



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 156 OF 2020

BETWEEN

DAKAWOU TRANSPORTERS LIMITED..... INTENDED APPELLANT/APPLICANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

RAPHAEL MUSYOKA NDETI (suing on behalf of the Estate of PETER NZUKI NDETI).....4TH RESPONDENT

(An application for extension of time to serve a Notice of Appeal out of time and filing Record of Appeal out of time in an intended appeal against the Judgment of the Environment and Land Court at Machakos (Angote, J.) dated 21st February 2020 in ELC Miscellaneous Application (JR) No. 56 of 2018)

RULING

Background

1. This Notice of Motion dated 16th June, 2020 is expressed to be brought under Sections 3A and 3B of the Appellate Jurisdiction Act, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law. Dakawou Transporters Limited (the applicant) seeks the following orders;

- a. "That time for service of the Notice of Appeal against the judgment of the Environment and Land Court of Kenya at Machakos (Hon. Mr. Angote J.) made on 21st February, 2020 be extended.
- b. That the time for service of the request for Court Proceedings dated the 28th of February 2020 be extended.
- c. That leave be granted to the Applicant to file and serve the Record of Appeal out of time.
- d. The cost of this Application abide with the results of the said Appeal."

2. The National Land Commission is the 1st respondent, the Chief Land Registrar is the 2nd respondent, the Hon. Attorney General is the 3rd respondent, while Raphael Musyoka Ndeti (suing on behalf of the Estate of Peter Nzuki Ndeti) is the 4th respondent herein.

3. A brief background to this application is that the applicant filed a Judicial Review Application in Machakos before the Environment and Land Court (ELC) (Angote, J.) seeking *inter alia* orders of Judicial Review that the ELC issue an order of certiorari for the purposes of quashing the decision of the 1st respondent and quashing the Gazette Notice Number 11710 of 9th November, 2018 in respect of the ownership of land parcel No. L.R. No. 337 of 1208 (the suit property). The learned Judge dismissed the applicant's application with costs.

4. The application is premised *inter alia* on the grounds: that being dissatisfied with the judgment delivered by the ELC on 28th February 2020, the applicant filed a Notice of Appeal on 3rd March 2020 and paid court filing fees on the same day, and the Court endorsed the Notice of Appeal on 9th March 2020; that the applicant also requested for proceedings from the ELC at Machakos; that the said documents were

sent to the applicant's Advocates' offices via courier on 11th March, 2020; that on 12th of March, the first Corona virus case was reported in the Country and the applicant was therefore unable to effect service of the two documents upon the respondents advocates within the prescribed 60 days.

5. It is the applicant's case that the intended appeal is arguable and has a good prospects of success if the application is allowed, as evidenced by the grounds contained in the draft Memorandum of Appeal; that the applicant has filed the application without inordinate delay; that the respondents will not be prejudiced if the orders sought are granted and they can be compensated by an order of costs if the intended appeal is unsuccessful; and that **Article 159 (2) of the Constitution** enjoins this Court to do substantive justice without undue regard to technicalities and Article 48 affords the applicant the right to access justice.

**6. Raphael Musyoka Ndeti**, the 14th respondent herein, filed a replying affidavit in opposition to the application. He deponed *inter alia* that the instant application should be dismissed having been brought inordinately out of time without any reasonable excuse; that the 4th respondent's counsel was served with the instant application on 22nd October, 2020 long after it had been drawn; that it was not plausible that the applicant was unable to serve the Notice of Appeal on time due to the outbreak of the Corona virus pandemic; that the applicant did not serve the 4th respondent's counsel with the letter bespeaking proceedings; that after collecting the typed proceedings, the applicant has taken 135 days to seek extension of time to file the Record of Appeal, an inordinately long delay without sufficient reason; and that the conduct of the applicant indicates that the instant application was an afterthought with a view to denying the 4th respondent the opportunity to enjoy the fruits of his judgment.

7. In response to the 4th respondent's replying affidavit, **Ahmed Abdille Noor**, the applicant's director swore a further affidavit wherein he deponed that the instant application was filed on 17th June, 2020, the same day that they were informed that the certified proceedings were ready hence there was no delay in filing the instant application; that the Notice of Appeal was served but the 4th respondent's Advocate denied receiving the documents which prompted the applicant's Advocate to resend them to the 4th respondent's counsel on 2nd July 2020; that during the initial days of the Corona virus pandemic in Kenya, the Judiciary had not issued any rules or directions regarding alternative service of documents and or operation of courts, and the applicant had no reason to believe that service by email would be sufficient; that the applicant's advocates filed the Record of Appeal on 3rd August, 2020 via the Judiciary's e-filing platform as an additional document to this application due to their unfamiliarity with the new platform; that the advocates noticed that they had not been issued with the Appeal Number and upon visiting the Court of Appeal Registry, they were advised to await the same; that they got no response, prompting the applicant's advocates to write an email to the Court on 20th August, 2020 upon which they were advised to file the Record of Appeal afresh; and that they filed the Record of Appeal afresh on 21st August 2020 thereby filing the record of appeal outside time.

### **Determination**

8. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought.

**Rule 75 of the Court of Appeal Rules** provides that a notice of appeal should be filed within fourteen (14) days of the date of the decision against which it is desired to appeal. **Rule 82 of the Court of Appeal Rules** provides that a record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal.

9. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** which provides as follows:

**“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.”**

**10. Rule 4 of the Court of Appeal Rules** does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters 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; and, fourthly, the degree of prejudice to the respondent if the application is granted.”** [Emphasis supplied].

11. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

**“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path... 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, (possible) 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 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 factor.”**

12. This was reiterated further in the case of **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No.**

190 of 2019 where it was explained that:

**“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or 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 a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”**

13. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

14. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court 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.”**

15. Pursuant to **Rule 75** of this **Court’s Rules**, the notice of appeal should have been filed within fourteen (14) days from the date of the impugned decision. In the instant application, the applicant claims to have filed the notice of appeal within time but was unable to serve the notice of appeal and the letter bespeaking proceedings due to the outbreak of the Global Corona Virus Pandemic.

16. **Rule 82** of the **Court of Appeal Rules** provides:-

**“(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-**

**i. a memorandum of appeal, in quadruplicate**

**ii. the record of appeal, in quadruplicate**

**iii. the prescribed fee, and**

**iv. security for the costs of the appeal:**

**Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellants of such copy.”**

17. Accordingly, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party files and serves an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. Thereafter, the Deputy Registrar of the relevant court issues a Certificate of Delay for verification of the period to be excluded by the Court and the parties.

18. In the instant application, the notice of appeal was lodged on 9th March, 2020. The applicants applied for typed proceedings at the ELC at Machakos vide a letter dated 28th February, 2020 and filed in Court on 3rd March, 2020. According to the Certificate of Delay issued by the Deputy Registrar of the ELC at Machakos on 18th June, 2020, the Deputy Registrar notified the applicant’s counsel on record on 17th June, 2020 that the proceedings were ready for collection and were collected on the same day. The instant application was filed on 16th June, 2020. I therefore find that the period of delay is not inordinate and is well explained.

19. The applicants contend that they have an arguable appeal on the ground *inter alia* whether the 1st respondent has jurisdiction to determine land ownership disputes between private entities under **Section 14** of the **National Land Commission Act**; whether the suit property is Public land and/or it falls within the ambit of **Section 14** of the **National Land Commission Act**; and whether the applicant was accorded a fair hearing and fair administrative action in compliance with **Article 47 and 50** of the **Constitution** and **Fair Administrative Action Act**. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. In **Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No. NAI. 356 of 1996**, this Court had the following to say as regards this Court’s discretion under **Rule 4**:

**“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”**

(Emphasis supplied).

20. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. In the case of ***Richard Nchapi Leiyagu vs IEBC & 2 Others***, Civil Appeal No. 18 of 2013, this Court expressed itself as follows:

**“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”**

21. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in ***Leo Sila Mutiso*** (supra). The upshot is that the notice of motion dated 16th June, 2020 is allowed as prayed.

22. Accordingly, I make the following orders:

- a. That the notice of appeal filed on 21st February, 2020 be deemed as properly filed;
- b. That leave is hereby granted to the applicant to serve the notice of appeal and letter bespeaking proceedings out of time within three (3) days from the date hereof;
- c. That leave is hereby granted to the applicant to file and serve the record of appeal and memorandum of appeal out of time within fourteen (14) days from the date hereof;
- d. Costs of this application to abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

signed

**DEPUTY REGISTRAR**