



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA)

NAIROBI CIVIL APPLICATION NO. 259 OF 2019

BETWEEN

ERIC KYALO MUTINDAAPPLICANT

AND

FESTUS MWANGANGI MASILARESPONDENT

(Being an Application for extension of time to file a Memorandum of Appeal and Record of Appeal out of time in respect of the Notice of Appeal dated 12/10/2018 filed with the Deputy Registrar of the Environment and Land Court in Machakos on the same date with intention to appeal against the whole of the Judgment of HON. MR. JUSTICE O. A. ANGOTE delivered on 12/10/2018 and the subsequent decree issued by the same Court on 18/6/2019

in

Machakos Environment and Land Case No. 190 of 2008)

RULING

1. The applicant Eric Kyalo Mutinda, has by application dated 26th July 2019 sought an extension of time, under Rule 4 of the Court Of Appeal Rules, within which to file a notice of appeal or alternatively for his notice of appeal filed on 12th October 2018 be admitted and be deemed to be properly filed. He also seeks an extension of time within which to file his memorandum and record of appeal. He intends to appeal against the judgment of the Environment and Land Court in ELC Case Number 190 of 2008 which was delivered at Machakos on 12th October 2018.
2. The application, supported by his affidavit, is based on the grounds that although he promptly filed a notice of appeal on 12th October 2018, that notice “*has been overtaken by events in view of the fact that the record of appeal and a memorandum of appeal were not filed within the statutory 60 days of filing the notice of appeal.*”; that his advocates applied for typed proceedings but the same were not supplied until 19th June 2019.
3. Although the firm of Kinyua Musyoki & Company Advocates for the respondent were duly served with the present application on 14th August 2019 and duly acknowledged receipt of the application by stamping, they have by their letter dated 30th June 2020 to the Deputy Registrar of the Court, sought for an adjournment of the application on grounds that they were not served with the application.
4. I am satisfied, based on an affidavit of service sworn by Joseph Ngumbau David, that the application was duly served on that firm ON 14th August 2019 and it acknowledged service and stamped “*received*” on the cover of the application. I therefore decline the request for adjournment.
5. As for the substantive application for extension of time, there is evidence that following the delivery the Judgment by the ELC

at Machakos on 12th October 2018, the applicant promptly filed a notice of appeal on the same day. The advocates for the applicant also applied to the Deputy Registrar of the ELC for typed proceedings and judgment on 12th October 2018 and a copy bespeaking proceeding was served on the respondent's advocates. A reminder to the Deputy Registrar dated 14th May 2019 to supply the typed proceedings was sent by the advocates for the applicant. Based on a certificate of delay issued on 26th June 2019, the certified copies of the proceedings and judgment were ready for collection on 19th June 2019. The present application was presented on 2nd August 2019 which is about 36 days after the certificate of delay was issued. It is not clear when the applicant's advocates collected the typed proceedings and the judgment.

6. I have considered the application, the affidavit in support and the submissions and authorities cited. As the Supreme Court of Kenya stated in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR 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.

7. Similarly, in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR Waki, J.A 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.”

8. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts. In relation to the present case, there is explanation for delay in relation to the period between the date of delivery of the judgment in October 2018 and June 2019 when the typed proceedings and judgment were ready for collection. It is suggested, though not very convincingly, that the period of over a month in filing the present application, was expended on account of voluminous proceedings, which counsel for the applicant submits is not inordinate.

9. It is evident that the applicant moved with speed to file a notice of appeal, having done so on the very day the judgment was delivered and also promptly applied for the typed proceedings and judgment. No doubt counsel would have been faster in making the present application. Nonetheless, I have taken into account that the impugned judgment relates to transfer of land and rectification of register and requires the applicant to vacate the suit property or face forceful eviction.

10. In this case, I think justice will be served by granting the applicant an opportunity to pursue his right of appeal. I do not think that the respondent will suffer prejudice, incapable of compensation in costs, should the Court allow an extension of time as sought.

11. I am therefore inclined to exercise my discretion in favour of the applicant. The Notice of Motion dated 26th July 2019 is allowed as prayed. If the applicant has not already done so, the memorandum and record of appeal shall be filed and served within 30 days of delivery of this Ruling.

I make no orders as to costs.

Dated and delivered at Nairobi this 10th day of July, 2020.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR