



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 27 OF 2020

BETWEEN

OLERAI INVESTMENTS LIMITED.....APPLICANT

AND

KENYA INSTITUTE OF

MASS COMMUNICATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(An application for extension of time to file and serve a Record of Appeal out of time from the ruling and order of the Environment and Land Court at Nairobi (K. Bor, J.) dated 12th September 2018

in

ELC No. 2348 of 1996

as consolidated with ELC Miscellaneous No. 392 of 2016)

RULING

1. The applicant has moved this Court under Rule 4 of the Court of Appeal Rules, seeking to have the time within which to file its intended record of appeal extended. The intended appeal is in regard to a judgment dated 12th September 2018 relating to a suit (**H.C.C.C No. 2348 of 1996**) which was filed by the applicant against the respondents on 20th September, 1996.
2. The applicant had sought in the suit to have the respondents evicted from land known as L.R No. 209/12046 (**suit property**), and an order to have the fence erected around the suit property by the 1st respondent removed. A defence filed by the respondents was struck out and the matter proceeded for formal proof before **Visram, J (as he then was)**. On 24th May 2001, Visram J awarded the applicant general damages of Kshs. 3,100,000, but failed to give orders on the prayers for eviction and removal of the fence. The applicant then filed an application for review of the judgment delivered on 24th May, 2001 on the ground that there was an error apparent on the face of the record. This application was heard by **Mbito, J** who delivered a ruling on 12th April, 2002 amending the judgment to include an order of eviction and removal of the fence on the suit property.
3. By an application dated 9th April 2018, the 1st respondent sought to have the order for its eviction and removal of fence around the suit property reviewed, on grounds that the order was made without the court being seized of all facts, as the suit property was public land. The applicant's suit was consolidated with **ELC No. 108 of 2017** and the application made by the 1st respondent was heard by **Bor, J** a judge in the Environment and Land Division.
4. In a ruling delivered on 12th September, 2018, Bor, J. allowed the respondents' application, set aside the judgment and decree in favour of the applicant and ordered that the matter be reheard. This is the ruling that the applicant is aggrieved of. The applicant filed a notice of appeal against the ruling on 11th October, 2018 and also requested for typed proceedings through a letter dated 11th October, 2018. In support of its application for extension of time, the applicant relied on a supporting affidavit sworn by Sadhu S. Devgun on 5th February, 2020. The applicant also relied on written submissions that it had duly filed.

5. The applicant submitted that although its advocate applied for typed proceedings on 11th October, 2018, the advocate inadvertently failed to copy and serve the respondents' advocate with the letter bespeaking proceedings as required under Rule 82(2) of this Court's Rules. The advocate wrote a reminder to the Deputy Registrar, in the Environment and Land Court, on 19th November, 2019 following up the typed proceedings as the intended appeal could not be filed without the typed proceedings. The applicant argued that the delay in obtaining the proceedings was not of its making as its advocate has been following up with the registry on the status of the proceedings.

6. In addition, it is submitted that the applicant's motion is meritorious as the intended appeal is not frivolous but has a high probability of success; that the substance of the appeal is the suit property which the applicant claims as the legal, beneficial and registered owner; and that the applicant stands to have his right to the property enshrined under Article 40 of the Constitution violated. Lastly, that the respondents would not suffer any prejudice as the applicant was willing to maintain the prevailing *status quo* pending the hearing and determination of the intended appeal. On the other hand, the applicant who has waited for 18 years to reap the benefits of the judgment in his favour before the respondents' application for review, would be highly prejudiced if time is not extended as it will not be able to pursue its right of appeal.

7. The 1st respondent opposed the application and filed its grounds of opposition and written submissions. It was submitted that the notice of appeal having been filed out of time contrary to rule 75(2) of this Court's Rules and also without leave of the Court as required under rule 75(4) of the Rules, it is of no effect; that the applicant having failed to secure leave to file its appeal out of time, the notice of appeal was deemed to be withdrawn as provided for under rule 83 of the Rules, hence the orders sought cannot be granted; and that the applicant has not explained the inordinate delay as the application has been filed two years after delivery of the impugned ruling. It was also submitted that no justifiable reason was given by the applicant to justify its delay, and that the delay of two years was inordinate and should not be excused by the Court.

8. Before considering whether the applicant's motion meets the threshold required, the 1st respondent has raised an issue concerning the propriety of the notice of appeal which is on record, contending that the same was filed out of time and without leave, and must be deemed to have been withdrawn as per Rule 83 of the Court Rules, and secondly, that the applicant can only benefit from the delay in the supply of proceedings if the applicant had copied the letter for typed proceedings dated 11th October, 2018 to the respondents as per the provisions of Rule 82(2).

9. The issue of whether there is a valid notice of appeal on record or whether it is deemed as withdrawn, is a matter for the full court and not a single Judge. In *Dolphin Palms Ltd v. Al-Nasibh Trading Co. Ltd & Others, Civil Application NAI No. 112 of 1999 (unreported)* Judge. Omolo JA sitting as a single judge, addressing a similar issue stated as follows:

"The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single Judge; that is the province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was no notice of appeal." (Emphasis added).

10. Rule 84 stipulates that a person may apply to have a notice of appeal struck out within 30 days of service of the notice of appeal if an essential step has not been taken within the required time. The said Rule reads:

"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

11. The respondent who admits having been served with the notice of appeal has not demonstrated that it filed any application to have the notice of appeal struck out within 30 days of having been served with the notice of appeal, nor is there any order striking out the notice. The issue before me is extension of time, and I must proceed on the assumption that the notice of appeal that is on record is proper as it is not for me as a single judge to determine the propriety of that notice.

12. As regards the failure by the applicant's advocate to serve on the respondent's advocate the letter bespeaking the proceedings, Rule 82(2) is clear that the applicant is precluded by that default, from having the period certified by the Registrar as necessary for typing the proceedings excluded from the computation of time.

13. In regard to the exercise of my discretion under Rule 4 of the Court's Rules, it is now well settled that the discretion is unfettered except that it must be exercised judicially. In *Mutiso v Mwangi [1999] 2 EA 231* this Court laid down the following parameters for the exercise of the Court's discretion in extending time.

"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".

14. In *Fakir Mohammed -vs- Joseph Mugambi & 2 Others (2005) eKLR*; Waki JA restated the position as follows:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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, (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 the 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.”

15. It is evident that the delay in filing the appeal has been exacerbated by the inadvertence of the applicant’s former counsel in failing to copy his letter bespeaking proceedings to the respondent. This has made it impossible for the applicant to take advantage of the proviso to section 82 (1) of the Rules, which means that the period of delay is computed 60 days from 11th October 2018 when the notice was filed, to 7th February 2020 when this motion was filed which is a period of about 14 months and not two years as alleged by the respondent. As is clear from the certificate signed by the registrar, the delay in filing the appeal was substantially due to the delay in obtaining the typed proceedings.

16. Both the delay from the Court in availing the proceedings and the mistake done by the advocate in failing to copy his letter to the respondent, were matters which were not within the applicant’s control, and the applicant cannot be accused of being indolent. As observed by the Supreme Court in **County Executive of Kisumu vs County Government of Kisumu & 8 others [2017] eKLR**:

“The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party’s reach.”

17. Furthermore, the ruling that the appellant seeks to appeal against, has the effect of setting aside a judgment which was delivered in favour of the applicant about 17 years ago. The applicant has demonstrated that it intends to challenge the ruling on arguable grounds, and the appeal is therefore not frivolous. It will be highly prejudicial to the applicant, if time is not extended as the intended appeal will have been dealt a death blow. On the other hand, the respondent has not demonstrated any prejudice that it is likely to suffer if the applicant’s motion is allowed. For these reasons, I am satisfied that in the circumstances of this case, it would be fair and just for me to exercise my discretion in the applicant’s favour.

18. Accordingly, I allow the applicant’s motion and extend time for the intended appeal and record of appeal to be filed out of time. The record of appeal shall be filed within 60 days from the date hereof. Costs of this application shall be in the appeal.

It is so ordered.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR