



IN THE COURT OF APPEAL

AT NYERI

[CORAM: SICHALE J.A]

CIVIL APPEAL APPLICATION NO. 4 OF 2020

BETWEEN

JOHN KARANI MWENDA.....APPLICANT

AND

JAPHET BUNDI CHABARI.....RESPONDENT

(Being an Application for Extension of Time for giving Notice/filing Notice of Appeal and for leave to appeal out of time from the Judgment and Decree of Njoroge J delivered on 14th January 2015.)

IN

(Meru Civil Appeal No.2 of 2011)

RULING OF THE COURT

By a motion dated 24th January 2020, brought pursuant to the provisions of **Rule 7 of the Appellate Jurisdiction Act, CAP 9 of the Laws of Kenya, Rule 4 of the Court of Appeal Rules**, John Karani Mwenda (*the applicant*) seeks the following orders:

“1. Spent.

2. **THAT the time for filing the Notice and Memorandum of Appeal in respect of the judgment made in the High Court of Kenya at Meru on 14th day of January, 2015 in Civil Appeal No.2 of 2011 be extended.**

3. **THAT this Honourable Court be pleased to define a time span within which to file the Record of Appeal.”**

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **John Karani Mwenda** who deponed *inter alia* that judgment was entered against him in Meru Civil Appeal No. 2 of 2011 on 14th January 2015 and being aggrieved and dissatisfied with the same, he wished to appeal the same to the Court of Appeal. That, he did not appeal against the same due to reasons set out in the affidavit *inter alia* that he had all along had every intention of appealing the decision of the High Court in a fora that he was misadvised to use more particularly vide Constitutional Petition No. 4 of 2015, in the High Court of Kenya at Meru and that he should not be penalized for the faults of his former advocates and that intended appeal was arguable and raises serious matters of law.

The application was opposed vide a replying affidavit sworn by **Japhet Bundi Chabari (the respondent)** who deponed *inter alia* that the applicant is bound by the provisions of the law to proffer adequate and

concrete reasons for the delay in preferring an appeal and to demonstrate the existence of a strong appeal and that a delay of 5 years was grossly inordinate and laying blame on counsel for adopting a legal procedure that another advocate may consider inappropriate was not a sufficient reason to allow this court exercise discretion in favour of the applicant and that he stood to suffer immense prejudice as he was now the registered owner of the suit property pursuant to a legally sound judicial process.

It was submitted for the applicant that the discretion of a judge under Rule 4 of the Court of Appeal Rules was wide and unfettered and that discretion must be exercised judicially and upon reason rather than arbitrary and capriciously on whim and/or sentiment and that the fundamental factors that the court takes into account while considering an application for extension of time include; length of the delay, reasons for the delay, the possible prejudice if any that each party stands to suffer, the conduct of the parties, the need to balance the interests of party who has a decision in his favour, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure a timely resolution of the dispute, the public interest issues implicated in the appeal and whether prima facie the intended appeal has chances of success or is a mere frivolity. It was further submitted that the exercise of discretion depends on the circumstances of each case and that the justice of this matter dictates that the instant application be granted since the subject matter involves land which is a very emotive and sentimental issue in Kenya.

On the other hand, it was submitted for the respondent that the issue for consideration in an application of this nature are the length of the delay, the reasons for the delay and the chances of appeal succeeding (possibly) and that the application under consideration lacked merit and should be dismissed with costs.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties and the cited authorities.

The applicant's motion is brought, under **Rule 4** of this Court's Rules. The said Rule provides:

“4. Extension of time

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.”

The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

In the instant case it is not in dispute that the impugned judgment was delivered on 14th January 2015 a period of over 6 years from the date of the judgment. Certainly a period of over 6 years is no doubt inordinate. The applicant contends that the reasons for the delay is because he was misadvised by his former advocates, culminating in filing of Constitutional Petition No. 41 of 2017 which was also dismissed and that mistake of his counsel should not be visited upon him. With regard to the chances of the appeal possibly succeeding, the applicant submitted that the learned judge should have dealt with the issue of jurisdiction and find that the tribunal did not have jurisdiction to deal with ownership of land and order a transfer to another party. As regards prejudice, it was submitted that the applicant had been in occupation for 26 uninterrupted years while the respondent was not and the person to suffer prejudice most would be the applicant.

Taking into totality all the circumstances in this case, I find that even though the delay herein is inordinate, I find that the reasons given are plausible and with regard to the possibility of the appeal

succeeding, I find the issue of jurisdiction raised to be weighty of course mindful of the fact that I cannot comment further on this sitting as a single bench. Similarly, I am of the considered opinion that the applicant would stand to suffer great prejudice as opposed to the respondent.

In the end, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case** (*supra*), to extend time and therefore reluctantly allow the application.

Accordingly, I direct the applicant to file and serve a notice of appeal within 14 from the date of this ruling and to within 60 days from the date of lodging of the notice of appeal to file and serve the record of appeal and in default these orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI 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