



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 123 OF 2019

BETWEEN

MARTIN MAURICE ODHIAMBO.....APPLICANT

AND

JOEL KIPSANG A. NG'ENO.....1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENT

DAWNING AGENCIES.....3RD RESPONDENT

M/S E. M. ORINA & CO. ADVOCATES.....4TH RESPONDENT

LAND REGISTRAR.....5TH RESPONDENT

SAMWUEL BIRGEN CHERUIYOT.....6TH RESPONDENT

(An application from the Ruling of the High Court of Kenya at Kericho dated 28th June, 2019

(J. M. Onyango, J) dismissing an application for extension of time to file notice of appeal

and record of appeal out of time

in

Petition No. 1 of 2014

Consolidated with

Judicial Review No. 2 of 2014)

RULING

[1] By a notice of motion dated 8th July, 2019, lodged in the registry on 1st August, 2019, the applicant **Martin M. Odhiambo**, who is in person, has moved the Court under Rule 4 of the Court of Appeal Rules, for orders that the Court be pleased to extend time for filing notice of appeal and record of appeal out of time.

[2] It is not clear what the applicant intends to appeal against because on the face of his motion, the applicant has indicated the motion as being an application from the Ruling of the High Court dated 28th June, 2019. However, from his affidavit in support of the motion, it appears that the applicant actually intends to appeal against the ruling of the High Court delivered on 11th May, 2018, and a draft memorandum of appeal has been availed in regard to the intended appeal for that ruling.

[3] It is also evident that the applicant had through an application dated 17th December, 2018, moved the High Court for an order of stay of execution of the judgment delivered on 11th May, 2018 and also sought to have time extended to enable him file a notice of appeal out of time in regard to the judgment delivered on 11th May, 2018.

[4] A ruling dated 28th June, 2019 has been exhibited wherein the learned Judge of the High Court dismissed the application dated 17th December, 2018. A notice of appeal against the judgment of 28th June, 2019 was lodged in the High Court registry on 1st July, 2019. The applicant has also exhibited a request to the Deputy Registrar, Kericho High Court for typed copies of the proceedings, judgment/ruling and decrees in regard to the judgment of 11th May, 2018 and ruling of 28th June, 2019. The request appears to have a court stamp but the date is illegible.

[5] It is apparent that in regard to the ruling of 28th June, 2019, the applicant filed a notice of appeal on 1st July, 2019 and therefore the notice was filed in time. The application before the Court can therefore only relate to the filing of the record of appeal which ought to have been filed within 60 days from 1st July, 2019. As for the ruling of 11th May, 2018, no notice of appeal appear to have been filed, and therefore if this is the intended appeal, then the extension of time must relate to both the notice of appeal and the record of appeal.

[6] From the above, it is evident the applicant who is in person is not very familiar with the procedures, hence the lapses in his application. The ruling dated 28th June, 2019, copy of which has been availed to us, was the one which dismissed his application for stay of execution and extension of time to appeal against the judgment delivered on 11th May, 2018. As the applicant has moved to this Court, that ruling is inconsequential as this Court still has powers to extend time for him to file an appeal against the judgment of 11th May, 2018. As already observed, no notice of appeal was filed in regard to that judgment.

[7] Under Rule 4 of the Court Rules, this Court has discretion to extend time for the filing of the notice of appeal. However, that discretion must be exercised judicially. In doing so, I take note of the Supreme Court decision in **Nicholas Kiptoo vs Arap Korir Salat vs I.E.B.C. & 7 Others (2014) eKLR** where the following were identified as relevant factors to be taken into account in exercising such discretion.

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- 6. Whether the application has been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

[8] In the grounds stated on the body of the motion, the applicant has stated that the time to file and serve the notice of appeal lapsed while he was filing the application for review. In the affidavit sworn in support of the motion, the applicant has explained further that he made an application for review of the ruling/judgment dated 11th May, 2018, and that he later discovered that the matter was for an appeal not review, and therefore withdrew the application for review and the court granted his application on 20th November 2018 and gave him 7 days, and the time to file the appeal lapsed while he was pursuing the application for review.

[9] While I do appreciate the fact that the appellant is in person, that does not excuse his apparent laxity in pursuing his appeal against the judgment. It is more than 3 years since the judgment of 11th May, 2018 was delivered. This is an inordinately long period for the applicant to take in pursuing the appeal. The applicant wasted time pursuing review, and even after he withdrew the application for review, he has not acted with speed to pursue his right of appeal. The Court has to take the interest of parties into account. It is unfair and unjust to keep a successful litigant from reaping the fruits of his judgment due to unnecessary delay caused by the unsuccessful litigant.

[10] For these reasons, I find that the applicant is not deserving of the exercise of this Court’s discretion in his favour. I dismiss the application dated 8th July, 2019. I make no orders as to costs.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR