



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, JA (IN CHAMBERS)) MOMBASA

CIVIL APPLICATION NO. 104 OF 2019

BETWEEN

UMMI MBWANA MWALIMU.....1ST APPLICANT

CHARLES JOAKIM.....2ND APPLICANT

PETER OMONDI.....3RD APPLICANT

AND

TAPIOCA LIMITED.....RESPONDENT

(Being an application for extension of time for filing notice of appeal and for stay of execution of the Judgment of the Environment & Land Court at Mombasa (Omollo, J.) delivered on 19th September 2019 in Mombasa Land & Environment Case No. 182 of 2011)

RULING

1. The applicants, in their application dated 8th November 2019, seek two substantive reliefs. The first order that is sought is that the time for filing notice of appeal be extended to 25th October 2019. The second order that is sought is that pending the hearing and determination of the appeal, there be a stay of execution of the judgment of the Environment and Land Court in Case No. 182 of 2011 which was delivered on 19th September 2019.1

2. Having regard to Rule 53 of the Court of Appeal Rules, I do not, as a single Judge, have jurisdiction to deal with an application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules. That is a matter for the full court. I will therefore confine myself to the request for extension of time under Rule 4 of the Court of Appeal Rules.

3. I have considered the application for extension of time, the supporting affidavit sworn by Ummi Mbwana Mwalimu, and the submissions as well as the replying affidavit sworn by Rajesh Khagram a director of the respondent. The court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time. However, that discretion should be exercised judicially, and each case must be considered on its own facts.

4. In **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR** the Supreme Court of Kenya stated 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.

5. 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.”

6. Applying those principles to the present case, it has been explained that the impugned judgment was supposed to have been delivered “on notice” but was delivered on 19th September 2019 without notice in the absence of all the parties; that counsel for the applicants discovered, fortuitously on 30th October 2019, that judgment had been delivered on 19th September 2019 whereupon counsel applied for copies of the proceedings and judgment and also filed a notice of appeal, by which time the time prescribed for filing a notice of appeal had lapsed. The present application is dated 8th November 2019 although it appears it was lodged on 13th November 2019.

7. I am satisfied that the delay is satisfactorily explained, and it is in any event not inordinate. It is not clear what prejudice, if any, the respondent will suffer in the event an extension of time is allowed.

8. I accordingly allow the application in terms of prayer 1 of the application. The notice of appeal dated 30th October 2019 is hereby admitted out of time.

I make no orders as to costs.

Orders accordingly.

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

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true *copy of the original*.

Signed

DEPUTY REGISTRAR