief, he should to have followed up with her to establish what had transpired in court on the 17th December 2019. However, I bear in mind the words of Madan JA, in the case of ***Belinda Murai & Others vs. Amos Wainaina, [1979] eKLR***, that:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate...”

8. The explanation given by the applicant explaining the lapse of time from when the ruling was delivered on 5th March 2020 to the time the present application was made on 19th August 2020 is plausible. On becoming aware of the ruling on being served with the Bill of Costs, counsel for the applicant moved with speed to present this application two days later.

9. This, in my view, is a proper case for the exercise of discretion in favour of the applicant. I allow the application dated 19th August 2020 in terms of prayer 1 thereof. The applicant shall file and serve a notice of appeal within 7 days of delivery of this ruling. He will thereafter have 45 days to file and serve the memorandum and record of appeal. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR