



REPUBLIC OF KENYA



KENYA LAW
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**Watako v Mumassaba (Civil Application 111 of 2019)
[2021] KECA 291 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 291 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 111 OF 2019
J MOHAMMED, JA
DECEMBER 3, 2021**

BETWEEN

WILSON WESONGA WATAKO APPLICANT

AND

MATHIAS M. MUMASSABA RESPONDENT

(An application for extension of time to file and serve Notice of Appeal and Memorandum of Appeal against the judgment of the Environment and Land Court at Kakamega (N.A. Matheka, J.) dated 7th May, 2019 in Kakamega HC ELC No. 290 of 2013)

RULING

Background

1. This application is brought under Rules 4 and 75 of the *Court of Appeal Rules*. Wilson Wesonga Watako (the applicant) seeks orders in the main:
 - a) That this Court be pleased to grant leave to file and serve a Notice of Appeal and Memorandum of Appeal respectively challenging the judgment delivered on 7th May, 2019 in Kakamega HC ELC No. 290 of 2013 by N.A. Matheka, J. out of time.
 - b) That costs of this application be provided for Mathias M. Mumassaba is the respondent herein
- 2) The application is supported by the affidavit sworn by the applicant. The applicant averred that he is dissatisfied with the impugned judgment and through his erstwhile lawyers vide a letter dated 29th May, 2019 applied and paid for certified proceedings and judgment; that he appointed new advocates, M/s Osango & Company Advocates on 14th August, 2019 to take up the matter and follow up on the appeal process; that the said advocates advised that he has an arguable appeal with overwhelming chances of success; that the intended appeal pertains to land parcel number N. WANGA/KHALABA/819 (the suit property) which the applicant had occupied and utilized for a



period exceeding 12 years; that the respondent has never set foot on the suit property; that the instant application will be rendered nugatory if the orders sought are not granted; that the applicant will abide by the conditions set by this Court; that it is in the interest of justice that the orders sought be granted; and that the respondent will not suffer prejudice if the orders sought are granted.

- 3) The respondent opposed the application and filed a replying affidavit and contended: that the impugned judgment was delivered on 7th May, 2019 in the presence of the applicant and his counsel; that upon delivery of the impugned judgment, there was available a typed copy of the judgment; that the applicant does not require proceedings or judgment to file a notice of appeal; that no explanation has been advanced for the delay in filing the notice of appeal; that the applicant is guilty of inordinate delay, which is not accounted for; that the instant application was filed on 16th September, 2019, a period of over four (4) months and the applicant has not accounted for this delay; that the applicant commenced the appeal process when he was served with the respondent's party and party bill of costs; that the instant application is an afterthought calculated to prejudice the respondent and delay the recovery of costs; that the subject of the applicant's case was a claim of adverse possession, yet he admitted not to be in possession of the suit property and stated that the respondent obtained the title to the suit property fraudulently; that the intended appeal is not arguable; that the averments in the supporting affidavit are false and calculated to mislead the Court; and that the application lacks merit. The respondent urged the Court to dismiss the application with costs.

Submissions

- 4) The application was heard by way of written submissions. Messers Osango & Company Advocates, learned counsel for the applicant reiterated the contentions made by the applicant in his supporting affidavit. Counsel urged the Court to allow the application with costs.
- 5) The respondent filed written submissions through his advocates, Messrs Gabriel Fwaya Advocates and reiterated the averments made in the respondent's replying affidavit. Counsel submitted that the instant application was filed on 16th September, 2019 which was over 4 months after the delivery of the impugned judgment; that the applicant is guilty of unreasonable and inordinate delay; that the impugned judgment was delivered on the scheduled date in the presence of the applicant; that a typed copy of the judgment was available on the date of the delivery; that the applicant has not attached a certificate of delay; and that no reasonable reason has been advanced to account for the delay.
- 6) Counsel for the respondent further submitted that the respondent is the registered owner of the suit property; that the applicant's claim is one of adverse possession yet at the hearing in the ELC he admitted that he was not in possession of the suit property; that the intended appeal has no chances of success; that the applicant will not be prejudiced if the orders sought are not granted; that the dispute between the parties in the ELC was purely between private individuals over private property; that there was no public interest demonstrated in the instant application; and that the application lacks merit and should be dismissed with costs.

Determination

- 7) I have considered the application, the submissions by counsel, the authorities cited and the law.
- 8) The discretion that the court is being called upon to exercise is to extend the time for lodging a notice of appeal beyond the fourteen (14) days provided under Rule 75(2) of the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a



reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9) While this Court’s discretion is unfettered, it has to be exercised judicially, not on whim, sympathy or caprice (See *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR).

(10) *Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997* sets out some of the factors the court ought to take in to account when determining whether to exercise this discretion as follows:

“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.”

11) In *Abdul Aziz Ngoma v Mungai Mathayo & another* [1976] eKLR, KLR 61, the Court of Appeal also held:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after “sufficient reason” for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

12) In the instant application, the impugned judgment was delivered on 7th May, 2019. The notice of appeal should have been filed by 21st May, 2019 but is yet to be filed. The instant application was filed on 16th September, 2019. The applicant cites the reason for the delay as arising from a change of legal representation and the fact that his advocates were awaiting receipt of the typed proceedings. In the circumstances, I find that no reasonable explanation has been given to explain the delay in filing the notice of appeal.

13) I am guided by the sentiments of this Court in *Bi-Mach Engineers Limited V James Kaboro Mwangi* [2011] eKLR where this Court held *inter alia* that:

“The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and principles...”

14) On prejudice, the applicant contends that he will suffer irreparable loss, damage and undue prejudice if the orders sought are not granted. On the other hand, the respondent contends that he is the registered owner of the suit property and at the hearing in the ELC the applicant admitted that he is not in possession of the suit property and will therefore not suffer prejudice if the orders sought are not granted. As regards the success of the intended appeal, the applicant contends that the appeal is arguable while the respondent contends that the intended appeal is not arguable. I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan CA No. 227 of 2015* where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court



has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

- 15) From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in Leo Sila Mutiso (supra). In the circumstances, I find no merit in the Notice of Motion dated 13th September, 2019 and dismiss it with costs to the respondent.

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

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

