



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 121 OF 2019

BETWEEN

SEA STAR MALINDI LIMITEDAPPLICANT

AND

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

(Being an application for extension of time to file Memorandum of Appeal and Record of Appeal out of time in an intended appeal from the Judgment and Decree of the Environment & Land Court at Malindi (Olola, J.) dated 29th May 2019

in

ELC No. 47 of 2006)

RULING

1. The applicant's suit against the respondent before the Environment and Land Court (ELC) at Malindi in ELC Case No. 47 of 2016, in which the applicant sought compensation for alleged wrongful demolition and destruction of its hotel, was dismissed by the ELC in a judgment delivered on 29th May 2019. Aggrieved by that decision, and intending to challenge it on appeal, the applicant promptly filed a notice of appeal dated 3rd June 2019.

2. In accordance with requirement under Rule 82 of the Court of Appeal Rules, the applicant should then have instituted its appeal by filing its memorandum and record of appeal within 60 days from the date of filing the notice of appeal. It did not do so until 16th September 2019 when it also filed the present application seeking an order that *"the Memorandum of Appeal and Record of Appeal dated 16th September 2019 be deemed to be properly on record and/or alternatively the time of lodging and serving the Memorandum of Appeal and Record of Appeal be extended."*

3. Appearing for the applicant, *Miss Ndirangu*, learned counsel referred to the affidavit supporting the application sworn on 16th September 2019 explaining that the delay in filing the Memorandum of Appeal and Record of Appeal was occasioned by the refusal by Ms. Wasuna & Company Advocates, who were the lead advocates for the applicant before the ELC, to release the applicant's file; that time was lost as attempts were made to retrieve the file from the said advocates who claimed a lien over the same for alleged outstanding fees which were contested by the applicant; that the applicant's present advocates were ultimately compelled to obtain copies of documents from the court file before the ELC that enabled them to institute the substantive appeal.

4. It was submitted that the intended appeal is arguable; that it has overwhelming chances of success; that the delay involved is not inordinate; that the respondent does not stand to suffer any prejudice and that the present application was made without delay.

5. Counsel pointed out that the respondent is itself aggrieved by the same judgment and has instituted an appeal against it with regard to award of costs, being Civil Appeal No. 2019, and there can be no possible prejudice to the respondent.

6. **Mr. Gicharu Kimani**, learned counsel holding brief for **Mr. Paul Mwangi** for the respondent pointed out that although the respondent has not filed any affidavit in reply, the explanation given by the applicant for the delay is not plausible as the current advocates for the applicant were also acting for the applicant before the ELC alongside the firm of Wasuna & Company Advocates; that the claim that the latter firm retained the file is not sufficient explanation; that as there is already an appeal filed by the respondent, the applicant should file a cross appeal; and that the delay involved is inordinate.

7. In brief reply, **Miss Ndirangu** asserted that although her firm was involved in the matter before the ELC, the firm of Wasuna & Company Advocates had custody of the file with all the pleadings.

8. I have considered the application, the affidavits, submissions and the authorities cited. Rule 4 of the Court of Appeal Rules, 2010 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. In ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR***, Waki, JA stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI.

8/2000 (UR) and Murai v Wainaina (No 4)

[1982] KLR 38.”

10. More recently, in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** the Supreme Court pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. Guided by those principles, I note that following delivery of the judgment by the ELC, the applicant promptly filed a notice of appeal. It has exhibited correspondence to the affidavit supporting the application showing the unsuccessful effort made to retrieve the applicant’s file from Wasuna & Company Advocates in order to institute the appeal. There is in my view satisfactory explanation for the delay in instituting the appeal, which in the circumstances is not inordinate. As already indicated the respondent has itself challenged the same judgment and it is no clear what prejudice it will suffer if this application is allowed.

12. All in all, I am inclined to exercise my discretion in favour of the applicant and I hereby allow the application dated 16th September 2019 in terms of prayer 1 thereof with the result that the memorandum and record of appeal instituted on 16th September 2019 is deemed to be properly on record. The costs of the application shall abide by the outcome of the appeal.

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

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR