



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J.A. IN CHAMBERS]

CIVIL APPLICATION NO. 106 OF 2020

BETWEEN

THE ATTORNEY GENERAL.....APPLICANT

AND

JANE WANJIRU NJOROGE.....RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal and Record of Appeal, respectively, out of time in an intended Appeal from the judgment of the ELC High Court of Kenya

at Thika (Honourable L. Gacheru J,) dated 25th October 2019 In ELC case 466 of 2017)

RULING OF THE COURT

The Applicant, the Attorney General filed a motion dated 30th April, 2020, brought under Rule 4 of the Court of Appeal Rules and sought the following orders:

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1. THAT this Honourable Court be pleased to extend the time for filing and service of the Notice of Appeal and Record of Appeal against the judgment of the ELC Court at Thika (Hon. L. Gacheru) delivered on 25th October, 2019.
2. THAT this Honourable Court be pleased to name a time within which the said Record of Appeal should be filed.
3. THAT the costs of this Application be provided for”.

The motion was supported by the affidavit of Deborah Robi, a Litigation Counsel at the offices of the applicant on behalf of the Applicant and sworn on 30th April, 2020.

She deponed that the Respondent filed a Petition dated 7th January, 2015 at the High Court, Constitutional and Human Rights Division in Nairobi where she sought orders that the two parcels of land; Thika Municipality LR No. 4953/195 and Thika Municipality LR No. 4953/1596 belong to herself (the respondent) jointly with one Cav. Giorgio Galanca; that the matter proceeded before Gacheru, J by way of written submissions and judgment delivered on 25th October, 2019 where the respondent was awarded Kshs 500,000 as damages; that she became aware of the judgment on 4th March, 2020 after perusal of the file at the ELC Registry in Thika; that the Applicant was not aware of the date of the judgment as the Counsel handling the matter, Ms. Ann Mwangi proceeded on maternity leave and she was only allocated the matter long after the judgment was delivered; that the applicant was aggrieved by the impugned judgment for finding that due process was not followed in revoking the Respondent’s title which resulted in the violation of her rights; in finding that the Applicant did not file their response hence failed to consider the applicant’s response in the ultimate decision rendered thereof; in finding that the two parcels of land were owned by the Respondent. The Applicant thereafter filed a Notice of Appeal and requested for typed proceedings and decree on 5th March, 2020 which was outside the fourteen (14) days period stipulated in the law.

On behalf of the respondent, Gerald Andego Magani, the Respondent’s counsel filed a replying affidavit on the 3rd July, 2020. He deponed

that the Application is not merited and is a delaying tactic meant to deny the Respondent the fruits of judgment; that the reasons given for not appealing within the given time are not sufficient since the Attorney General has many legal persons who should have been assigned the file. Further, it was contended that, the grounds advanced and contained in the draft intended Appeal lack merit and shall not afford the Applicant any probability of success even if leave to appeal is granted.

The Applicant in her submissions dated **15th April, 2021**, reiterated her averments in the supporting affidavit and added that the Applicant had satisfied the conditions for extension of time and came to Court without delay upon discovery that the judgment had been delivered; that the intended appeal is of great public importance as it touches on the ownership and use of public land.

The Respondent in her submissions dated **19th April, 2021** contended that in exercising its discretion to extend time, the Court should be guided by the case of **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & ors [2014] eKLR** which outlined the principles to be considered in an application such as this one. The Court's attention was drawn to the case of **Republic v Kenyatta University Exparte Martha Waihuini Ndung'u [2019] eKLR** which laid down the principles and what amounts to reasonable delay and that in the case of **Omwoyo v African Highlands & Produce Co. Ltd (2002) 1 KLR**, it was stated that discretion should not be permissive towards lethargy.

I have considered the motion, the supporting affidavit and the law in absence of counsel due to the circumstances caused by the Covid 19 pandemic. The applicant's motion, is *inter alia*, predicated on Rule 4 of this Court's Rules which provides:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

Rule 4 of this Courts Rules, do not however, provide for factors for consideration in an application for enlargement of time. However, this Court in a plethora of decisions has devised appropriate principles to be applied in achieving a “just” decision befitting each particular case. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2EA 331** – it was stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

The above matters for consideration by a single Judge are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed vs. Joseph Mugambi & 2 others (2005) eKLR** where it was held that:

“the exercise of this Court's discretion under Rule 4 has followed a well beaten path As it 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, (possible) 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”.

The Applicant's counsel applied for proceedings of the High Court on **5th March, 2020**, judgment having been rendered on **25th October, 2019**. This was out of the fourteen (14) days stipulated time limit.

The applicant does not provide details of when **Ms Ann Mwangi** proceeded on maternity leave. Besides, maternity leave is not an emergency and prior arrangements ought to have been put in place. The record is completely silent on specifics as relates to the period of about 4 months from **25th October, 2019** upto **5th March, 2020** when the applicant applied for proceedings. In view of the above, I am not satisfied that a reasonable explanation has been given for the delay. The motion dated **30th April, 2020** is declined. Costs of this motion to the respondent.

DATED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF JUNE, 2021

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR