



IN THE COURT OF APPEAL

AT NYERI

CORAM: KIAGE J.A(IN CHAMBERS)

CIVIL APPLICATION NO. 64 OF 2019

BETWEEN

OBADIA PETER KAIRARIA.....APPLICANT

AND

ANDERSON GITONGA JUSTACE.....1ST RESPONDENT

CECILIA CHURI SALESIO.....2ND RESPONDENT

RORLAND KIMATHI KANGA.....3RD RESPONDENT

(An application for extension of time to file and serve the record of appeal from the Judgement and Decree of the Environment and Land Court at Chuka (PM Njoroge, J.) dated 13th December, 2018)

in

ELC Case No. 79 of 2017)

RULING

The applicant, **Obadia Peter Kairaria** has brought by the Motion dated 9th May 2019, seeking the following prayers;

- 1. THAT this Honourable Court be pleased to grant leave to the Applicant to file and serve a Notice and Record of Appeal out of time.**
- 2. THAT this Honourable Court be pleased to grant a stay of execution of the judgement and decree in the High Court of Kenya at Chuka No. 79 of 2017 Formerly Meru E&L no. 60 of 2012 delivered on 13th December, 2018.**
- 3. Cost of this application be provided for.**

On the face of it, the application is omnibus and is probably incompetent because an application under **Rule 4** is heard by a single Judge while one under **Rule 5 (2) (b)** ought to be heard by a full bench. However, I will treat it as an extension of time application as it declares in its heading. I will ignore the prayer for stay of execution, over which I have no jurisdiction.

Over the years, this Court has devised sound principles to be applied in order to achieve a just decision on an application for extension of time, to be applied on a case by case basis. In **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231**,

for example, it was stated;

“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.”

From the record, it is clear that the applicant initially filed an application at the High for extension of time to file an appeal to this Court. This is in my opinion erroneous, but complicated by the fact that the **Civil Procedure Act** seems to donate that power to the High Court when it ought to properly and exclusively belong to this Court. Nonetheless, that application was dismissed and he then filed the instant application, a manoeuvre that underscores the second-bite-at-the-cherry mischief inherent in the High Court entertaining such applications.

The instant application was filed on 13th May 2019 while the judgment sought to be challenged was delivered on 13th December 2018, exactly 5 months before. In his supporting affidavit, the applicant averred that the reason for that delay was ignorance. He claimed that he was unaware of the rules that required him to file a Notice of Appeal within 14 days after the delivery of judgment.

Upon perusal of the record, it is clear that the applicant had based his application to the High Court on the following grounds;

(a) That judgment in this case was delivered on 13th December 2018.

(b) That on 13th December 2018 immediately after delivery of judgment the applicant applied for certified copies of judgment.

(c) That it was not until 15th January 2019 that I was supplied with certified copies of the judgment.

(d) That I took time and sought advise (sic) from a counsel who read the judgment and advised that he had isolated several grounds of appeal.

(e) That after the advise (sic) from the counsel the applicants decided to file notice of appeal but unfortunately such notice of appeal is filed within 14 days of judgment.

(f) That the delay in filing the notice of appeal was not deliberate rather the applicant was not supplied with the judgment within a reasonable time.

Those grounds quickly debunk the notion that the applicant was unaware of the requirement to file a Notice of Appeal within 14 days as he now claims. The grounds clearly paint a picture of a man who was aware of the said rules and had even attempted to abide by them. Additionally, the applicant stated that he sought advice from Counsel hence the claim of ignorance cannot stand. I find that the applicant was economical with the truth and he was trying to mislead the Court. That High Court Judge made the same observation en route to dismissing the application before him. The reason given for the delay is both untrue and unsatisfactory. Such want of candour dries up the stream of favourable discretion and he does not deserve the order he seeks. In that regard I reiterate what this Court said in **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

It is trite that extension of time lies in equity and before one is granted such an extension, he must show himself worthy of the same. This Supreme Court put it thus in **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**;

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

From the circumstances of this application, I have come to the inevitable conclusion that the 5-month delay was not only inordinate but also unexplained and therefore inexcusable. I disallow the application for extension of time and dismiss it with costs.

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

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR