



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. E280 OF 2020**

**BETWEEN**

**KIOKO MUTHOKA.....APPLICANT**

**AND**

**KALEMBWANI & NGAAMBA**

**FARMERS COMPANY LIMITED.....RESPONDENT**

(Being an application for extension of time to lodge a notice of appeal and record of appeal against the Judgment of the High Court of Kenya at Machakos (O.A Angote, J.) delivered on 31<sup>st</sup> January, 2020 *in ELC NO. 342 OF 2012.*)

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**RULING**

1. This is an application dated 2<sup>nd</sup> September 2020 for extension of time to file a notice of appeal and record of appeal out of time. The judgment sought to be appealed from was delivered on 31<sup>st</sup> January 2020. The application was brought under **section 3A** and **3B** of the **Appellate Jurisdiction Act** and **rules 4** and **82** of this **Court's Rules**.
2. The applicant via an amended plaint dated 20<sup>th</sup> January 2015 brought a claim against the respondent for; declaration order that he is entitled to be allocated a parcel of land from the respondent's company land measuring 5 acres, an order directing the respondent to allocate him a parcel of land from its land and thereafter issue him with a title deed, costs of the suit and interests.
3. The respondent entered appearance and filed their amended statement of defence dated 9<sup>th</sup> March 2015.
4. On 31<sup>st</sup> January 2020 the learned judge, **O. A Angote**, dismissed the applicant's suit with costs.
5. Aggrieved by the said judgment the applicant has attached to his application a filed notice of appeal dated 24<sup>th</sup> February, 2020 and a draft memorandum of appeal.
6. The instant application is supported by the grounds laid out on its face and the facts deponed in the supporting affidavit sworn by the applicant on 2<sup>nd</sup> September 2020.
7. The applicant depones that he was supplied with copies of proceedings and judgment on 3<sup>rd</sup> March 2020 and immediately he obtained them, courts were closed due to covid- 19 pandemic and cessation of movement imposed. Thus, it was difficult for him to travel to see his advocate who is based in Nairobi.
8. Further the applicant states that failure to file the appeal on time was not deliberate but was due to circumstances beyond his control.
9. In conclusion, the applicant avers that he has an arguable appeal with chances of success, that the respondent is not likely to suffer any prejudice if leave to file an appeal out of time is granted, and lastly, that it is in the interest of justice that the instant application is allowed.

10. In response to the application, the respondent filed its replying affidavit sworn by its advocate, Philip Mulwa.
11. It is contended that **rule 75(2)** of this **Court Rules** requires that the notice of appeal be lodged within fourteen (14) days of the judgment and the same is to be served within seven (7) days of filing as per **rule 77(1)**. Therefore, there is no provision requiring the intended appellant to first obtain copies of proceedings in order to file the notice.
12. The respondent's advocate argues that no notice of appeal has been lodged or served upon them. In addition, covid-19 pandemic and the subsequent restriction on movement of people came vide the Kenya Gazette special issue of 6<sup>th</sup> April, 2020. This came more than two (2) weeks after the judgment was delivered and as such, citing of covid-19 pandemic as the cause of delay is not a plausible reason for extension of time.
13. Further, the respondent's advocate indicates that the scaling down of courts' activities in Kenya came into force on 16<sup>th</sup> March, 2020 after the press address by the Chief Justice (rtd) David Maraga on the 15<sup>th</sup> of March 2020. This is barely two (2) weeks after the applicant had obtained typed proceedings. Thus, the continued delay cannot be attributed to the covid-19 pandemic.
14. It is the respondent's advocate statement that courts activities resumed in June 2020. It is averred that no explanation has been tendered as to why it took the applicant additional three (3) months to file the instant application and another one (1) month to serve them.
15. In conclusion therefore, the respondent argues that the applicant's application lacks merit and ought to be dismissed with costs.
16. The application was canvassed by way of written submissions whereby the applicant filed his submission dated 18<sup>th</sup> December 2020 whereas the respondent's are dated 26<sup>th</sup> April 2021.
17. The applicant reiterated the reasons for delay as captured in both his application and supporting affidavit. He submits that the delay was neither inordinate nor deliberate but was as a result of the circumstances beyond his control.
18. The applicant urges the Court to be guided by the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** which lays down the principles for extension of time that the Court should consider in exercise of such discretion.
19. In conclusion, the applicant submits that it is in the interest of justice and in the spirit of **Article 259** of the **Constitution of Kenya, 2010** and **rule 3(4)** of the **Court's Rules**, that this Court grants him leave to lodge notice of appeal and record of appeal out of time. On that note, the notice of appeal and record of appeal filed by the appellant be deemed as properly and duly filed.
20. On the other hand, the respondent submits that Courts in exercising their discretion to extend time, have over time placed emphasis on the condition that a party seeking such leave must state a justifiable reason for delaying the court process. The respondent relied on the case of **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR** where **M.K Ibrahim** and **S.C Wanjala, S.C.J.J.**, stated:

***"It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court."***

21. It is the respondent's argument that the reason advanced by the applicant that the delay was as a result of the covid- 19 pandemic does not hold water. Further, it is their submission that there is no explanation given as to why the instant application had to be filed after the applicant had obtained the copies of typed proceedings and judgment.
22. The respondent submits that on the case of **Government of Mombasa v Kooba Kenya Limited (2019) eKLR** the judge dismissed the application for extension of time on grounds that the delays were not explained.
23. In conclusion the respondent maintains that the applicant has failed to establish the cause of delay and therefore, the application lacks merit and should be dismissed.
24. I have considered the grounds as presented in the notice of motion, the facts deponed in the affidavits supporting and opposing the motion, the rival written submissions and authorities cited.
25. Under the provision of **rule 4** of the **Court's Rules**, this Court has power to enlarge time required for the performance of any acts set out in the Rules notwithstanding that the said time has expired. It therefore follows that whether to extend time is a matter of judicial discretion.
26. This discretionary power of the Court was affirmed in the case of **Leo Sila Mutiso v Rose Wangari Mwangi, CA No. Nai 255 of 1997** (unreported) where it was held that:

***"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."***

27. **Rule 75(2)** of this **Court Rules** requires that the notice of appeal be lodged within fourteen (14) days of the judgment and the same is to be served within seven (7) days of filing as per **rule 77(1)**.

28. It is clear from the rules that leave to file a notice of appeal out of time can only be granted to a party where sufficient cause has been tendered.

29. In an application of this nature, 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 said principles have been echoed in couple of decisions of this Court. See Karny Zaharya & Another vs. Shalom Levi [2018] eKLR; Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR and also Leo Sila Mutiso v Rose Wangari Mwangi (supra).

30. In the instant application, I have established that the impugned judgment was delivered on 31<sup>st</sup> January 2020 while the instant application was filed on 16<sup>th</sup> September 2020, a period of close to eight (8) months. Considering the length of filing the instant application, I do find that there was inordinate delay.

31. On the reasons for the delay, the applicant avers that it was as a result of the covid-19 pandemic that resulted to restriction in peoples' movement and scaling down of courts' operations countrywide. This position was strongly opposed by the respondent by tendering evidence that rebutted the applicant's averments.

32. I note that scaling down of courts' activities countrywide came in force on 16<sup>th</sup> March 2020. However, the Chief Justice also issued practice directions on electronic case management on 4<sup>th</sup> April 2020 which provided for e-filing and e-service system to be adopted by courts.

33. The applicant avers that he obtained proceedings on 3<sup>rd</sup> March 2020 in order to file a notice of appeal. I agree with the respondent that there is no provision requiring the intended appellant to first obtain copies of proceedings in order to file a notice of appeal. I observe that the applicant is silent as to why he did not file the instant application between 31<sup>st</sup> January 2020 and 15<sup>th</sup> March 2020.

34. I am persuaded by the case of County Executive of Kisumu v County Government of Kisumu & 8 Others (supra) where it was held that;

*"it is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court."*

35. The respondent rightly stated that courts resumed operations in June 2020. The applicant on the other hand did not sufficiently explain the delay between June 2020 and 16<sup>th</sup> September 2020 when he filed the application.

36. Whereas the covid-19 pandemic initially affected the ability of parties to access this Court, there is no sufficient evidence in the instant case that the applicant was unable to file and serve his notice of appeal in time. Consequently, I dismiss this application with costs to the respondent.

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

**DK. MUSINGA, (P)**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**