



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 136 OF 2019

BETWEEN

NAHESH KUMAR AGGARWAL.....APPLICANT

AND

SILAS KIPTUI KIPCHILLA alias SILAS K. YEGO.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(An application for extension of time to file and serve notice of appeal and record of appeal from the decision of the Environment and Land Court at Eldoret, (A. Ombwayo, J.) dated 10th September, 2019)

in

ELC PETITION NO. 2 OF 2014)

RULING

The application before me stems from the Judgment and decree of the Environment and Land Court, **(ELC)** at Eldoret **(A. Ombwayo, J.)**. The application is by way of motion on notice dated 28th October, 2019. It was filed pursuant to Rules 4, 41, 42 & 43(1) of the Court of Appeal Rules. The applicant seeks extension of time within which to lodge and serve a Notice and record of Appeal on the respondents.

The grounds in support of the application are that; the applicant was the petitioner in the ELC whereas the defendants were the respondents. Judgment was delivered on 10th September, 2019. The applicant alleges to have only learnt of the Judgment on 18th October, 2019 after he had instructed his current advocates to come on record. His previous advocates on record were however present when judgment was delivered but failed to inform him of the outcome. That he was dissatisfied with the said judgment and now intends to appeal. However, he is out of time as the 14 days provided within which an appeal should be lodged have long lapsed. That it would be in the interest of justice that he be granted the leave sought. That the extension of time will not cause any prejudice to the respondents. That the delay in any event had not been inordinate.

The application was countered by a Replying Affidavit sworn by the 1st respondent. He deposed that the applicant had failed to demonstrate that he had an arguable appeal with a likelihood of success. That the decision sought to be impugned was delivered in the presence of the applicant's then advocates on record after notice had been issued to the parties. That the applicant cannot now blame his former advocates for failing to inform him of the outcome of the decision as it was his duty to follow up on his case. That it is not enough for the applicant to simply blame his advocates for all manner of transgressions in the conduct of litigation as a litigant has a responsibility to show interest in and follow up on his case even when represented counsel. That the applicant had not exhibited a single letter raising complaint against his previous advocates over the alleged failure to keep him posted of the progress of the case as the same was a serious allegation bordering on professional misconduct leaving a clear doubt as to the genuineness of the allegation. That the delay of 48 days had not been

explained, and to extend time will be an act in futility given that the applicant's letter requesting for proceedings had not been copied to and or served on the respondents as required by Rule 82(2) of the Court of Appeal Rules. That the court will not in those circumstances issue a certificate of delay. That he stands to be prejudiced should the application be allowed since litigation between the parties had been ongoing for over 11 years despite there being a consent judgment in Eldoret HCCA No. 80 of 2012 settling the dispute. That to grant the extension would not only amount to an abuse of the judicial process but also militate against the overriding objective of the court under Section 3B (1) (b) of the Appellate Jurisdiction Act which ordains the efficient use of Judicial time, available and administrative resources. That he would be prejudiced if the application was to be allowed as he had already filed his bill of costs for taxation. He therefore urged that the application be dismissed. There was no response from the 2nd and 3rd respondents.

When the application came up for hearing, **Mr. Kariuki**, learned counsel appeared for the applicant while **Mr. Kiboi**, learned counsel held brief for **Mr. Wambua**, learned counsel for the 1st respondent. There was no appearance by the 2nd and 3rd respondents though served. Counsel relied on their respective affidavits and opted not to submit.

I have considered the application, the supporting and replying affidavit and the law. The issue for my determination is whether the applicant is deserving of the relief sought. To do so, I am called upon to exercise my unfettered discretion under Rule 4 of this Court's rules. Rule 4 of the Court of Appeal Rules provides inter alia:

“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 doing 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.”

Given the foregoing, an applicant may apply for extension of time either before or after taking the action in respect of which extension of time is sought. In this case the applicant seeks extension of time in order to lodge a notice, memorandum and record of appeal out of time.

The discretion of a single Judge under Rule 4 is wide and unfettered but it has to be exercised judiciously upon reason and not subjectively, impulsively, on whim or emotion. For the court to exercise this discretion, the applicant must establish the foundation upon which the discretion should be exercised. This Court in the case of **Leo Sila Mutiso v Rose Wangari Mwangi**, Civil Application No. Nai.255 of 1997 (**unreported**) took the view that:

“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 delay; secondly, the reason for 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.”

Similarly, in **Mwangi v Kenya Airways Ltd**, [2003] KLR 48, this Court in setting out perimeters which a single Judge should take into account when exercising the discretion under Rule 4, held that:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

The principles for extension of time were further enunciated by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others** [2014] eKLR (page 31) as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion: 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; a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis; where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court; whether there will be any prejudice suffered by the respondents, if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

In the instant application, it is common ground that the length of delay was about 48 days. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay will suffice and is the key that unlocks the court's flow of discretionary indulgence. There have to be valid and clear reasons, upon which discretion can be favourably exercised in favour of the applicant. The applicant stated that the delay was occasioned by his previous advocates who failed to inform him of the judgment so that he could make a decision on whether to prosecute an appeal or not. However, in the case of **Bi-Mach Engineers Limited v James Kahoro Mwangi** [2011] eKLR this Court held that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”

Similarly in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR this Court observed thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.

In view of the foregoing, it is clear that delay has not been sufficiently explained. The only reason given by the applicant for delay was that he was not informed that judgment had been delivered by his advocates. He had a responsibility to follow up on his case and attend court whenever the matter came up before court. Further, litigation has been ongoing for over 11 years and litigation must surely come to an end. There is also consent entered into by the parties in Eldoret H.C.C. A. No. 80 of 2012 settling the same dispute. The applicant has not disputed this assertion. Nor has the applicant demonstrated that the intended appeal will be arguable.

All in all the applicant has failed to place sufficient material before me that would persuade me to exercise my discretion in his favour. Accordingly, the application stands dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR