



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR J.A.)

CIVIL APPLICATION NO. E526 OF 2020

BETWEEN

DAVID MWIYEL.....APPLICANT

AND

JULIUS MUSYOKA KILYA.....RESPONDENT

(Being an Application for extension of time to file an appeal out of time against the Judgment of the Environment and Land Court at Garissa (Cherono, J.) dated on 27th June 2018 in ELC Case No. 40 of 2017))

RULING OF THE COURT

The applicant, David Mwiyei, has brought this Notice of Motion dated 21st December 2020 under **rule 5 (2) (b)** of the rules of this Court seeking for time to be extended within which to file an appeal out of time.

In the application brought on grounds on its face, the applicant's affidavit in support, as well as on written submissions, it was contended that following a suit filed in the Environment and Land Court (*Cherono, J.*) against *the respondent, Julius Musyoka Kilya*, the applicant claimed that the respondent had blocked the access and the applicant's right of way to his property LR No. Mwingi/Mwingi/141; that the trial court had found in his favour, save that the court declined to award the applicant costs; that the applicant was aggrieved by the court's decision on costs and filed an application for review of that decision. In a ruling rendered on 28th January 2020, the trial court dismissed the application for reasons that an award of costs was an exercise of discretion of the court, and not a subject for review.

Though the respondent was served on 2nd February 2021, he did not file an affidavit in reply or written submissions.

Despite the application having been brought under **rule 5(2)(b)** instead of **rule 4** the applicant's submissions showed that the applicant's counsel was cognisant of the threshold requirements necessary for an application for extension to succeed. Under **rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*.

In determining the length of delay, it is observed that the applicant intends to appeal against the judgment rendered on 27th June 2018, and this application is dated 21st December 2020. The period of delay can therefore be computed to a delay of 30 months. As to whether the delay has been explained, besides informing the Court that the applicant filed an application for review which delayed the filing of an appeal against the judgment, the applicant has not provided any substantive reason for this inordinate delay.

In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98, the Court stated thus:

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said, the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

After considering the application, I find no reason or material advanced by the applicant upon which I can exercise my discretion under **rule 4**.

As to whether the appeal has a chance of success, since it is not in dispute that the award of costs is an exercise of discretion, my view is that the applicant will be hard put to challenge such exercise of discretion on appeal. And given the inordinate delay in bringing the appeal, it cannot be doubted that the respondent will be more than likely to suffer prejudice.

In sum, I have come to the conclusion that the application for extension of time is not merited. I decline to exercise my discretion to allow it. I order that the Notice of Motion dated 21st December 2020 be and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR