



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPEAL (APPLICATION) NO. 549 OF 2019**

**BETWEEN**

**CORNELLY KIMANTHI KUTI ..... APPLICANT**

**AND**

**GACHANJA MUHORO & SONS LTD. .... RESPONDENT**

*(Being an application seeking leave to file the Record and Memorandum of Appeal out of time arising from the judgment of the High Court of Kenya at Machakos (Kemei, J.) dated 7<sup>th</sup> November, 2018 in H.C.C.A No. 52 of 2016)*

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**RULING**

1. By a tenancy agreement dated 12<sup>th</sup> March, 2012 the applicant leased out his premises situated on LR No. 11800/93/11 to the respondent for a period of 10 years at a monthly consideration of Kshs.300,000. However, a dispute ensued regarding rent. As per the applicant, the respondent fell into arrears leaving him with no option but to distress for the rent arrears of over 3,000,000 through a proclamation dated 13<sup>th</sup> April, 2013.
2. Being of a contrary view, the respondent filed a suit in the Chief Magistrate's Court on 26<sup>th</sup> April, 2013 challenging not only the proclamation but also the amount claimed thereunder. In addition, the respondent filed a motion on even date seeking stay of execution of the proclamation which was dismissed 4<sup>th</sup> October, 2013. A plethora of motions by both parties followed thereafter.
3. Apparently, the applicant had by a motion dated 28<sup>th</sup> October, 2014 urged the subordinate court to dismiss the respondent's suit and adopt its findings in the ruling dated 4<sup>th</sup> October, 2013 as the judgment of the court. The basis of that motion was that there was nothing left to litigate on in light of the findings in the ruling in question. The subordinate court acceded to the motion vide a ruling dated 3<sup>rd</sup> March, 2015.
4. Subsequently, the applicant through auctioneers went on to attach the respondent's property including motor vehicle registration number KXH O92 for purposes of meeting the said rent arrears. In turn, the respondent who objected to the attachment sought by its motion dated 3<sup>rd</sup> December, 2015 for the same to be raised and release of the vehicle to him amongst other orders.
5. Nonetheless, Hon. C.A Ocharo, Principal Magistrate by a ruling dated 17<sup>th</sup> February, 2016 dismissed the motion. Apart from reiterating that there was nothing left for litigation, the learned magistrate was also not convinced that the attachment was improper.
6. Aggrieved with the above ruling, the respondent lodged an appeal in the High Court, H.C.C.A No. 52 of 2016, which was allowed by a judgment dated 7<sup>th</sup> November, 2018. This was because Kemei, J. found that the subordinate court's judgment was irregularly entered on the basis of an interlocutory application and without the respondent's suit or the applicant's counter claim being heard. Towards that end, the learned Judge *inter alia* set aside the order attaching the respondent's property; directed the unconditional release of the said property and that the suit be set down for hearing before the subordinate court.
7. Intent on challenging the above decision, the applicant filed a notice to that effect on 19<sup>th</sup> November, 2018. According to the applicant, he tried to file the record of appeal on 23<sup>rd</sup> August, 2019 but the same was rejected in this Court's Registry since the decree of the High Court had been omitted. It was at that juncture that he learnt that the decree had not been extracted. After extracting the decree he lodged the record of appeal, albeit out of time, on 13<sup>th</sup> November, 2019.

8. As such, the applicant by the current motion before me seeks extension of time under **Rule 4** of this Court's Rules to file the record and memorandum of appeal against the impugned judgment of the High Court as well as an order deeming the lodged record as being properly before the Court.

9. As far as the applicant is concerned, the delay was not deliberate and he had given an excusable reason for the same; the appeal raises both points of law as well substantive issues which require to be addressed by this Court; and the respondent would not suffer any prejudice if the orders sought were granted.

10. I take note that despite service of the motion and the hearing notice, there was no response or submissions by the respondent.

11. Be that as it may, an application for extension of time invokes this Court's unfettered discretionary power and some of the factors that ought to inform my decision include, the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the appeal should the application be granted. See **Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR.**

12. Taking into account that the notice of appeal was filed on 19<sup>th</sup> November, 2018 and the Proviso to **Rule 82(1)** of this Court's Rules which excludes the period taken by the High Court to prepare and deliver the court proceedings, that is from 19<sup>th</sup> November, 2018 to 17<sup>th</sup> June, 2019 as evinced by the certificate of delay on record, the record ought to have been filed on or before 19<sup>th</sup> August, 2019. Therefore, the record which was lodged on 13<sup>th</sup> November, 2019 was 2 months and 22 days late.

13. Whether the above delay was inordinate is dependent on whether the reason advanced for the delay was reasonable. See **Kennedy Odhiambo Owiti (Practicing as Odhiambo Owiti & Company Advocates) vs. Jane A. Staussi, Betty O. Asunah (Practicing as Staussi & Asunah Advocates) [2021] eKLR.**

14. To begin with, even if I were to give the applicant the benefit of doubt that he had attempted to file the record on 23<sup>rd</sup> August, 2019, there was still a delay of 4 days for which no explanation was given. Moreover, on record there is a letter dated 27<sup>th</sup> August, 2019 under the hand of the applicant's advocates forwarding the draft decree to his counterpart's advocates for their approval. There is also on the face of the said letter an acknowledgement of receipt of the same on 28<sup>th</sup> August, 2019 by the respondent's advocates. I cannot help but note that the applicant did not give any explanation as to why having sent the draft decree for approval on 28<sup>th</sup> August, 2019 he only filed the record on 13<sup>th</sup> November, 2019, over two months thereafter. I am therefore not persuaded by the explanation rendering the delay inordinate.

15. Besides, being cognizant that it is not in my place to determine the merits of the appeal, I have my doubts on its arguability.

16. For those reasons, I decline to exercise my discretion in the applicant's favour.

Consequently, the motion dated 6<sup>th</sup> December, 2019 is hereby dismissed with no orders as to costs.

*Dated and delivered at Nairobi this 9<sup>th</sup> day of July, 2021.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

(signed)

**DEPUTY REGISTRAR**