



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OTIENO ODEK, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 34 OF 2019 (UR 23/2019)

BETWEEN

KENNEDY OCHIENG OTIENO.....1<sup>ST</sup> APPLICANT

GRADUS ATIENO OTHIM..... 2<sup>ND</sup> APPLICANT

AND

ELISAPHAN OMOLO NYASITA .....RESPONDENT

(Being an application for Extension of time to lodge and serve a Record of Appeal against the Judgment and Decree of the ELC Court at Migori, (Hon. G. M. A. Ongondo, J) dated and delivered on 20<sup>th</sup> November, 2018

in MIGORI ELC 218 OF 2017)

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RULING

Before me is a Notice of Motion dated 5<sup>th</sup> April, 2019 lodged in court on 10<sup>th</sup> April, 2019. The Motion is an application for leave to extend time within which to file and serve the record of appeal out of time.

The impugned judgment of the ELC Court was delivered on 20<sup>th</sup> November, 2018.

Learned counsel for the applicant, **Mr. Sagwe**, relied on the supporting affidavit deposed by **Mr. Kennedy Ochieng Atieno**. In the supporting affidavit, it is stated that the present application was filed because the Registry officials asked him to file the application for extension of time. It is further deposed that the applicant had prepared a record of appeal and when he went to file the same, he was informed time had lapsed and an application for extension of time had to be made.

Counsel submitted that the failure to file the record of appeal within time was not intentional but proceedings were obtained late after expiry of the stipulated 60 days.

Learned counsel for the Respondent, **M/S Ochwal** in opposing the instant application submitted that the applicant has not given any explanation for delay in filing the record of appeal within time. It was submitted there is no certificate of delay to indicate when the proceedings were ready for collection. There is also no letter from the Registry indicating when the proceedings were collected.

I have considered the instant application for extension of time. It is trite law that the grant of leave to extend time is at my discretion. I am reminded that in exercising my discretion, I must bear in mind the said discretion should not be exercised whimsically, arbitrarily or capriciously.

In an application for extension of time, an applicant must explain the reason for delay and the delay should not be inordinate. At the same time, the application for extension of time must be made timeously.

In the instant matter, the impugned judgment was delivered on 20<sup>th</sup> November, 2018. The time for filing the Records of Appeal lapsed on 20<sup>th</sup> January, 2019.

It is the applicant's explanation that the delay in filing the Record of Appeal was due to delay in obtaining the typed proceedings before the Environment and Land Court. Counsel submitted that the typed proceedings were collected on 28<sup>th</sup> January, 2019. There is no certificate of delay on record indicating when the typed proceedings were ready and collected. However, counsel for the applicant submitted that the proceedings were certified on 28<sup>th</sup> January, 2019 and it was collected on the same day.

On record is a copy of payment receipt for the typed proceedings. There is no letter requesting for the proceedings. Counsel for the respondent submitted they have never been served with a letter requesting for typed proceedings.

I have considered whether the explanation that the typed proceedings was collected on 28<sup>th</sup> January, 2019 is plausible and a good and sufficient explanation for delay. I am satisfied based on the date of certification that the proceedings were ready on 28<sup>th</sup> January, 2019. Guided by this date, I find the explanation for delay in collecting the typed proceedings is sufficient.

However, I note the instant application was filed on 10<sup>th</sup> April, 2019. There is no explanation by counsel why the application was filed after more than 2 months of collecting the typed proceedings. The only explanation given is that the Registry staff advised that the application for extension of time should be made. I note that it is not the duty of the Registry staff to advise counsel on what to do. It is counsel as an advocate who has the conduct of client's case who should exercise due diligence in the discharge of his professional duty to a client.

Whereas I note the explanation given is not convincing, I am reminded of the dicta that mistake or inadvertence on the part of counsel should not be visited upon a client. In this matter, having found that the delay was not inordinate, I am inclined to exercise my discretion and extend time to file and serve the record of appeal. Noting that this is a land matter, I am reluctant to visit inadvertence of counsel to the client.

Accordingly, I extend time to file the record of appeal. The applicant to file and serve the Record within 14 days of the date hereof.

As to costs, counsel for the applicant having been inadvertent, I hereby order the respondent's cost in this application be paid personally by counsel for the applicant. The costs be paid before filing the Record of Appeal. Costs assessed by consent at Kshs.10,000/= to be paid before the Record of Appeal is filed.

**Dated at Kisumu this 3<sup>rd</sup> June, 2019.**

**OTIENO ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**