



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 75 OF 2018

BETWEEN

MARY GATHONI KIHARA.....APPLICANT

AND

JOSEPH KARUA NGAREH.....1<sup>ST</sup> RESPONDENT

GERALD MBUTHIA MUREITHI.....2<sup>ND</sup> RESPONDENT

THE LAND REGISTRAR, LAIKIPIA.....3<sup>RD</sup> RESPONDENT

*(An application for extension of time to file and serve the Notice of Appeal out of time of*

*an intended appeal from the Judgment and orders of the High Court of Kenya at Nyeri (L.N. Waithaka, J.) dated 15<sup>th</sup> May, 2018*

in

ELC Case No. 241 of 2013)

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RULING

1. This ruling is in respect of an application dated 25<sup>th</sup> June, 2018 that was brought under **rule 4** of the **Court of Appeal Rules, 2010**. The application seeks to have the notice of appeal filed on 7<sup>th</sup> June, 2018 and served on 8<sup>th</sup> June, 2018 deemed to have been filed and served on time.
2. In her affidavit in support of the application, **Karen Muthee**, an advocate practicing in the firm of **Muriu, Mungai & Company Advocates**, who are based at Nairobi and who are on record for the applicant, stated that following closure of the hearing of **Environment and Land Case No. 241 of 2013** at Nyeri on 7<sup>th</sup> December, 2017, the court indicated that judgment would be delivered on notice; that subsequently a notice was issued to the effect that the judgment would be delivered on 9<sup>th</sup> May, 2018.
3. However, on the aforesaid date the judgment was not ready and it was deferred to 15<sup>th</sup> May, 2018. Counsel further stated that after delivery of judgment the court file was not released to the registry as the typed judgment needed to be corrected before it could be released to the parties.
4. The applicant, being aggrieved by the said judgment, instructed her advocates to appeal against it, and the advocates prepared a notice of appeal on 24<sup>th</sup> May, 2018. Vide an email dated 28<sup>th</sup> May, 2018, the applicant's advocates instructed **Mr. Samuel Gathiga Mwangi**, an advocate based at Nyeri, to file the notice of appeal on their behalf. However, Mr. Mwangi was unable to file the notice because the court file was not at the registry, it was at the judge's chambers. The registry therefore refused to stamp the notice of appeal in the absence of the file. The file was released from the judge's chambers on 7<sup>th</sup> June, 2018 and on the same day the notice of appeal was filed.
5. Miss Muthee further stated that the delay was not inordinate, it was only 9 days outside the prescribed period and had been well explained; that the intended appeal has good chances of success; and no prejudice would be occasioned to the respondents if the order sought is granted.

6. Samuel Gathiga Mwangi also swore an affidavit that corroborated the contents of Miss Muthee's affidavit in every material aspect. In particular, he stated that on 29<sup>th</sup> May, 2018 he proceeded to the registry to file the notice of appeal but was informed that the court file was in the trial judge's chambers for correction of errors in the judgment; that he made numerous follow ups with the registry so as to file the notice of appeal but the registry refused to stamp it without the file. Eventually the file was released on 7<sup>th</sup> June, 2018 and he proceeded to file the notice on the same day.

7. The first respondent opposed the application. He disputed Miss Muthee's contention that the file was released from the trial judge's chambers on 7<sup>th</sup> June, 2018 because the second respondent filed his notice of appeal on 25<sup>th</sup> May, 2018. He urged the Court to reject the application.

8. When the application came up for hearing on 23<sup>rd</sup> May, 2019, **Mr. D.K. Musyoka** appeared for the applicant and **Miss Mwikali** held brief for **M/S Gathara Mahinda & Company Advocates** for the second respondent.

There was no appearance for the first and third respondents, although they had been duly served with hearing notices.

9. Mr. Musyoka made brief oral submissions in support of the application. He urged the Court to find that the applicant was not to blame for the short delay in filing the notice of appeal; and in any event, the delay had been well explained.

10. Miss Mwikali supported the application for extension of time. She told the Court that somehow her firm was able to have the notice of appeal stamped at the registry without the Court file. She added that the judgment was certified on 7<sup>th</sup> June, 2018, which was a further pointer to the fact that it was not available at the registry until that date.

11. I have considered the application, the affidavits in support thereof and counsel's submissions. The principles that guide this Court in an application of this nature are now well settled. The Court (single judge) exercises wide and unfettered discretion, which must, however, be exercised judiciously and not arbitrarily or capriciously.

12. Some of the considerations that the Court must take into account include the length of the delay; the reason(s) for the delay; whether any of the parties would suffer serious prejudice if the application is allowed; the conduct of the parties; and the chances of success of the intended appeal, among others. See **IMPERIAL BANK LIMITED (In Receivership) & ANOTHER v ALNASHIR POPAT & 18 OTHERS [2018] eKLR**.

13. The length of the delay in this matter was 9 days, which is not inordinate. The reason for the delay has been well explained by both Miss Muthee and Mr. Gathiga. I have no reason to doubt what the two advocates stated in their respective affidavits. Miss Mwikali further told the Court that the second respondent's notice of appeal was stamped without the court file. I cannot tell why the registry would accept to stamp one notice of appeal without the court file and reject another in the same matter.

14. Having perused the impugned ruling as well as the proposed grounds of appeal, I cannot say that the intended appeal is frivolous; it is arguable. And lastly, the first respondent did not indicate that he would suffer any prejudice if the order sought is granted.

15. Taking all the above into consideration, I am inclined to exercise my discretion in favour of the applicant, which I hereby do. Consequently, the notice of appeal that was filed on 7<sup>th</sup> June, 2018 and served on 8<sup>th</sup> June, 2018 is hereby deemed to have been filed and served on time. The record of appeal should be filed and served within 30 days from the date hereof.

The costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2019.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**