



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPLICATION NO. 115 OF 2020**

**BETWEEN**

**HORRY AKALO NG'ONG'A.....APPLICANT**

**AND**

**TIMOTHY SHIVAJI MWANJE.....RESPONDENT**

(An application for extension of time within which to lodge the notice of appeal and record of appeal

from the judgment of the Environment and Land Court at Kakamega (N.A. Matheka, J.)

delivered on 24th June, 2020 in **Kakamega ELC No. 349 of 2014**)

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**RULING**

**Background**

1. This application is expressed to be brought under **Rule 4** of the **Court of Appeal Rules** and **Section 3A and 3B** of the Appellate Jurisdiction Act and all enabling provisions of the law. **Horry Akalo Ng'ong'a** (the applicant) seeks extension of time within which to lodge a notice of appeal and record of appeal against the judgment of the Environment and Land Court (ELC) (**N.A. Matheka, J.**) dated 24th June, 2020 and that the costs of this application do abide by the outcome of the intended appeal. **Timothy Shivaji Mwanje** is the respondent herein.

2. A brief background is that the respondent (the plaintiff in the ELC) filed a suit claiming to be the sole proprietor of **Land parcel Kakamega/Soy/1059** (the suit property) having purchased the same; and that the applicant herein (the defendant in the ELC) had without lawful excuse and without any equitable interest refused to vacate the suit property. The learned Judge found in favour of the respondent and ordered the applicant to vacate the suit property within six (6) months from the date of delivery of the judgment and in default, an eviction order to issue.

3. Dissatisfied by that judgment, the applicant filed the instant application. The application is premised on the grounds set out on the face of the application and supported by the applicant's affidavit. The applicant depones *inter alia* that the notice of appeal and the record of appeal could not be lodged on time due to the Covid-19 Pandemic which downscaled the Court's activities; that the applicant has an arguable appeal with high chances of success; and that the respondent will not suffer prejudice if the orders sought are granted.

4. The applicant deponed in his supporting affidavit that he bought the suit property from one **Ann Chemaiyo Kiptalam**; that at the time the impugned judgment was delivered, the Courts were not working at their optimal and had just initiated digital technology which had technological hitches; that the Courts was operating with a skeleton staff; that due to the Covid-19 pandemic he was unable to file the notice of appeal and the record of appeal on time; that he is desirous of pursuing the intended appeal which has overwhelming chances of success; that he is acting in person and did not have technical knowledge or know how in digital technology and was therefore not aware of the scheduled date of delivery of the judgment; that he has applied for proceedings to enable him file the intended appeal; that the respondent will not suffer prejudice if the orders sought are granted; and that he stands to suffer loss if the application is not granted.

5. The respondent filed a replying affidavit sworn by his advocate **Michael Muhuyi Kiveu** who deponed that the applicant was represented by the firm of **D.S.G. Mango and Company Advocates** in the lower courts; that the instant application was served on his office on 20th January, 2021; that the respondent is deceased as evidenced by a copy of the Certificate of Death annexed to his replying affidavit

indicating that the respondent died on 12th December, 2020; and that the family of the deceased respondent are keen to pursue this matter. Counsel prayed for time within which to pursue the process of substitution.

**Determination**

6. I have considered the application, the affidavits on record, submissions by counsel and the law. This discretion is provided for under **Rule 4** of the **Court of Appeal Rules**:

**“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.”**

7. The principles guiding this Court in the exercise of that discretion are set out in **Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997**:

**“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.”**

8. 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”.**

9. In the instant case, the applicant has not filed a notice of appeal. **Rule 75** of this Court’s Rules provides that a notice of appeal should be filed within fourteen (14) days from the date of delivery of the impugned decision. The impugned judgment was delivered on 24th June, 2020 and the instant application was filed on 23rd September, 2020. The applicant averred in his affidavit in support of the application that he was unrepresented and that he is technologically challenged and was therefore unable to file the notice of appeal and the record of appeal within time. I note that the respondent’s counsel has not opposed the instant application but seeks time to proceed with the process of substitution of the respondent who died on 12th December, 2020. I find that the delay in filing the notice of appeal and the record of appeal has been satisfactorily explained.

10. From the circumstances of the application before me, the applicant has laid a sufficient basis upon which this Court can exercise its discretion in his favour. The upshot is that the notice of motion dated 23rd September, 2020 is allowed.

11. Accordingly, I make the following orders:

- a. That the time within which to lodge and serve the notice of appeal and the record of appeal is hereby extended;
- b. That the notice of appeal be lodged within seven (7) days from the date hereof;
- c. That the Memorandum and record of appeal be lodged in accordance with **Rule 81** of this Court’s Rules and time for such lodging will commence running from the date of the lodging the notice of appeal within the period of extension specified in this Ruling; and
- d. That costs of this application do abide by the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2021**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*Signed*

**DEPUTY REGISTRAR**