



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAL 84 OF 2020

BETWEEN

BENSON NDUNGU KARIUKI.....APPLICANT

AND

KAMAU KEBENU.....1ST RESPONDENT

NGUGI KIBINU.....2ND RESPONDENT

IGAMBI KIBINU.....3RD RESPONDENT

MUIGAI KAMAU.....4TH RESPONDENT

JOSEPH KARANJA KARIUKI.....5TH RESPONDENT

(Being an application of extension of time to serve the Notice of Appeal out of time in an intended appeal from the judgment of the Environment & Land Court of Kenya at Nairobi (Komingoi, J.) dated 11th December, 2019

in

ELC Case No 717 of 2005 (OS)

RULING

[1] Before me is a notice of motion dated 16th March, 2020 which is taken out by **Benson Ndungu Kariuki** (the applicant). This being a single judge matter under the provisions of **Rule 4** of this Court's Rules, the only prayer in the said motion that I can deal with is in regard to granting leave to the applicant to file and serve the Notice of Appeal out of time. The other prayers seeking stay of execution are not within my edit as a single judge.

[2] The motion is supported by the applicant's affidavit which is not dated. Nonetheless, the applicant states therein that judgment was delivered on 11th December, 2019 dismissing his suit with costs to the respondents. However, the applicant was not able to file a notice of appeal due to financial crisis that he was facing until 21st January, 2020 which was outside the prescribed period.

[3] The applicant did not serve this notice of motion upon the respondents. When it came up for hearing before me on 1st July, 2020 by consideration of the motion and written submissions without appearance of the parties under the COVID-19 Pandemic Practice Directions, I noticed that there was no replying affidavit or written submissions by the respondents. I directed the Deputy Registrar to inquire from the parties and upon doing so, the Firm of **Khaminwa & Khaminwa Advocates** who are on record for the respondents wrote a protest letter dated 13th July, 2020 indicating that they were never served with the motion; and that even the Notice of Appeal was served on them on 26th February, 2020. Counsel for the respondents pointed out that they are prejudiced because they have not been accorded an opportunity to be heard.

[4] I have considered this motion bearing in mind the guiding principles set out by this Court in matters of extension of time which invokes

the exercise of this Court's discretion. That discretion is however exercised judicially and the guiding principles have been enunciated in a long line of authorities especially the oft' cited case of Fakir Mohamed vs. Joseph Mugambi & Two Others Civil Application No. Nai. 332 of 2004 thus: -

“The exercise of this Court's discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of 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 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 by factors ...”

Also see Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (1999) 2 EA 231, which is the *locus classicus*, laid down the following parameters: -

“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 the delay, secondly, the reason for the 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.”

[5] The applicant who seeks the exercise of this Court's discretion has not even bothered to serve the respondents with this motion. It is a well-established practice and also an entrenched fundamental principal of a fair trial that pleadings must be served on the other side. Any pleading filed and not served on the opposite side has no legal force. I cannot therefore issue any lawful order to the applicant who has failed to comply with the law and practice of serving the respondents.

[6] Accordingly, this notice of motion is a non- starter it is hereby struck out as being an abuse of the process of the Court.

Dated and delivered in Nairobi this 7th day of August, 2020.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR