



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: J MOHAMMED, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 108 OF 2020

BETWEEN

LABAN MASINJILAAPPLICANT

AND

COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

(An application for extension of time to file and serve Notice of Appeal from the Judgment of the Environment and Land Court at Kakamega (Matheka, J.) delivered on 16th April, 2020 *in ELC Case No. 279 of 2014*)

RULING

Background

1. This application is brought under **Rules 4, 42, and 76** of the Court of Appeal Rules and all other enabling provisions of the law. **Laban Masinjila** (the applicant) seeks extension of time to lodge and serve a Notice of Appeal from the judgment of the Environment and Land Court at Kakamega (ELC) (**N. A. Matheka, J.**) delivered on 16th April, 2020. The **County Government of Kakamega** is the respondent herein.

2. The application is premised on the grounds that the applicant is aggrieved and dissatisfied with the judgment delivered on 16th April, 2020 and intends to appeal against the said judgment and decree; that the statutory period within which to lodge such an appeal has lapsed hence the need to file this application for leave to appeal out of time; that the delay in lodging the appeal within the statutory period is excusable and not due to indolence on the part of the applicant; that it is in the interest of justice that time be extended to enable the applicant be heard on appeal as the applicant has an arguable appeal with high chances of success and is likely to suffer substantial loss if the orders sought are not granted; that the respondent will suffer no prejudice, hardship or injustice by granting the orders sought; and that the cause of delay in filing the notice of appeal was a breakdown in communication between the ELC due to the COVID-19 pandemic and the counsel handling the matter on behalf of the applicant.

3. The applicant swore an affidavit in support of the application reiterating the grounds on the face of the application. The applicant deposed that his advocate on record was not notified of the date of the delivery of the said judgment due to COVID-19 and his advocate came to know that judgment had been delivered when he visited the Court Registry on 22nd July, 2020; and that the advocate then wrote a letter requesting for a certified copy of the judgment and proceedings for purposes of filing an appeal. The applicant averred that the cause of the delay in filing the notice of appeal was a breakdown in communication between himself and his advocate; and that he is prepared to abide by whatever reasonable conditions the Court may find fit and necessary to impose for the grant of an extension of time.

Submissions

4. In written submissions filed by his counsel on record, the applicant submitted that the delay in filing the notice of appeal within the statutory period was excusable and was not due to indolence on the part of the applicant. The applicant reiterated that the impugned judgment was delivered online in their absence and they were not notified of the date of delivery.

5. The respondent filed a replying affidavit sworn by **Vivianne Mmbaka Komwonyo, (Ms. Komwonyo)** the respondent's Senior Legal Officer, dated 20th February, 2021. **Ms. Komwonyo** averred that prior to the judgment being delivered, all parties had attended court before the learned trial Judge on 3rd March, 2020 when the judgment was reserved for 26th March, 2020 but due to the onset of the COVID-19 pandemic, the same was not delivered until 16th April, 2020. **Ms. Komwonyo** averred that the applicant offered no plausible explanation

why it took him 117 days to follow up on the judgment being cognisant of the judgment date that had been reserved by the Court; and that this failure to follow up amounted to inexcusable indolence and laches. **Ms. Komwonyo** averred that the applicant had also not offered a plausible explanation why it took him a further 56 days from the date he became aware of the judgment to file the instant application. She further contended that the respondent stands to suffer injustice as it has already moved into the subject property and is using it to generate County revenue; and that the draft Memorandum of Appeal does not raise triable issues warranting the exercise of discretion of the court to extend time to file and serve the Notice of Appeal.

6. Counsel for the respondent filed written submissions dated 26th February, 2021, in which Counsel cited ***Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR*** for the proposition that parties have a responsibility to show interest in and follow up their cases even when they are represented by counsel. Counsel also cited ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR*** for the proposition that extension of time is an unfettered discretion but only available to a deserving party and it is incumbent on the applicant to explain the reasons for delay and whether there are any extenuating circumstance that can enable the court to exercise discretion in his favour. It was also submitted that the intended appeal has no chances of success as the Memorandum of Appeal does not disclose triable issues warranting the discretion of the court.

Determination

7. I have considered the motion, the affidavits, the submissions, the authorities cited and the law. The discretion that the Court is being called upon to exercise is whether to extend the time for lodging a notice of appeal beyond the 14 days provided under **Rule 75(2)** of the Court of Appeal Rules.

8. Rule 4 of the Court of Appeal Rules provides that:

“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 Court’s discretion under **Rule 4** of this Court’s Rules is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice (See ***Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others [2013] eKLR***).

9. Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997 sets out some of the factors that the Court ought to take in to account when determining whether to exercise this discretion as follows:

“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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

10. Regarding the period of delay, this Court in ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*** stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. When considering the possible chances of the appeal succeeding, caution should be exercised by the Court not to delve into the merits of the intended appeal, as aptly stated in ***Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR***:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

12. It was counsel for the applicant’s contention that the impugned judgment was not delivered on the scheduled date (11th March, 2020) but was delivered on 16th April, 2020. Counsel for the respondents contended that the applicant was aware of the judgment date as the same was set in the presence of both parties.

13. The applicant has not sufficiently explained the delay in filing the notice of appeal. In ***Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR*** the Court held *inter alia* that:

“The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and principles...”

14. Accordingly, I find that no explanation has been given by the applicant for the 117 days delay in following up on the judgment. This Court in ***Habo Agencies Limited v. Winfred Odhiambo Musingo [2015] eKLR*** stated:

“...that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel”.

15. On the question of prejudice, the respondent contends that it will suffer prejudice as it has already entered into the suit property and is already utilizing the suit property to generate County Revenue.

16. From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in **Leo Sila Mutiso** (supra). The upshot is that I decline to grant the prayer to extend time. The application is accordingly dismissed. I make no order as to costs.

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

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR