



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 53 OF 2020

BETWEEN

IZAAK MWANGI KURIA.....APPLICANT

AND

KIBUCHI MURITHI.....RESPONDENT

*(Being an application for extension of time to file an appeal against the Ruling of the Environment and Land Court (Okong'o, J.) dated 12<sup>th</sup> July, 2018*

in

ELC No 785 of 2015)

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RULING

[1] Before me is a notice of motion filed on 26<sup>th</sup> February, 2020 which is taken out by *Izaak Mwangi Kuria* (the applicant) where he seeks leave to file a notice and record of appeal out of time in regard to the Ruling delivered as above on 12<sup>th</sup> July, 2018. According to the grounds in support of the motion, summary judgment was entered against the applicant and he was therefore denied an opportunity to present his case. The motion is supported by the applicant's affidavit sworn on 24<sup>th</sup> September, 2019 in which he complains that he was not aware of the said ruling where his suit was dismissed until in the month of August, 2019 when the respondent wanted to evict him from his home where he lives with his wife and children.

[2] The applicant further stated that it was on 23<sup>rd</sup> September, 2019 when he was able to get a copy of the ruling and that he intends to appeal on the five (5) grounds stated in the draft memorandum of appeal. According to the applicant, he has an arguable appeal as in his view the learned Judge did not consider the evidence and the documents adduced thereto. Moreover, he intends to join another party in the suit as he was denied a fair hearing.

[3] The applicant however did not serve this motion upon the respondent. When the motion came up for hearing before me on 1<sup>st</sup> July, 2020 by consideration of the motion and written submissions without appearance of the parties under the COVID-19 Pandemic Practice Directions, I noticed there was no replying affidavit and submissions by the respondent. I therefore directed the Deputy Registrar to inquire from the parties and upon doing so, the Firm of *Gachanja & Company Advocates* wrote a letter dated 14<sup>th</sup> July, 2020 to the Deputy Registrar indicating that they were never served with the motion. Despite having been directed to serve the motion to the respondent within seven (7) days from the 1<sup>st</sup> of July, 2020 the applicant did not comply.

[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 exercise of discretion. That discretion is however exercised judicially and the guiding principles have been enunciated in a long line of authorities especially the often 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 othered to serve the respondent with this motion. It is a well-established practice which is 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 respondent.

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

***Dated and delivered in Nairobi this 7<sup>th</sup> day of August, 2020.***

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**