



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E216 OF 2020

BETWEEN

HESBON K. LIMISI.....APPLICANT

AND

DELILAH ACHIENG MATHEWS.....1ST RESPONDENT

ARGWINGS KODHEK OCHIELY.....2ND RESPONDENT

THE CHIEF LANDS REGISTRAR, NAIROBI.....3RD RESPONDENT

(Being an application for extension of time within which to file an application

to strike out the notice of appeal dated 14th February 2020 filed

in court by the 2nd respondent on 18th February 2020

in

Nairobi ELC Case No. 1227 of 2013)

RULING

1. In his application dated 3rd August 2020 brought under Rule 4 and 84 of the Court of Appeal Rules, the applicant, Hesbon K. Limisi seeks an order for extension of time within which to file an application to strike out the respondent's notice of appeal served on the applicant's advocate 9th March 2020.

2. The application is based on the grounds that the notice of appeal was served on the applicant's advocates outside of the seven days provided for under rule 77(1) of the Court of Appeal Rules; that the application to strike out that notice should have been filed within 30 days from 9th March 2020, the date when it was served, meaning the application to strike it out should have been filed by the 10th of April 2020; that the applicant was not able to do so as the courts were not operational from 15th March 2020 due to the outbreak of the coronavirus pandemic; that it was not until June 2020 that the courts upscaled and slowly resumed operations; that the applicants advocates offices reopened on 1st of July 2020 and started regular operations and it was therefore not practical for the application to strike out the notice of appeal to have been filed earlier.

3. In his replying affidavit sworn in opposition to the application, the 2nd respondent, Argwings Kodhek Ochiely, deposes that contrary to the claims by the applicant, practice directions issued by the court on 21st April 2020 provided for electronic filing of applications; that prior to that, the Chief Justice had issued practice directions on 20th March 2020; that the present application was filed electronically pursuant to those practice directions but the applicant has not explained sufficiently why it took four months to do so; that the court operations were scaled up and the use of electronic means of filing was fully automated on 1st July 2020 and the applicant has not established sufficient reasons on the basis of which his application should be considered.

4. I have considered the application, the submissions in support by N. O. Sumba & company advocates for the applicant and by Maina Rogoi

& Co Advocates for the 2nd respondent. In *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR Waki, J.A* stated 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. More recently, in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* the Supreme Court of Kenya stated 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; and that delay should be explained to the satisfaction of the court. Other considerations include public interest; whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay.

6. In effect, although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion must be exercised judicially, and each case must be considered on its own facts.

7. In this case the applicant is the beneficiary of a judgment of the lower court upholding his claim, over that of the respondent, over a property known as Flat F Block MF 32, Madaraka Estate, Nairobi within L.R No. 25980. Aggrieved, the 2nd respondent as indicated filed a notice of appeal on 18th February 2020 and served the same upon the applicant’s counsel on 9th March 2020.

8. Under Rule 84 of the Court of Appeal Rules, the applicant was supposed, if he was so minded, to apply to strike out that notice within 30 days of service. As noted, the applicant concedes that his advocates were served with the notice of appeal on 9th March 2020.

The present application is dated 3rd August 2020. That is almost 5 months after the service of the notice of appeal. The explanation given for the delay, that it is due to down scaling of the courts’ operation due to Covid 19 pandemic and other urgent office matters which were to be handled first, is not in my view satisfactory. As correctly stated by the respondent, the electronic filing has been available from July 2020, and even prior to that. It is also noteworthy that the present application is electronically filed, and no satisfactory explanation is given why it was not filed earlier.

9. Furthermore, the applicant has not demonstrated what prejudice he will suffer by sustaining the appeal. On the contrary, granting the orders sought will occasion the 2nd respondent prejudice as there will be undue delay in the prosecution of the appeal.

10. All in all, the application lacks merit. It is accordingly dismissed with costs to the 2nd respondent.

Dated and delivered at Nairobi this 7th 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