



IN THE COURT OF APPEAL

NAIROBI

(CORAM: MURGOR, JA – IN CHAMBERS)

CIVIL APPLICATION NO. E293 OF 2020

BETWEEN

DAVID MAHUGU THONDU .....1<sup>ST</sup> APPLICANT

KING DAVID FAST FOOD LIMITED .....2<sup>ND</sup> APPLICANT

LIZARDS ENTERTAINMENT LIMITED.....3<sup>RD</sup> APPLICANT

AND

KENYA URBAN ROAD AUTHORITY.....RESPONDENT

*(Being an application for extension of time to file and serve a Notice of appeal and record of appeal against the judgment and order of the environment and land court at Nairobi (Obaga, J.) delivered on 5<sup>th</sup> March 2020*

in

**Nairobi ELC Petition No. 34 of 2017))**

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RULING OF THE COURT

**The applicants, David Mahugu Thondu, King David Fast Food Limited & Lizards Entertainment Limited** have brought this Notice of motion dated 18<sup>th</sup> September, 2020 under various provisions including **rules 4, 41 and 47 (1)** and

**(2)** of the Court of Appeal Rules seeking for time to be extended within which to lodge a Notice of appeal out of time.

The application was brought on grounds on its face and an affidavit in support sworn by **David Mahugu** wherein it was contended that the judgment was delivered on 5<sup>th</sup> March, 2020 in the absence of counsel who were therefore not aware of the judgment date; that it was not until sometime on 17<sup>th</sup> June, 2020 that the applicant’s counsel received a copy of the judgment online. It was further contended that the Chief Justice had issued directions downscaling court operations sometime about 13<sup>th</sup> March, 2020 that made it impossible to access the Court’s registry. As such, the applicant’s counsel was unable to obtain a copy of the judgment on time, and as a result, the time for lodging a Notice of appeal lapsed.

It was further contended that upon analysing the judgment, the applicants considered it necessary to lodge an appeal against the trial court’s decision; that although there was a delay in filing the Notice of appeal, the delay was not deliberate and was sufficiently explained; that they were certain of success and that the respondents were unlikely to suffer any prejudice if time for filing the appeal was extended.

Despite having been served with the hearing notice on 15<sup>th</sup> April, 2021, there was no response from the Attorney General.

By an email communication of 26<sup>th</sup> April 2021, the applicant’s counsel Mr. Walter Akwabi notified the Court that the deponent, the 1<sup>st</sup> applicant was deceased sometime in March 2021 after a short illness, but counsel nevertheless urged that the application proceed.

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.

The judgment was delivered on 5<sup>th</sup> March 2020. But the applicant contends that it did not become aware that the judgment was delivered until 17<sup>th</sup> June when time for filing of the Notice of appeal had already lapsed. The applicant attributes the delay in filing the Notice of appeal to the lack of notification of the date of delivery of the judgment which was occasioned by downscaling of court operations on account of the Covid - 19 pandemic.

I find this explanation to be plausible as it was on 15<sup>th</sup> March 2020, that the Chief Justice ordered the scaling down of all court operations from 16<sup>th</sup> March 2020 for a period of two weeks in response to the Presidential containment measures issued on 6<sup>th</sup> March 2020. If the judgment was delivered on 5<sup>th</sup> March 2020, and shortly thereafter court operations were interrupted, there is no doubt that this would have affected the delivery of judgments, and the attendant communication to the parties. As such, there is every possibility that during this time the court's ability to communicate with the applicant or its counsel was impaired. I therefore find the explanation for delay to be satisfactory.

I consider that the appeal has a chance of success, and since the delay in filing this application was not inordinate, I do not envisage that the respondent will suffer any prejudice.

For the above reasons, I exercise my discretion to grant an extension of time to file and serve the Notice of Appeal which extension will lapse **seven days** from the date of this Ruling. The Memorandum and record of appeal to be lodged in accordance with **rule 82** of this Court's rules. The costs of this application shall be in the intended appeal.

***It is so ordered.***

***Dated and delivered at Nairobi this 4<sup>th</sup> day of June, 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**