



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI E135 OF 2021

BETWEEN

MUTHITHI INVESTMENTS COMPANY LIMITED.....APPLICANT

AND

COMMISSIONER OF PRISONS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

COUNTY GOVERNMENT OF MURANGA.....3RD RESPONDENT

(An Application for extension of time to file and serve the applicant's record of appeal out of time being an appeal from the judgment of the Environment and Land Court at Muranga (J. G. Kemei, J.) dated 27th *January, 2020 in **Petition No. 1B of 2017***)

RULING

1. Muthithi Investments Company Limited (the applicant) has moved this Court vide a notice of motion dated 30th May, 2021 under **Rules 4** and **42** of the Court of Appeal Rules (the Rules) seeking in the main, orders of extension of time to file and serve the record of appeal out of time.

2. The application is predicated on grounds that the notice of appeal against the judgment delivered on 27th January, 2020 was lodged on time; the notice of appeal was served on time and the letter bespeaking proceedings was also filed in compliance with the Rules. All these events happened before the onset of Covid 19 which was around March 2020. According to the learned counsel for the appellant after Covid 19 struck, there was a scaling down of operations at the court registries and members of the public were not allowed to access the court registries and communication was mostly through email and telephone calls.

3. According to counsel, they stayed put waiting for communication from the court to be informed when the certified copies of the proceedings would be ready for collection. Such communication was not forthcoming until 27th November, 2020 when counsel for the applicant called the registry to find out if the proceedings were ready, only to be told that the said proceedings had been ready since 30th June, 2020 as evidenced by a letter found in the court file. Under the Court of Appeal Rules, the appellant had 60 days within which to file the record of appeal after receiving the certified copy of the proceedings accompanied by a certificate of delay from the Deputy Registrar of the court. The application was therefore, clearly out of time to file the record of appeal, hence the application now before me for extension of time.

4. These grounds are repeated in the depositions made by Chumba Ntuli Sichale, learned counsel for the applicant in the affidavit in support of the motion sworn on 3rd May, 2021. According to counsel, the delay was unintentional, not inordinate and the circumstances surrounding the delay have been sufficiently explained. He urges the Court to exercise its unfettered discretion to allow the application in the interest of justice.

5. The application is opposed by the 1st and 2nd respondents, through the grounds of opposition filed by Mr. Motari Matunda, Principal State Counsel from the Attorney General's office. The state counsel says that the delay has not been explained; that this application was filed late and that the applicant's memorandum of appeal does not disclose any likelihood of success. He states that the application is frivolous and that the orders sought will be prejudicial to the respondents.

6. Both parties filed submissions buttressing their rival submissions. I have considered the application along with the rival affidavits and

submissions. The principles that guide the exercise of discretion under the Rule 4 of the Rules of this Court are now well settled by numerous enunciations in case law both binding and persuasive. See for instance **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, **Fakir Mohamed vs. Joseph Mugambi & 2 Others [2005] eKLR**; **Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020] eKLR**;

7. The principles encapsulated in the above cases include the following:-

- “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 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 respondent of the extension is granted.
6. Whether the application has been brought without undue delay;

8. It is common ground that the notice of appeal was filed and served on time. The letter bespeaking proceedings was also sent to the deputy registrar and served on the respondents’ counsel on time. The confusion appears to have set in following the onset of the Covid 19 phenomenon which threw everyone into a spin. In an unprecedented action, operations at the court registries were scaled down and some court registries were actually closed. Most of the court staff started working from home and there was confusion as to how the registries could be accessed. It is from that background that this application must be considered.

9. Whereas the delay of 5 months as is the case here would raise concern under normal circumstances, each case must be considered within its own peculiar circumstances. In this case, the Covid 19 phenomenon as stated earlier was unexpected and for some time there was confusion as to how the courts and the registries were to operate. With those circumstances in mind, I am persuaded that the delay has been sufficiently explained.

10. Looking at the substratum of the judgment and the grounds of appeal raised, I have no doubt in my mind that it is in the interest of all the parties herein that the issues raised in the intended appeal be addressed and determined by this Court.

11. Finally, I also don’t discern what prejudice the respondents will suffer if this application is allowed to pave way for the intended appeal to be heard and determined on merit.

12. Accordingly, this application is allowed with costs in the appeal. The appellant is ordered to file and serve the record of appeal within 14 days from the date hereof failing which the notice of appeal will stand struck out.

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

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR