



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KANTAL JA (IN CHAMBERS))

CIVIL APPLICATION NO. 149 OF 2020

BETWEEN

JULIUS EMITATI OMUSULA.....APPLICANT

AND

JOHN OMAMO NDUNDE (Suing as the legal And personal representative of the estate of

YOHANA OTABA NDUNDE (DECEASED).....RESPONDENT

(Being an application for extension of time to file and serve notice of appeal and record of appeal out of time

from the Ruling of the Environment and Land Court of Kenya at Kakamega (Matheka, J.)

dated 18th February, 2020 in ELC Case No. 183 of 2013)

RULING

I am asked in the Motion brought under **Articles 47, 50 and 159** of the **Constitution of Kenya, 2010** and **rule 4** of the **Court of Appeal Rules** to grant leave to the applicant to serve a notice of appeal out of time and to file a record of appeal. In grounds in support of the Motion and in a supporting affidavit of **Julius Emitati Omusula** (the applicant) it is stated that the suit at the Environment and Land Court (“ELC”) at Kakamega was heard in the absence of the applicant and Judgment was delivered on 6th March, 2018; that the applicant filed an application for review which application was presumably dismissed on 18th December, 2020; that the applicant filed a notice of appeal on 13th March, 2020; he applied for proceedings on 19th May, 2020 which were not supplied until 23rd October, 2020; that the applicant has an arguable appeal. Further, that at the ELC the applicant instructed a law firm to represent him in the case but that law firm did not attend court and the case proceeded without him; he later instructed another 2 law firms in the matter, the latest one to file an appeal.

There was no replying affidavit when I considered the application on 31st May, 2021.

I have seen and considered the applicant’s submissions and draft Memorandum of Appeal where 7 grounds of appeal are taken.

I have considered the Motion and the submissions made.

The principles that apply in an application of this nature are well known and were well summarized in the case of **Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No. 332 of 2004 (ur)** thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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 (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 the 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 v Mwangi, Civil Application No. NAI. 255 of 1997 (ur)**, **Mwangi v Kenya Airways Limited [2003] KLR 496**, **Major Joseph Mwereri Igweta v Murika Methare & Attorney General Civil Application No. NAI 8 of 2000 (ur)** and **Murai v Wainaina (No. 4) 1982 KLR 38.**”

The Motion before me is dated 30th November, 2020 and it is intended to appeal a ruling delivered on 18th February, 2020. Notice of Appeal was lodged on 12th March, 2020 which was out of the time allowed by **rule 75** of the **rules of this Court**. It is said in the affidavit that Covid-19 restrictions did not allow easy access to court and I am alive to that fact. Court premises were closed when the pandemic hit our borders and court operations were adversely affected, most operations going virtual which created various challenges for court users. I accept that explanation for delay.

I note that the suit at the ELC was heard without participation of the applicant and a Judgment was delivered. The applicant thereafter applied for review but his application was not successful and was dismissed. I have looked at draft Memorandum of Appeal and noting that the application for review was dismissed where the applicant had not participated in the proceedings I am not persuaded that the intended appeal has any chance of success. I note from the Judgment of Matheka, J. delivered on 6th March, 2018 that the applicant and the respondent are brothers, sons of the late **Yohana Otaba Ndonde** and the dispute at ELC revolved around rights to inheritance, rights which that court determined.

The Motion has no merit and I dismiss it with no order on costs, the respondent having not participated in the Motion before me.

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

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR