



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 382 OF 2019

FRANCIS WAITHAKA NGARIUKO.....APPLICANT

VERSUS

MARGARET NYAWIRA KARIUKI.....RESPONDENT

(An Application for extension of time to file and serve the Record of Appeal against the Ruling of the Environment and Land Court of Kenya at Embu (Angima, J) dated 15th November 2018 in (ELC Cause No. 41 of 2014)

RULING

Before me is a motion dated **6th December 2019**, brought pursuant to the provisions of **Rule 4 of the Court of Appeal Rules 2010**, in which **Francis Waithaka Ngariuko** (*the applicant herein*) seeks the following orders:

“1. Spent.

2. THAT this honourable court be pleased to order a stay of execution of the Rulings dated 17th day of October 2019 and 28th day of November 2019 respectively and all consequential orders arising therefrom pending inter parties hearing hereof and final disposal this application.

3. THAT this honourable court be pleased to allow the applicant to file an appeal out of time against the dismissal of his Originating Summons dated 20th July 2011 and filed on 21st day of July 2011 on 15th November 2018 for want of prosecution.

4. THAT cost of this application be provided for.”

The motion is supported by the grounds on the face of the motion and an affidavit sworn by **Francis Waithaka Ngariuko** who deponed *inter alia* that he had filed Originating Summons under civil suit No. 86 of 2011, dated **20th July 2011** which was dismissed for want of prosecution on **15th November 2018** and that he had never received service of the Judiciary notice dated **16th October 2018** which had been purportedly effected through the registered post and that there was no evidence that it was ever posted as alleged.

That, his Originating Summons was dismissed purely on technicalities and was not heard on merit which amounted to a miscarriage of justice as justice shall be administered without undue regard to technicalities. He further deponed that he had always been acting in person and was having health challenges and fell sick several times and that was the reason why he was unable to prosecute the same and that there was a ruling which was delivered **17th October 2019** in favour of the respondent in ELC Case No. 41 of 2014, granting orders in her favour to evict him from the suit property and that he had an arguable appeal that raised triable issues thus the need to allow the filing of his appeal out of time and determination of the same on merit and that any eviction would render his appeal nugatory and that there would be no prejudice on part of the respondent since the applicant was still in possession of the suit property.

The applicant in his submissions reiterated the averments in the supporting affidavit and submitted that extension of time was upon judicial discretion and implored on the court to be persuaded by the fact that the applicant had an arguable appeal with a high probability of success and that failure to prosecute the matter was not of his own making but due to the fact that he was indisposed and did not have counsel to advance his cause in court.

The respondent on the other hand did not file any submissions or a reply to the application.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants' submissions, the cited authorities and the law.

The applicant is seeking an order for stay of execution of the rulings dated **17th October 2019** and **28th November 2019** respectively and an order to file an appeal out of time against the dismissal of his Originating Summons dated **20th July 2011**.

With regard to the application for stay of execution, the provisions of the law that guide the court in applications of these nature are to be found in **Rule 5 (2) (b) of the Court of Appeal Rules 2010**. These provisions of the law have not been cited in the instant application. Be that as it may, this court sitting as single Judge cannot proceed to make a determination on the same. Consequently, I will not say more regarding this prayer for stay of execution.

With regard to the prayer for extension of time. The applicants motion is brought, under **Rule 4** of this Court's Rules. The said Rule provides:

"4. Extension of time

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 principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the court stated:

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

In the instant case the applicant's Originating Summons was dismissed on **15th November 2018** whereas the instant application was filed sometimes in **December 2019**, a period of about one year from the date when the applicant's suit was dismissed. There is no doubt a period of 1 year is inordinate. The applicant has contended that he has always been acting in person and that he had fallen sick several times and that was the reason why he was unable to prosecute the suit. I have indeed seen documents from Coptic Hospital dated **9th March 2019**, annexed to the application showing that the applicant was sick and as such not fit enough to attend court matters. In my opinion and from the circumstances of this case, it is my considered opinion that sufficient reasons have been given for the delay to the satisfaction of this court and I find the same to be reasonable in the circumstances.

As to the possibility of the appeal succeeding, I am of course mindful of the fact that I cannot make a determination/finding on this issue sitting as a single Judge of the court. Be that as it may, the applicant's case was dismissed for want of prosecution and the notice from the Judiciary which culminated to the dismissal of the suit has been disputed.

As regards prejudice, it has not been demonstrated to this court that the respondent will suffer any prejudice since the applicant has and is still in occupation of the suit property and in any event, the respondent has not even opposed the application. On the other hand, the applicant would stand to suffer great prejudice in the event that he is evicted from the suit property.

Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case (supra)**, to extend time and therefore allow the application in terms of prayer 3 as prayed.

Accordingly, the applicant is hereby granted 60 days within which to file an appeal out of time against the dismissal of the Originating Summons dated **20th July 2011**, failure to which these orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 9th day of July, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR