



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 6 OF 2020

BETWEEN

EDWIN K. TOO.....APPLICANT

AND

PAUL K. SITIENEL.....RESPONDENT

(An application for leave to extend time to lodge the notice of appeal pending the lodging

and hearing of the intended appeal against the ruling of the High Court of Kenya

at Eldoret (S.M. Kibunja, J.) dated 13th November, 2019

in

ELC Case No. 6 OF 2014)

RULING

The applicant **Edwin K. Too** seeks an order that he be granted leave to file a notice of appeal out of time “*against the ruling of the High Court at Eldoret S.M. Kibunja, J. on 13th November, 2019 in E & LC appeal No. 6 of 2014.*” It is obvious to me that the said ruling was by the Environment and Land Court, not the High Court, and it is a sign of careless drafting for the two courts to be confused and conflated.

Nor is that the only token of carelessness on the part of counsel who drafted the application. As I have indicated, it seeks extension of time, and should therefore have been brought under **Rule 4** of the **Court of Appeal Rules**, to be handled by a single judge, yet that rule is not cited. Instead, it is **Rule 5(2)(b)**, which deals with application for stay of execution or injunction pending appeal by the full Court, that is invoked.

Were I to insist on a strict application of the rules, and I would be entitled to do so, if only to help stem the creeping tide of sloth and inattention in some sections of the practicing bar, I would strike out the application as incompetent, on account of those two careless mistakes. Since, however, I am bound to do substantive justice untrammelled by technicalities of procedure, and being mindful that the current Covid-19 Pandemic might have led counsel to stay at home too long and thereby lose, I hope only temporarily, the cutting edge required of litigation, I will let it pass. I will therefore address the intent of the application though its form be erroneous.

From the lengthy grounds on the face of the motion, which are replicated in the applicant’s affidavit in support thereof, it is apparent that the applicant is in peril of being evicted from some two acres of land known as **Nandi/Aruos/1062** that he bought from the respondent, who is his uncle, back in 2008. He built permanent houses and planted tea and blue gum trees thereon. He contends that he cannot move the Court for protection by way of stay of execution, unless time is extended for him to first file a notice of appeal. He explains that his previous advocates did not inform him of the fate of his appeal before the court below, and he only came to learn that a consent judgment had been entered on 15th March, 2017 withdrawing his appeal, yet he

never gave instructions for its withdrawal.

He changed advocates and made an application to set aside the consent judgment, but the same was dismissed on 13th November, 2019, but his new advocates did not inform him of that, either. He came to know of that turn of events on 3rd February, 2020, on receiving notice from the registrar that there was going to be subdivision of the suit land, which would have led to his eviction. This led him to instruct his current advocates, who then made the instant application.

I have given this application anxious consideration. The applicant's explanation for the delay in filing the notice of appeal is that he was not aware of the delivery of the ruling sought to be appealed against. He blames his then advocates, **Ms. Odhiambo B.F.O. & Co. advocates** for not informing him. I am skeptical about litigants' claims that their advocates did not keep them informed, because advocates can sometimes be convenient scapegoats for all manner of ills and omissions. I am also keenly aware, however, that parties can be let by their legal advisers.

As there was no replying affidavit filed, and there was no opposition to the motion before me, I must place aside my skepticism and accept, in the absence of controvert or contrary assertion, that the applicant was indeed let down by his advocate and was not aware of the ruling until much later. He seems to have moved with some alacrity on finding out the truth, and I am in the circumstances inclined to exercise my discretion in his favour. I accept that unless I grant the motion, the applicant is likely to suffer much prejudice as his eviction from his residential home of over a dozen years appears imminent.

I think the justice of the case requires that I allow him to access the seat of justice and urge his appeal. I need not comment on the likelihood of success of the said intended appeal, as that is really matter for the bench to hear it.

I accordingly allow the application. The applicant shall file and serve the notice of appeal within **Ten (10) days** of the date hereof. He shall also lodge the record of appeal within **Forty five (45) days** thereafter.

The costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 24th day of April, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR