



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, JA. (IN CHAMBERS)**

**CIVIL APPLICATION NO. 112 OF 2020**

**BETWEEN**

**LORNA INGETI CHARLES.....APPLICANT**

**AND**

**PARAMJIT SINGH SOKHI.....RESPONDENT**

(Being an Application for extension of time to file an Appeal out of time from the

Judgment and Decree of the Environment and Land at Kajiado (Christine Ochieng, J)

dated 29th January in E.L.C No. 406 of 2017)

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**RULING**

1. In a ruling rendered on 29th of January, 2020, the Environment and Land Court (Christine Ochieng, J), found in favour of the respondent, as against the applicant, declaring the respondent herein as the rightful owner of the suit property, Title No. Kajiado/ Kaputieti North/277 and that the applicant herein had trespassed on the same. The learned Judge granted among others, mandatory orders that the applicant unconditionally demolish all structures put up on the suit property and vacate and hand over possession to the respondent.

2. The applicant intends to challenge the judgment but has not done so because time within which she ought to have filed the appeal has elapsed. The instant application is brought under Rule 4 of the Rules of this Court and premised on grounds, *inter alia*, that: the applicant's advocates on record filed a Notice of Appeal on 27th March, 2020 but the same was lodged on 29th April, 2020 due to the deputy registrar's absence during that period; the applicant has through her advocates made an application to be supplied with certified copies of proceedings, judgment and decree in the matter to enable her file her appeal but the same have not yet been availed and; that the delay to file and lodge the notice and record of appeal was not occasioned by indolence on the part of the applicant but due to circumstances beyond her control.

3. In her affidavit in support of the application she deposes that after the entry of the impugned judgment, her former advocate failed to communicate this fact to her; that the same only came to her knowledge on 13th March, 2020 when a decree was served on her through her former advocates; that upon learning of it, she instructed her former advocates to file and lodge an appeal but they failed to do so for reasons that they were unable to file and lodge the same due to the government and the National Commission on Administrative Justice directives on Covid 19 pandemic issued on 16th March, 2020; that she then instructed the firm of Messrs. Were Lukoko & Co. Advocates who filed this application to have the time for filing the appeal enlarged; that no prejudice would be occasioned to the respondent if the instant application is allowed.

4. In reply, the respondent opposed the application vide his replying affidavit, contending that the instant application has been overtaken by events due to the applicant's own fault and negligence; that the applicant's advocates are not properly before the Court as they have not made the requisite application to come on record on behalf of the applicant; that in the alternative, if they are properly before this Court then the application is incompetent as it was not served upon the respondent; that there is an inordinate delay of 58 days after delivery of the impugned judgment in contravention of the law; that the respondent has not been served with the letter by the applicant seeking to be furnished with typed proceedings of the trial Court; that the applicant has not adduced any evidence proving indolence by her previous advocates; that the applicant is guilty of laches and the instant application is frivolous and an abuse of the Court process.

5. In his submissions, counsel for the applicant reiterated the averments in the applicant's supporting affidavit emphasizing that mistake of counsel should not be visited upon the applicant. (See: **Philip Chemwolo & Anor. v. Augustine Kubende (1982 - 88) KAR 103**). Further,

that the intended appeal raises weighty & arguable issues with high probability of success. (See: **Nairobi Women's Hospital v. Purity Kemunto (2018) eKLR**). Counsel maintained that no prejudice would be occasioned to the respondent if the application was to be allowed. Further, that in the event that this Court allows the instant application, the applicant is willing to abide by the terms this Court may set including depositing security for costs.

6. In response, learned counsel for the respondent in his submissions reiterated the averments in the respondent's replying affidavit.

7. I have considered the application, the rival affidavits, submissions and the authorities cited. By dint of **Rule 75** of this Court's Rules, a party wishing to appeal a decision of any superior Court below must start by giving notice of that intention by lodging such a notice with the registrar of the superior Court below within 14 days of the date of the decision against which it is desired to appeal.

8. However, it is recognized that there may well be justifiable reasons that may prevent a party from taking the requisite steps to file an appeal within those timelines. Therefore, **Rule 4** gives any such party a ventilation thus:-

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

(Emphasis supplied).

The justifiable reasons to be considered in determining whether or not to grant an application for extension of time are now settled law. This Court in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231, laid 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”.** (Emphasis supplied)

9. In the instant application, the impugned judgment was delivered on 29th January, 2020. The notice of appeal was filed on 27th March, 2020 and lodged on 29th April, 2020 being 58 days out of time. I also note that the Notice was lodged late but I am apt to note that once a party files the Notice of Appeal at the registry, there is little one can do to ensure the same is lodged because that depends on the registrar of the Court who is not under the control of the parties. The applicant herein cannot therefore be blamed for the lapse of time between the filing of the Notice of Appeal and the lodging of the same by the deputy registrar of the Court.

10. Is the delay inordinate and has it been plausibly explained? In my view the delay of 58 days in the circumstances of this case cannot be said to be inordinate. The applicant may have been let down by her previous counsel on record and it would be draconian to dethrone her from the seat of justice.

11. On whether the intended appeal has high chances of success, this Court in **Athuman Nusura Juma V. Aftwa Mohamed Ramadhan, Civil Appeal No 227 of 2015**, cautioned that this question cannot be determined conclusively by a single Judge. The Court stated that:

**“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.**

12. A close perusal of the memorandum of appeal shows that indeed the applicant raises legal issues that beg for adjudication by this Court. This is a land matter where the applicant is threatened with eviction. In my view the applicant should be accorded an opportunity to ventilate her case so that the same can be determined on its merits. I am not persuaded that the respondent will suffer any prejudice if this appeal is heard and determined on its merit.

13. In conclusion, I would say that this was a very badly drafted application, the kind this Court refers to as omnibus and which applications will more often than not be struck out. The application was fixed for hearing before me as a single Judge for purposes of enlargement of time only. All the other prayers in the application will have to be pursued before a properly constituted bench in a properly drafted application.

14. For now, I will exercise my discretion in favour of the applicant and extend time for the filing and serving the Notice of Appeal. I therefore order that the Notice of Appeal filed on 27th March, 2020 out of time be and is hereby deemed to have been served within time. The timelines set in the Rules for service of the Notice of appeal and filing of the record of appeal be complied with. Costs of this application will abide the outcome of the appeal.

**Delivered and dated at Nairobi this 6th day of November, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**