



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E020 OF 2020

BETWEEN

LAZARUS KIBUI NDEGWA.....APPLICANT

AND

HENRY ORYEM OKELLO (*Suing in his capacity as the legal representative of*

LABULE OKELLO LUTWA (DECEASED).....RESPONDENT

(Being an application for extension of time in respect of the lodging, hearing and determination of an appeal out of time in an intended appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (K. Bor, J.) dated and delivered on 26th July, 2018 in

ELC Case No. 1784 of 2007 formerly Nai.HCC Case No. 141 of 2006)

RULING

1. In his application dated 20th July 2020 brought, mainly under Rule 4 of the Court of Appeal Rules, the applicant Lazarus Kibui Ndegwa seeks leave to file his appeal against the judgment of the Environment and Land Court (**K. Bor, J.**) delivered on 26th July 2018 out of time; and that the time for filing the appeal be extended.
2. In his affidavit in support, he deposes that he promptly applied for copies of the proceedings and judgment on 27th July 2018; that he filed and served a notice of appeal on 2nd August 2018; that by the time the proceedings and judgment were released to him on 3rd March 2020, the period of appeal had already lapsed; that he believes he has a prima facie case against the respondent; that there were “*reasons beyond [his] control*” that could not allow him to appeal within time; that the delay was on the part of the court as it did not release the proceedings and judgment in time and the delay is not inordinate; and that he has good grounds of appeal as demonstrated in his draft memorandum of appeal and should be granted an opportunity to appeal. Among the documents exhibited to his affidavit are: the letter bespeaking typed proceedings and judgment; notice of appeal dated 2nd August 2018, and certificate of delay dated 10th March 2020 certifying that the “*time taken by the court to prepare and supply the certified copies of the proceedings was from 14th day of August 2018 to 20th day of February 2020 being 548 days*” and that the certified proceedings were availed to the applicant on 3rd March 2020.
3. The advocates for the respondent, Onsando Ogonji & Tiego Advocates were served with notice of hearing on 12th April 2021 and acknowledged receipt of service in a letter addressed to the Deputy Registrar dated 13th April 2022. They however claimed in the same letter that they had not been served with the application and that they are “*not linked to the electronic portal*”. The advocates for the applicant S. J. Nyang’ & Company Advocates in their letter in rejoinder dated 23rd April 2021 addressed to the Deputy Registrar of the Court have countered that claim and maintain that the application was served on 20th July 2020 and that the respondent’s counsel received the same, signed and stamped a copy under protest. I have no reason to doubt that service of the application was affected. The Deputy Registrar also indicates there was also service of the application on 23rd April 2021.
4. In their submissions in support of the application, the advocates for the applicant submit that the respondent is in the process of the evicting the applicant from the suit property known as L.R. No. 209/8000/136 situated in New Muthaiga Nairobi; that the intended appeal has high chances of success as the respondent gave contradictory evidence and did not establish ownership of the property; that the court granted ownership of the property to the respondent “*from the backdoor*” as ownership was not proved.

5. I have considered the application and the submissions. 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.”

6. 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.

7. 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. In this case, the dispute over the suit property between the parties has been in court for a long time. The transcript of proceedings shows the matter has been in court for over 14 years. Undoubtedly, the applicant filed a notice of appeal within the time period prescribed and also applied for typed proceedings and judgment which he says he received on

10th March 2020. Based on the certificate of delay exhibited, the period of 548 days between 14th August 2018 and 20th February 2020 was required for the preparation of the typed proceedings and judgment. Under the proviso to Rule 82, the time required for the preparation and delivery of a copy of the proceedings to the appellants is to be excluded.

8. The appeal should have been instituted by lodging the memorandum and record of appeal within 60 days of the date when the notice of appeal was lodged. The notice of appeal was lodged on 2nd August 2018. The copy of proceeding was availed to the applicant on 3rd March 2020. Sixty days hence, the applicant should have filed the memorandum and record of appeal by 4th May 2020 at the latest. He did not do so and presented this application on 20th July 2020. That is a delay of 77 days, approximately two and half months, that is not at all accounted for and no explanation is offered for that delay. Sympathetic as I might, in the absence of any explanation for that delay which is inordinate, I have no basis for exercising the court’s discretion in the applicant’s favour and I therefore decline to allow the application.

9. Consequently, the application dated 20th July 2020 is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 7th day of May, 2021.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR