



**Mbitha v Bromine Investments Limited (Civil Application
E005 of 2020) [2021] KECA 275 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 275 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E005 OF 2020
P NYAMWEYA, JA
DECEMBER 3, 2021**

BETWEEN

KALUME KARISA MBITHA APPLICANT

AND

BROMINE INVESTMENTS LIMITED RESPONDENT

(An application for leave to file a Record of Appeal out of time for an intended appeal against the judgement of the Environment and Land Court at Malindi (Olola J.) dated 6th May 2020 in Malindi ELC Case No. 119 of 2016)

RULING

1. The application by way of the Notice of Motion dated 3rd September 2020 is brought by the Applicant herein pursuant to Rule 4 of the Court of Appeal Rules, and is seeking extension of the time and leave to file the Record of Appeal against the judgement delivered on 6th May 2020 in Malindi Environment & Land Court Case No. 119 of 2016. Further, that the costs of the application be provided for. The application is supported by an affidavit sworn by the Applicant on 3rd September 2020, wherein he stated that being aggrieved by the judgment delivered by the trial Court on 6th May 2020 in, he filed a Notice of Appeal on 7th May 2020, and applied for certified copies of the proceedings.
2. However, that the certified copies of the proceedings were only availed to him on 9th July 2020 with a Certificate of Delay issued on 20th July 2020. The Applicant averred that his case was arguable, and that the delay is not inordinate and excusable, and was caused by factors beyond his control. In addition, that it would be in the interest of justice to allow the application.
3. The Respondents did not file a response to the application.
4. The application was heard by way of written submissions in the absence of the parties. J. K Mwarandu & Company Advocates for the Applicant filed written submissions dated 10th September 2020, while



the Respondent's advocates, Mogaka, Omwenga & Mabeya Advocates, filed submissions dated 20th September 2021. The power to extend time is provided in Rule 4 of the *Court of Appeal Rules*, and under Rule 53(1) of the Rules, this power may be exercised by a single Judge of this Court. While the Court has wide unfettered discretion in this regard, it should act judiciously and according to the principles set out in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, [1999] 2 EA 231*. This Court set out the guidelines for the exercise of the court discretion under Rule 4 as being first, the length of delay; second, the reason for delay; third (possibly), the chances of the appeal succeeding if the application is granted; and, fourth, the degree of prejudice to the respondent if the application is granted.

5. In the present application, the Applicant's counsel while citing the decisions in *Vishva Stone Supplies Company Limited vs RSR Stone (2006) Limited, Civil Application No 55 of 2020* and *David Mwecher Changwony vs James Kikech, Civil Application No. 122 of 2020*, submitted that that the application for extension was filed on 7th September 2020, and that the due diligence was exercised but the obtaining certified copies of the proceedings and judgment so as to prepare the record was beyond his control. Therefore, that the delay if any was not so inordinate as to be inexcusable since the same has been explained. On the issue of prejudice, the counsel submitted that the Respondent had not demonstrated the prejudice that it was bound to suffer, and observed that though the Respondent was entitled to the fruits of the judgment, the said right needed to be balance with the Applicant's right to appeal against the judgment.
6. The Respondent's counsel submitted that the certificate of delay excluded the period between 11th May 2020 and 9th July 2020 as the period necessary for the typing of the proceedings and judgment, which was supplied to the Applicant on 14th July 2020, therefore by dint of the proviso to Rule 82 (1) of the Court of Appeal Rules, the Appeal was to be filed within sixty days that is 14th July 2020 to 14th September 2020. However, that the Applicant did not give a reason for filing the present Notice of Motion instead of filing the Record of Appeal, yet the days had not lapsed, and the present application is therefore incompetent and does not fall within the contemplation of Rule 4 of the Court of Appeal Rules.
7. I have considered the rival arguments by the parties herein, and the background to the application, which arises from a suit by the Applicant in the trial Court, in which he claimed to be the registered proprietor of the suit property therein, and sought certain declarations thereto. The Applicant's suit was dismissed in the judgment intended to be appeal from dated 6th May 2020, which also allowed the Defendant's Counterclaim that the Applicant had unlawfully caused amendments to the maps and land record of the suit property. Under Rule 82 of the Court of Appeal Rules, the Record of Appeal ought to have been filed within 60 days from 7th May 2020 when the Applicant lodged his Notice of Appeal, which was within time.
8. The proviso to rule 82 states that "... where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy". The import of the proviso is that the time spent in obtaining the proceedings are excluded from the 60-day timeline for lodging of the appeal. The Applicant in this respect annexed a copy of its Notice of Appeal lodged on 9th May 2020, its letter requesting for proceedings received on 11th May 2020, and of the certificate for delay dated 20th July 2020.
9. I have perused the certificate of delay dated 20th July 2020, and while it is indicative that proceedings were supplied to the Applicant on 14th July 2020, the registrar certifies the period that was required for



preparation of the proceedings as being from 11th May 2020 to 9th July 2020. There is in this regard no bar to the filing of an application for extension of time before the expiry of the timeline for lodging an appeal, and Rule 4 of the Court of Appeal rules expressly empowers this Court to grant extension of time before or after the expiry of the period required to do certain acts. The Applicant's application is therefore competently before this Court.

10. On the aspect of delay, the material period is the time between the receipt of the proceedings on 14th July 2020 and the filing of the instant application which was on 7th September 2020. As pointed out by the Respondent's counsel, the Applicant was still within time, and was therefore acting out of the abundance of caution, having averred that he needed time to prepare the record after receipt of the proceedings. There is therefore no inordinate delay and the Applicant has adequately explained his position.
11. A perusal of the draft memorandum of appeal also indicates that the Applicant has raised issues as regards the legality of re-parcelling and amendment of the maps for the suit property, and the application of the doctrine of res judicata in this regard, which will require consideration. Any prejudice the Respondent will suffer in this regard can adequately be addressed by way of costs.
12. I therefore find that arising from the above stated factors, the Applicant merits the exercise of this Court's discretion in its favour. I accordingly allow the Applicant's application by way of the Notice of Motion dated 3rd September 2020 to the extent of the following orders:
 1. The Applicant herein is granted leave to file and serve his appeal within 60 days from the date of this ruling.
 2. The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

P. NYAMWEYA

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JUDGE OF APPEAL

