



REPUBLIC OF KENYA



KENYA LAW
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**Embu Gaturi Housing Co-op Society v Njenga & 2 others (Civil Appeal
(Application) 119 of 2018) [2021] KECA 2 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 2 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 119 OF 2018
AK MURGOR, JA
SEPTEMBER 23, 2021**

BETWEEN

EMBU GATURI HOUSING CO-OP SOCIETY APPLICANT

AND

WAMAE NJENGA 1ST RESPONDENT

SIMON NJOGU MUTURI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An application to file the Appeal out of time from the Judgment of the High Court of Kenya at Embu (F. Muchemi) dated the 22nd February, 2017 in High Court Civil Appeal No. 22 of 2014)

RULING

1. By a Notice of Motion dated 18th September, 2018, the applicant, Embu Gaturi Housing Cooperative Society, seeks to have an appeal from the judgment of the High Court at Embu delivered on 22nd February, 2017 deemed as filed and served within time.
2. In the motion which is premised on the grounds on its face and the supporting affidavit of Sylvester Njeru Muruatetu, the applicant's chairperson, sworn on the same day, and in written submissions, it was contended that the judgment was delivered on 22nd February, 2017; that being dissatisfied with the decision, the applicant filed an appeal together with an application for stay of execution; that after the judgment was delivered, and the applicant's board communicated its decision to appeal against the judgment to its advocates on 8th March, 2017, a Notice of appeal was filed on 9th March, 2017 which resulted in a one day delay beyond the period prescribed by the rules of this Court; that the delay was not unreasonable, and the applicant has already filed the Record of appeal.



3. It was further contended that the appeal is arguable for the reasons that the learned judge erred in finding that the cross appeal instituted by the applicant was not merited and as a result, struck it out on for the reason that admission of the cross appeal would amount to an abuse of the court process.
4. Further, that the respondents were wrongfully arrested and charged by the police and therefore, their prosecution was unlawful. And finally, that the learned judge wrongly assessed the evidence and applicable law and in so doing, came to the wrong conclusion that a letter to the DCIO and General Assembly was defamatory and injurious to the respondents' reputations. It was finally contended that no prejudice would be suffered by the respondents were time to be extended that would not adequately be compensated by an award of costs.
5. In a replying affidavit sworn by Wamae Njenga, the 1st respondent, it was asserted that the applicant's motion was aimed at preempting a notice of motion dated 31st May, 2018 filed by the respondents; that the judgment of the High Court was delivered on 22nd February, 2017, and the Notice of appeal ought to have been filed not later than 8th March, 2017; that instead it was filed on 9th March, 2017; that it was therefore filed out of time, thus rendering the appeal incompetent and bad in law.
6. It was further averred that the respondents were served with a Record of appeal on 2nd May, 2018; that this notwithstanding, their advocate was not at any time served with a letter bespeaking a request for the typed proceedings; that the respondents' advocate had applied for and obtained the certified typed proceedings on 17th October, 2017 for the purposes of lodging their Notice of Motion dated 13th March, 2018 seeking to review and set aside the interim order of stay of execution issued by the High Court on 9th March, 2017 in favour of the applicant; that in response to the respondents' application, the applicant filed a replying affidavit on 10th April, 2018, to which it annexed a letter dated 23rd March, 2018 addressed to the Deputy Registrar, complaining that the Deputy Registrar had not communicated the progress of the typed proceedings; that this letter was not copied to his advocates and furthermore, nothing demonstrated that the applicant had at any time requested for the proceedings.
7. The deponent further averred, that a certificate of delay dated 28th March, 2018 also annexed to the applicant's reply was erroneous as it indicated that time for preparation and delivery of the typed proceedings was 384 days between 9th March, 2017 and 27th March, 2018; that even after the applicant was issued with a certificate of delay, it has failed to explain the further delay of 35 days between the date it obtained the typed proceedings and the date the record was filed.
8. The respondents concluded by asserting that, the appeal is incompetent since, the Notice of appeal dated 8th March, 2017 was filed out of time; the Record and Memorandum of appeal were not filed within the prescribed period of 60 days; the applicant has not filed a request for certified typed proceedings and neither was such request served on the respondents' advocate within 30 days of the judgment.
9. Having considered the application and submissions, under Rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*
10. It is not in dispute that the judgment was delivered on 22nd February 2017. It is also not in dispute that the Notice of appeal ought to have been filed not later than 8th March, 2017, but was instead filed



a day later on 9th March, 2017, meaning it was filed out of time by one day. In so far as the Notice of appeal is concerned, I am satisfied that the one day delay has been duly explained.

11. Next, for consideration is whether there was a delay in filing the record of appeal and whether such delay was explained. The applicant was required to file the record of appeal within the prescribed period of 60 days. Beyond this, that is, if there was a delay beyond the 60 days, rule 82 of this Court's rules allows the applicant to exclude the time for preparation of the typed proceedings from the period of delay.
12. Rule 82 specifies that once an appellant has requested for proceedings and served the relevant notification on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant, which period is then excluded when computing delay. Sub rule (2) is explicit that;

"An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his (or her) application for such copy was in writing and a copy of it was served upon the respondent."
13. In other words, to bring itself within the ambit of the rule, the applicant must demonstrate that after the request for proceedings was made, a copy of such request was served on the respondents' advocate. If it cannot show that such copy was duly served, it must then adequately explain to the satisfaction of the court why it delayed in filing the record of appeal.
14. To begin with, the record of appeal was filed 383 days from the date the Notice of appeal was filed which was well beyond the 60 days prescribed. As to whether that delay has been explained, my analysis of the motion is that it was not. The applicant has only presented the Court with a *fait accompli* by stating that the record has already been filed. But it has not set out any reasons why the filing of the record was delayed by close to one year. Though it is observed that it annexed a certificate of delay dated 28th March 2018 in reply to the respondents' motion in the High Court dated 13th March, 2018, this certificate was not annexed to the motion before this Court, and the applicant has not sought to rely on it to exclude the time for preparation of the proceedings, to explain the delay in this motion.
15. Essentially, the applicant has not provided any explanation at all for the delay of nearly one year in filing the record of appeal. In the circumstances there is nothing upon which I can rely to reach the conclusion that the delay has been in any way explained.
16. As to whether the appeal has any likelihood of success, since the applicant did not attach a copy of the judgment of the High Court, I have no basis on which to ascertain the success or not of the appeal.
17. Turning to the question of prejudice to the respondents were time to be extended and the record deemed as filed, my view is that extending time will only further subject them to delay in enjoyment of the fruits of their judgment.
18. In sum, the notice of motion dated 18th September 2018 is unmerited and it is dismissed. I decline to extend time to file the record of appeal or to deem the record as duly filed. Costs to the respondents.
19. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a



true copy of the original

DEPUTY REGISTRAR

