



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 245 OF 2019

BETWEEN

JOSEPH NGIMITHI MUIKAMBA.....APPLICANT

AND

JORAM NDUNGU.....RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal and a record of appeal from the Judgment of the Environment and Land Court at Nairobi (K. Bor, J.) dated 6th December, 2018

in

ELC No. 1687 of 2017 formerly HCCC No. 1328 of 2005.)

RULING

1. The applicant filed a notice of motion dated 24th July 2019 under **rule 4** of the **Court of Appeal Rules, 2010** seeking extension of time to file and serve a notice of appeal and a record of appeal from the judgment of the Environment and Land Court at Nairobi delivered on 6th December 2018 by **K. Bor, J.** in **ELC Case No. 1687 of 2007 (formerly HCCC No. 1328 of 2005)**.
2. The application is supported by the grounds set forth on its face together with those laid down in the supporting affidavit sworn by the applicant on 24th July 2019.
3. It is the applicant's case that the respondent filed a suit against him in HCCC No. 1328 of 2005 now ELC No. 1687 of 2007 for adverse possession on land title number **Limuru/Bibirioni/723**, which the applicant claims to be the registered owner thereof, having bought it from one Grace Nyambura in 1970, and the transfer effected in 2001.
4. The case proceeded to hearing and judgment was scheduled for 20th November 2018. However, judgment was not delivered as scheduled, and the court said that it would be delivered on notice, as deponed by the applicant on advice given to him by his then advocates on record, **Kiingati Ndirangu & Co. Advocates**.
5. On 6th December 2018 the trial court entered judgment for the respondent and granted him ownership of the suit property by virtue of adverse possession.
6. Aggrieved by the said judgment, the applicant urges this Court to grant him extension of time to file and serve a notice of appeal and a record of appeal on grounds that, they were not notified of the delivery date of the impugned judgment and only became aware of it on 27th May 2019 after visiting his former advocate's office.
7. It is the applicant's contention that he was unable to file the notice of appeal and record of appeal within the required time for lack of communication of the delivery date from his former advocate. Secondly; that the said file became available at the Environment and Land Registry on 27th June 2019. Finally, it is his argument that he will suffer loss if the said prayers are not granted.
8. The respondent neither filed a reply to the application, nor written submissions, despite having been served with a hearing notice on 15th April 2021 issuing directives to have the said documents filed within seven (7) days.

9. In the written submissions filed by the applicant dated 17th March 2021, the applicant submits that the respondent is deceased, information given to him on 3rd October 2019 by the firm of **Mbichire & Company Advocates**, the respondent's former advocate, when they sought for time to substitute the respondent.

10. Further, it is the applicant's argument that the respondent has a legal representative, having been served with a notice of change of advocates dated 21st November 2019 by the firm of **Mengesa & Company Advocates**. Therefore, the applicant submits that for failure by the respondent to file a response to the application, this Court should grant the applicant the prayers as sought.

11. I have carefully considered the motion and the written submissions by the applicant. There is no doubt that the discretion that I am called upon to exercise is one that is provided for under **rule 4** which provides: -

“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.”

12. By dint of the provisions of the above rule, as held in Leo **Sila Mutiso v Rose Wangari Mwangi**, CA No. Nai 255 of 1997, this Court has wide and unfettered discretionary powers in its consideration of applications for extension of time. However, it is trite that these powers ought to be exercised judicially, not on whim, sympathy or caprice. See **Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others [2013] eKLR**.

13. While dealing with an application for extension of time, the Court should consider the period of delay, the reason for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. The same was expressed in the case of **Karny Zaharya & Another v Shalom Levi [2018] eKLR** where it was held that:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal” see also **Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR.**

14. It is not in doubt that the impugned judgment subject to the intended appeal was delivered on 6th December 2018. The instant application seeking extension of time to file and serve a notice of appeal and a record of appeal was filed on 24th July 2019, 7 months 18 days to be precise, after delivery of the judgment.

15. **Rule 75 (2)** of the Court's Rules requires that a person desirous of filing an appeal shall within fourteen (14) days from the date of the impugned decision file a notice of appeal.

16. The applicant argues that he failed to lodge a notice of appeal timeously because he was never informed of the judgment. The applicant faults his former advocate for non-communication. Further, he contends that he only became aware of the impugned judgment on 27th May 2019 when he visited his former advocate's office.

17. I find the explanation advanced by the applicant not plausible. A litigant must be vigilant in the conduct of his affairs and should make effort to find out the progress of his case from his advocate. In this case, the applicant was not in close touch with his advocate.

18. Even if there was no communication of the delivery date and that the applicant knew of the said judgment on 27th May 2019, and the file became available at the Environment and Land registry on 27th June, 2019, the applicant did not explain why it took him twenty-seven (27) days after the file was availed at the registry to file the instant application.

19. Based on the time it took the applicant to file the instant application, I find that the delay in filing the notice of appeal was occasioned by the applicant's indolence.

20. In **Abdul Azizi Ngoma v Mungai Mathayo [1976] eKLR**, this Court stated:

“We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

21. The applicant has not attached a draft notice of appeal for the Court to assess if the same raises any arguable issues. For this reason, it is my view that this application is an afterthought and a tactic to deny the respondent the fruits of his judgment. It must be borne in mind that **“Equity does not aid the indolent”** and **“delay defeats justice.”**

22. Even though this application is uncontested, it is my view that the orders sought are not merited and cannot be granted simply because there is no reply by the respondent. Absence of a response by the respondent does not in any way negate the fact that the applicant's application has not met the threshold for grant of orders for extension of time. Consequently, the application is hereby dismissed.

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

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR