



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 248 OF 2018

BETWEEN

JOSPHAT KAVATI NZIMBI.....APPLICANT

AND

JOSPHAT NYINGI PETER.....RESPONDENT

*(Application for leave to Appeal out of time against Judgment of the Environment and Land Court at Machakos (O.A. Angote, J.) dated 27<sup>th</sup> July, 2018 in*

*ELC No. 34 of 2012)*

\*\*\*\*\*

RULING

It is now firmly settled by a long thread of decisions of this Court that the power to extend time under **Rule 4** is discretionary; and that extension of time is not a right of a party. As an equitable remedy it is only available to a deserving party; that a party seeking extension of time has the burden of laying a basis, to the satisfaction of the Court; and that this Court takes into account the length of the delay, the reason for the delay, the degree of prejudice to the respondent if the application is granted, and (possibly) the chances of the appeal succeeding if the application is granted. See: **Leo Sila Mutiso V. Rose Wangari Mwangi**, Civil Application No. Nai. 255 of 1997.

On 27<sup>th</sup> July, 2014 the Environment and Land Court at Machakos (Angote, J.) dismissed the applicant's plaint in which he had claimed the ownership of plot No. 3063 King'oti Adjudication Section. It was his case that in 1993 during adjudication of land in the area, he had a mental impairment and was admitted at Mathari Hospital; that upon recovery, he learnt that the respondent had made an objection to the adjudication of the suit land without disclosing that the applicant was mentally unwell and instead presented a stranger in the proceedings; and thereafter the respondent proceeded to have the suit property transferred to himself. He instituted an action in the court below for a declaration that he is the lawful owner of the suit property. The action was however dismissed as explained earlier on the grounds that there was no proof that he had been admitted in hospital; similarly, that he had not presented evidence to prove his claim; and that he had failed to appeal against the decision of the Adjudication Board.

The applicant was aggrieved by this outcome and since time to file a notice of appeal had lapsed, he took out this notice of motion for extension of time to do so under **Rule 4(1) and (2)** of this Court's Rules. The prayers are framed thus;

**"2. The court be pleased to extend time for giving notice of appeal and grant leave to the Plaintiff to appeal out of time against the judgment..."**

**3. The said leave do operate as a stay of proceedings."**

I reiterate the caution issued in **Riccardo Fanelli & 2 others V Frigrieri Graziano**, Civil Application No. 51 of 2015 that an application for extension of time being one for consideration by a single judge in chambers must never be brought in an omnibus manner with a prayer for the full bench, as the applicant has done in this application. The prayer for stay of proceedings cannot be in the same application as that for extension of time. This ruling therefore relates only to the first limb of the application.

The delay in filing and serving the notice of appeal was 13 days. Delay, irrespective of the length should not be the basis for shutting out an aggrieved party from pursuing an appeal to this Court, so long as the circumstances are fully explained. This has been demonstrated in many

cases. For example, Okwengu, J.A in **Ramadhan Barasa Ozula V Rose Adijah Barasa & Another**, Civil Application No. 28 of 2018 excused a delay of 5 years upon being satisfied with the explanation proffered by the applicant in that case.

In the present application, the applicant has explained that his attempt to have the firm of Mulwa, Isika & Mutia Advocates to represent him after he was referred to them by Kituo Cha Sheria failed; that by the time he got the services of his present counsel, KMK Law LLP Advocates on the 10<sup>th</sup> August, 2018 they had only one day of the 14-day period to file the notice of appeal; that they applied to be issued with typed proceedings on 13<sup>th</sup> August, 2018 which they are yet to receive upto this day despite their efforts in following up; that the appeal has high chances of success; and that the respondent will not be suffer any prejudice.

While it is appreciated that the respondent has a judgment in his favour and may be prejudiced by any further delay standing between him and the enjoyment of the fruits of that judgment, it is equally important to bear in mind that this application was filed within 26 days of the date of judgment and that what is in contest is the ownership of the suit property. The delay, in my estimation was not inordinate or prejudicial.

For these reasons, I grant the prayers for extension of time within which the notice of appeal may be filed and served and order the applicant to do so along with the record of appeal within thirty (30) days from the date hereof.

**Dated and delivered at Nairobi this 22<sup>nd</sup> Day of March, 2019.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**