IN THE COURT OF APPEAL

AT ELDORET

(CORAM: VISRAM, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 56 OF 2018

BETWEEN

RICHARD KIPKEMEI LIMO..... APPLICANT

AND

HASSAN KIPKEMBOI NGENY.....1ST RESPONDENT

LAND REGISTRAR - UASIN GISHU..... 2ND RESPONDENT

CHIEF LAND REGISTRAR..... 3RD RESPONDENT

ELDORET MUNICIPAL COUNCIL.....4TH RESPONDENT

ATTORNEY GENERAL..... 5TH RESPONDENT

(An application for extension of time to file the memorandum and record of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated 9th February, 2018

in

Petition No. 4 of 2013)

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RULING OF THE COURT

1. Before us is a reference to the full Court under ***Rule 55*** of the ***Court of Appeal Rules (the Rules)*** against the decision of a single Judge (Githinji, J.A) dated 8th November, 2018. The 1st respondent is challenging the exercise of the learned single Judge's discretion and as such, our mandate was succinctly discussed in ***Hezekiah Michoki vs Elizaphan Onyancha Ombongi [2015] eKLR*** as follows:

> ***"For this Court to interfere with exercise of discretion by a single Judge sitting on behalf of the full Court and to vary, discharge or reverse that decision, the full Court must bear in mind that the single Judge was exercising a discretion which is unfettered, though exercisable judicially, and it has to be shown by the applicant that the single Judge took into account some irrelevant factor or factors or failed to take into account a relevant factor or factors; that the Judge failed to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision was plainly wrong."***

In addition, we must bear in mind that our jurisdiction does not entail the substitution of our discretion with that of the learned single Judge. See ***Rozaah Akinyi Buyu vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR***.

2. The facts that culminated in the reference are that **Richard Kipkemei Limo** (the applicant) instituted Petition No. 4 of 2013 seeking

various declaratory and injunctive orders in regard to Land Reference Number Eldoret Municipality Block 7/178 (suit property). Apparently, the applicant, **Hassan Kipkemboi Ngeny** (1st respondent) and one Enock Kibiwott Kiptanui had each been issued with a title to the suit property and each party claimed to hold a better title than the other.

3. Towards that end, the applicant sought *inter alia*, a declaration that his title to the suit property was valid; a declaration that the titles issued in favour of Enock and the 1st respondent were invalid and cancellation of the same; and injunctive orders restraining Enock and the 1st respondent from interfering with his quiet enjoyment of the suit property.

4. The parties presented their respective claims before the trial court (Ombwayo, J.) which ultimately pronounced itself in a judgment dated 9th February, 2018 as follows:

> ***"I have gone through the pleadings and evidence on record and do find that the certificate of lease produced by the 1st respondent was properly and legally acquired as due process was followed. The certificate of lease produced by the petitioner*** *(the applicant herein)* ***was not procedurally obtained as the alleged vendor of the property was not the registered proprietor and therefore could not transfer non-existent rights to the petitioner. The certificate of lease produced by the 6th respondent*** *(Enock)* ***was unprocedurally obtained as the 6th respondent was allocated plot number 20 that was un-surveyed which after survey gave rise to Eldoret Municipality Block 7/177, and not plot no 21 that was also unsurveyed but after survey gave rise to Eldoret Municipality Block 7/178, and therefore could not have been issued with title in respect of the latter.***
>
> **…**
>
> ***The upshot of the above is that the petitioner has failed to demonstrate that he acquired the suit property regularly and procedurally and that he is the legal owner of the suit property and therefore I do dismiss the petition with costs and do hereby nullify the certificates of lease issued to the Petitioner and 6th respondent and for avoidance of doubt, I do find that the 1st respondent obtained his title legally and therefore he is the lawfully registered proprietor. The costs of the petition to be borne by the Petitioner. Orders accordingly."***

5. Aggrieved with that decision, the applicant lodged a notice of appeal on 20th February, 2018 challenging the decision and sought certified copies of the proceedings by a letter dated 22nd February, 2018. However, the applicant did not manage to file the appeal within the requisite time. As a result, he filed an application dated 14th May, 2018 seeking extension of time to file the record and memorandum of appeal; he also sought the Court's indulgence to admit the memorandum and record which he had filed out of time.

6. The application was premised on the grounds that after requesting for certified proceedings on 22nd February, 2018, the Deputy Registrar of the Environment and Land Court (ELC) informed the applicant's advocate vide a letter dated 12th April, 2008 that the proceedings were ready. Upon paying for the proceedings on 13th April, 2008, the applicant's advocate was shocked to learn that they had not been certified by the Deputy Registrar. Eventually, the proceedings were certified on 20th April, 2018.

7. By the time, the proceedings in question, were collected on 24th April, 2018 the applicant's advocate barely had enough time to prepare and file the record of appeal on time. He only managed to file the record and memorandum of appeal on 4th May, 2018. All in all, the delay was beyond the applicant's control and was occasioned by the ELC. The applicant also urged that the intended appeal was arguable in terms of the grounds set out in the memorandum of appeal.

8. As would be expected, the application was strenuously opposed by the respondents on a number of grounds. The respondents contended that they had not been served with the notice of appeal within the requisite time frame or at all. Likewise, the letter requesting for certified proceedings was not served upon them. What is more, the record of appeal was filed out of time without the leave of the Court. It followed therefore, that the Court could not admit such a record as that would be tantamount to condoning an illegality.

9. Upon considering the positions taken by the respective parties, the single learned Judge (Githinji, J.A) allowed the application in a ruling dated 8th November,2018 stating as follows:

> ***"In this case, the Notice of Appeal was lodged on 20th February, 2018. The appeal was lodged on 4th May, 2018 which was approximately 14 days out of time.***
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> ***Firstly, that is not an inordinate delay. Secondly, the present application was filed on 16th May, 2018 which again is not an inordinate delay. Thirdly, the applicant has given a reasonable explanation for delay in filing the appeal.***
>
> **…**
>
> ***The Deputy Registrar is obliged to accept the document and mark the document as "lodged out of time". Thus, the lodging of the appeal out of time is not an illegality as alleged. Furthermore, Rule 4 permits extension of time whether before or after the doing of the act for which extension of time is sought.***

Moreover, there is no provision in the Court of Appeal Rules which bars a party from lodging a document out of time and thereafter applying for extension of time to file the document.

The copy of the Memorandum of Appeal filed shows that the appeal is arguable on points of law and fact. The lengthy judgment of the ELC shows that the court had to consider disputed issues of fact and weighty issues of law.

There was evidence that the disputed plot had been offered for sale for Shs. 35,000,000/=. Thus, the appeal relates to a valuable property. In the interest of justice the applicant should be afforded an opportunity to exercise his right of appeal.

The respondents have not demonstrated that they would suffer undue prejudice if time is extended. On the other hand, the applicant would suffer prejudice as his title was registered first and as he claims to have constructed rental buildings in the disputed plot."

It is the aforementioned decision that the 1st respondent is calling upon us to interfere with the discretion of the single Judge exercised under ***Rule 4*** of the ***Rules***.

10. At the plenary hearing, Dr. Khaminwa, SC together with learned counsel, Mr. Ondabu appeared for the 1st respondent. Learned state counsel, Mr. Odongo appeared for the 2nd - 5th respondents while, learned counsel, Mr. Rapando, appeared for the 4th respondent. There was no appearance for the 6th respondent despite service of the hearing notice. The applicant was represented by learned counsel, Mr. Ngigi and Mr. Tororei.

11. Dr. Khaminwa, SC faulted the single Judge for finding that the intended appeal was arguable. In his view, the learned Judge's finding was premised on irrelevant matters namely, the mere existence of a memorandum of appeal, the length of the trial court's judgment and the value of the subject matter, which have no bearing on the arguability of an intended appeal. He contended that the learned Judge should have paid regard to the nature of the applicant's claim which would have led him to the correct conclusion that the intended appeal was frivolous.

12. Expounding on that line of argument, SC submitted that whilst the applicant's position was that he had purchased the suit property from one Patrick Ngumbao on 22nd December, 2003, the certificate of official search dated 17th December, 2003 disclosed that at the time of the alleged sale, the property was registered in the name of Rhoda Chelagat Kandie. There was no evidence of a sale agreement between Rhoda and Patrick and/or power of attorney donated to Patrick by Rhoda to dispose the suit property. Moreover, that there was no indication of whether a transfer had been executed by Rhoda prior to registration of the suit property in favour of the applicant. Similarly, that there was no evidence that Rhoda had been allocated the suit property and/or she had authority to dispose of the same.

13. He went on to assert that despite the respondents bringing to the learned single Judge's attention that the applicant had not only failed to give a reasonable explanation for the delay in filing the appeal but also in bringing the application seeking extension of time -, the learned Judge found otherwise. Counsel argued that the misapprehension was due to the fact that the learned Judge had overlooked the fact that the applicant had not served the letter requesting for proceedings upon the respondents hence the proviso to ***Rule 82*** of the ***Rules*** was not applicable.

14. It was SC's argument that the single Judge failed to balance the competing interests of the parties. In particular, he failed to appreciate that the extension of time granted to the applicant would occasion wanton waste in light of an order issued by the ELC restraining all parties from dealing with the suit property pending the hearing and determination of the intended appeal. In addition, the learned Judge ignored the 1st respondent's rights as the legal proprietor of the suit property.

15. Furthermore, the learned Judge had failed to address his mind on the issue of whether the applicant had served the notice of appeal within the requisite time frame as stipulated under ***Rule 77*** of the ***Rules***. SC asked us to consider that issue more so, taking into account that there was conflicting evidence by the applicant with respect to the same.

16. Supporting the reference, Mr. Odongo argued on more or less similar grounds as SC. He posited that the failure on the part of the applicant to give a reasonable explanation for the delay connoted indolence on his part, and that the learned single Judge should not have exercised his discretion in favour of such a party.

In that regard, this Court's decision in ***Donal O. Raballa vs Judicial Service Commission & Another [2018] eKLR*** was cited.

17. As far as counsel was concerned, once the respondents raised the issue of non-service of the notice of appeal, which goes to the legality of an appeal, the learned single Judge should have put down his tools and referred the matter to the full court. He also took issue with what he believed was a merit consideration of the intended grounds of appeal by the learned single Judge. To him, definite determinations made by the learned single Judge such as the alleged value of the property and assumption that the applicant was in occupation of the suit property prejudiced the respondents. He submitted that all the learned single Judge was required to do is to merely state that the intended appeal was arguable and leave it at that.

18. Similarly, reading from the same script as the other respondents, Mr. Rapando supported the reference. On the issue of prejudice, he submitted that the learned single Judge failed to appreciate that the 4th respondent was fully funded by the public and if leave sought was granted the 4th respondent would be forced to incur colossal expenses to the detriment of the public.

19. Opposing the reference, Mr, Ngigi argued that the learned single Judge exercised his discretion in line with the guidelines set out by the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat vs Independence Electoral and Boundaries Commission & 7 Others [2014] eKLR***. To him, the learned Judge properly applied his mind on whether the intended appeal was arguable; whether the applicant had offered a reasonable explanation for the delay and arrived at the right conclusion.

20. He argued that the applicant was not required to establish that the intended appeal would succeed. It was sufficient to demonstrate that the same warranted the consideration of the Court. In counsel's opinion, the learned single Judge was satisfied with the explanation offered for the delay and appreciated that the same was beyond the applicant's control. Counsel added that save for alleging that they would suffer prejudice, the respondents fell short of proving any prejudice. He concluded by stating that there was no reason for the full court to interfere with the single Judge's exercise of discretion.

21. We have considered the reference and submissions by counsel. The principles which guide the Court in exercise of its discretion in an application for extension of time under ***Rule 4*** of the ***Rules*** are well settled. They were aptly summed up in ***Fakir Mohammed vs Joseph Mugambi & 2 Others [2005] eKLR*** in the

following manner:

> ***"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 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."*** *[Emphasis added]*

22. In our view, the learned single Judge appreciated his role and the aforementioned factors. With respect to whether the notice of appeal and the letter requesting proceedings were served, we cannot help but note that contrary to the respondent's contention, the learned single Judge considered the issue and expressed himself as follows:

> ***"There is a dispute whether the applicant served the letter of 22nd February, 2018 to the respective advocates as stipulated by proviso to Rule 82 (1).***
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> ***Further, the Deputy Registrar has not certified the time required for the preparation and delivery of the copy of the proceedings.***
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> ***There is therefore uncertainty as to whether time for the preparation and delivery of proceedings could be excluded from computation of time. Had the applicant complied with the provisions of Rule 82 (1) and its proviso it would have meant that the appeal filed on 4th May, 2018 would have been filed within time.***
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> ***But that is not the applicant's case. By filing the present application, the applicant implicitly concedes that the appeal was filed out of time. The compliance with Rule 82(1) could have precluded the time from running but the non-compliance does not bar the applicant from applying for extension of time to file the appeal."*** *[Emphasis added]*

Equally, we find that the learned single Judge properly addressed his mind on whether the reason adduced for the delay was reasonable as we have set out in the preceding paragraphs of this ruling.

23. On the arguability of the appeal, it is imperative to point out that in dealing with an application for extension of time, a single Judge cannot make definite pronouncements on the success of the intended appeal as the same may embarrass the Court while dealing with the appeal. Nonetheless, the learned single Judge was required to look at whether the intended appeal raised issues which would warrant the consideration of this Court. We find he did so by observing that the memorandum of appeal raised arguable points of law and fact. Further, the learned single Judge in making reference to the length of the trial court's judgment, was simply buttressing that weighty issues of law were involved.

24. In addition, we find that the learned Judge did not err in taking into account the value of the property in exercising his discretion. This is because under ***Rule 4*** the single learned Judge has unfettered discretion and can take into account issues he considers necessary in the exercise of his/her discretion. See ***Fakir Mohammed vs Joseph Mugambi & 2 Others (supra)***.

25. As for the issue of balancing the parties' interest and the prejudice likely to be occasioned to each, we are not convinced that the learned single Judge misdirected himself as alluded by the respondents. Besides, we are conscious of what we have already stated that our mandate is not to substitute our discretion with that of the single learned Judge, but only to establish whether the single judge exercised his discretion judicially.

26. For the foregoing reasons, we find that the learned single Judge exercised his discretion judicially and that there are no good reasons for interfering with the decision of the learned Judge. Accordingly, the reference to the full Court is dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR