



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA. (IN CHAMBERS)

ELDORET CIVIL APPLICATION NO. 145 OF 2019

BETWEEN

JANE KISAKA MUNG'AU..... APPLICANT

AND

JOSEPH OUMA ONDITI.....RESPONDENT

(An applicant for extension of time to file record of appeal out of time against the judgment of the Environment and Land Court of Kenya at Kitale (F. M. Njoroge, J.) delivered on 31st July, 2017

in

ELC NO. 38 OF 2012)

RULING

1. Although the notice of motion dated 11th November, 2019 is pronounced to be brought under Rule 5(2)b of the Rules of this Court, the same is essentially an application for extension of time which is supposed to be premised on Rule 4 of the Rules of Court.
2. The applicant seeks an order for extension of time to file the record of appeal against the judgment made by the Environment and Land Court (ELC) on 31st July, 2017 in ELC No. 38 of 2012. According to the applicant, being aggrieved with the above judgment, through her counsel on record she lodged a notice of appeal within time and also wrote the letter bespeaking the proceedings to the Deputy Registrar of the High Court and copied the same to counsel for the respondent.
3. According to counsel, there was no communication from the Deputy Registrar to inform him that proceedings were ready for collection. Out of his own diligence, he enquired from the registry and having confirmed that the proceedings were ready for collection, the same were collected on 18th October, 2019. From the certificate of delay on record which was issued on 15th October, 2019 the certified copies of the proceedings and judgment were ready for collection on 24th June, 2019. This therefore meant that the applicant had 60 days from June 2019 to file and serve the record of appeal, so by the time the proceedings were collected, the 60 days within which to file the record of appeal had already lapsed.
4. I have considered the application before me, the grounds it is predicated on and the supporting affidavit of Dennis Otieno Oduor sworn on 11th November, 2019. **Rule 4** of the Court of Appeal Rules does not provide for factors a court ought to consider in an application for enlargement of time, but the courts have devised appropriate principles to be applied in achieving a just decision in the circumstances of each case. These principles were succinctly set out in the *locus classicus* case of **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi** (1999) 2 EA 231, as follows:-

“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.”(Emphasis supplied)

The above parameters are nonetheless both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v.**

Joseph Mugambi & 2 others (2005) eKLR where it was held that;

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path..... As it 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, (possible) 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 factor.”

See also: **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees**, Civil Application No. 190 of 2019.

5. First and foremost, I note that the application is not opposed as there is no replying affidavit on record. Secondly, and in view of absence of submissions to the contrary, the five months’ delay has been explained. The respondent had not controverted the applicant’s deponements and so the explanation given for the delay would appear to be acceptable to the respondent. I have no reason to find otherwise. Although no draft memorandum of appeal is annexed to the affidavit to demonstrate whether the intended appeal had good chances of success, in view of the fact that the application is not opposed, and the explanation given for the delay being plausible, I allow the application.

6. The applicant is given 30 days from the date hereof to file and serve the record of appeal. I make no order as to costs as the application is not contested.

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

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR