



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. 68 OF 2020 (UR 58/2020)

(CORAM: OKWENGU, JA (IN CHAMBERS))

DAVID PIUS MUGAMBI.....APPLICANT

AND

KENYA COMMERCIAL BANK.....1ST RESPONDENT

ISACK GITONGA RINGERA T/A VIEW LINE AUCTIONEERS.....2ND RESPONDENT

DR. JITESH DODHIA.....3RD RESPONDENT

(Being an application for extension of time to file and serve a record of appeal out of time from the judgment (**Mabeya, J**) delivered on 16th January, 2020 *in Meru HCCC No. 31 of 2018*)

RULING

[1] By a notice of motion dated 22nd July 2020, **David Pius Mugambi** (applicant), seeks leave to file and serve a record of appeal out of time, and have the appeal, which is **Civil Appeal No. 98 of 2020**, deemed as properly filed. The motion is supported by an affidavit sworn by **Steven Nzaku**, the applicant's advocate and the grounds stated on the face of the motion.

[2] In brief, the applicant is aggrieved by the judgment of the High Court (**Mabeya J**), delivered on 16th January, 2020. He lodged a notice of appeal on 21st January, 2020. He explains that he prepared a record of appeal, but was unable to file the record of appeal due to the Covid-19 pandemic, and the subsequent government's directive and travel restrictions that were imposed. He maintains that he has an arguable appeal and provides 4 grounds upon which he intends to canvas the appeal.

[3] **Kenya Commercial Bank Limited** and **Isaac Gitonga Ringera T/A** as View Line Auctioneers (1st and 2nd respondents), have opposed the applicant's motion through an affidavit sworn by **Francis Komen** (Komen), who is the 1st respondent's Credit Support Manager. Komen maintains that the applicant has not demonstrated any basis for the exercise of the Court's discretion in his favour, as he has not sufficiently explained the delay in filing the record of appeal. Komen points out that the cessation of all movements in and out of Nairobi Metropolitan area, came into force through a legal notice that was published on 6th April, 2020 which was well over 73 days from the last date the record of appeal was due for filing. Komen also avers that the applicant's advocates being members of the Law Society, were exempted from the movement restrictions.

[4] In addition, Komen states that the court put in place sufficient mechanism for online filing of pleadings, and the cessation of movement lapsed on 6th July, 2020. This notwithstanding, the applicant did not file the motion until 28th July, 2020. He therefore urges that the applicant motion is an abuse of the court process and that he is not deserving of the prayers sought.

[5] **Dr. Jitesh Dodhia**, the 3rd respondent also filed a replying affidavit in which he states that the applicant has not provided evidence to show that he applied for proceedings in time, and that if the applicant had prepared the record of appeal within the 60 days provided, the record of appeal would have been lodged before the lockdown came into effect. He urges that the applicant's motion has no merit and should be dismissed with costs

[6] Due to the Covid-19 pandemic, hearing of the motion proceeded by way of written submissions that were duly filed by all parties' counsel, without the presence of parties or their advocates. The parties also filed list of authorities and digest which, I have considered together with the motion.

[7] For the applicant, it was submitted that Rule 4 of the Court of Appeal Rules gives the Court power to extend time as a matter of judicial

discretion. Citing Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (UR), the applicant identified 4 principles that the Court needed to take into account in considering the application for extension of time. These were: the length of delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice likely to be suffered by the respondent if the extension is granted.

[8] In regard to the length and reason for the delay, the applicant reiterated that the record of appeal was ready for filing but could not be filed due to the Covid-19 pandemic and the government's directive and travel restrictions. The applicant urged that it has already filed Civil Appeal No. 98 of 2020, and therefore the Court should extend time and have this appeal deemed to have been filed on time. The applicant reiterates that its intended appeal is meritorious and likely to succeed, and that no prejudice will be suffered by the respondents as the appeal has been filed and can be listed for hearing and determination.

[9] In their submissions, the 1st and 2nd respondent asserted that the discretion of the Court to extend time for filing and service of the record of appeal, though unfettered, must be exercised judicially and cannot be exercised in the absence of clear and cogent reasons for the delay. The 1st and 2nd respondents pointed out that the delay of 180 days from the date of filing of the applicant's notice of appeal was inordinate and had not been explained; that there was an enabling environment for the applicant's counsel to file the record of appeal within the prescribed time frame; that the applicant's advocate was indolent as he neglected to use the available framework; and that the applicant has not demonstrated how the covid-19 pandemic impacted his ability to file his application, and the record of appeal within time. [10] The 1st and 2nd respondents cited Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others [2014] eKLR, for the proposition that the applicant had to explain the reasons for the delay and any extenuating circumstances, as extension of time is not a right but an equitable remedy that is only available to a deserving party; and that in view of the blatant indolence demonstrated by the applicant, he was not deserving of the exercise of the Court's discretion.

[11] In addition, the 1st and 2nd respondents urged that neither Article 159(2)(d) of the Constitution nor the Covid-19 pandemic, can be used as a panacea for curing procedural shortfalls. The 1st and 2nd respondents argued that the grounds intended to be raised in the applicant's appeal were ambiguous, general and blanket fashion. They therefore urged the Court to dismiss the applicant's motion.

[12] For the 3rd respondent, it was submitted that the applicant had not placed himself within the parameters required to enable the court exercise its discretion in his favour; that the applicant contradicts himself when he attributes the delay in filing the record of appeal to the Covid-19 pandemic, yet states that the record of appeal was ready before the lockdown; that the applicant had not provided any plausible reasons for filing the record of appeal late; and that he had not revealed to the Court when the record of appeal was filed to enable the Court ascertain whether the delay was inordinate. The Court was therefore urged to dismiss the applicant's motion.

[13] The motion is substantively before me as a single Judge under Rule 4 of the Court of Appeal Rules. This rule gives discretion to the Court to extend time for the doing of any act authorized or required by the rules of the Court. It is trite that in considering an application for extension of time under Rule 4, the Court exercises a judicial discretion that must be exercised judicially.

[14] The principles upon which such an application is determined are now well crystalized in the Supreme Court decision of Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others (supra), where the following principles were identified:

- "1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."**

[15] The only reason that the applicant has given for the delay in filing the record of appeal is that although the record of appeal was ready for filing, his advocates were unable to do so due to the Covid-19 pandemic and the consequent government restriction on movement. As observed by the respondents, the notice of appeal having been filed on 21st January, 2020 under Rule 82(1), the applicant had 60 days from that date to file the record of appeal, which means, the record should have been filed by 21st March, 2020. The applicant has not explained why this was not done as the Covid-19 pandemic restrictions came into force in April 2020. By this time, the applicant ought to have filed the record of appeal. The respondents have also demonstrated that advocates were exempted from the movement restrictions, and the applicant having filed a notice of appeal, there was nothing to prevent them from filing the record of appeal, if indeed it was ready for filing as alleged. No good reason has therefore, been given as to why the record of appeal was not filed within the statutory period. Moreover, the applicant has not explained the delay in filing this motion.

[16] As was stated in Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others (supra), the applicant had the burden of laying circumstances before the Court that would justify the exercise of the Courts' discretion in his favour. It was not enough for the applicant to rely on the Covid-19 pandemic without explaining the efforts that were made in filing the record of appeal, and how the Covid-19 pandemic affected these efforts. Although the applicant claims that the record of appeal was ready for filing, there is nothing to substantiate this. I find that the

applicant has not laid any basis upon which the discretion of the Court can be exercised in his favour.

[17] The applicant claims that if the Court does not extend time for him to file an appeal, he will suffer irreparable loss as he will lose the suit property. I do not think that this is a factor that the applicant can rely upon. The judgment of the learned Judge which was annexed to the applicant's motion shows that the applicant charged the suit property and was in fact in default at the time the 1st and 2nd respondents sold the suit property to the 3rd respondent. The applicant willingly undertook the risk of possible loss of his property by mortgaging it, and cannot therefore be heard to complain of this possible loss.

[18] Parties are entitled to have their suits determined without undue delay, and it cannot therefore be said that the respondents will not suffer any prejudice by the delay occasioned by the applicant, given the nature of the dispute that involves access to immovable property which the 3rd respondent claims to have purchased.

[19] For these reasons, I find the applicant has failed to lay a sufficient basis upon which this Court can exercise its discretion in his favour. Accordingly, the notice of motion dated 22nd July, 2020 is dismissed with costs.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR