



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 369 OF 2018

BETWEEN

ANN WAITHERERO KABERERE.....APPLICANT

AND

OPEN HIRE LIMITED.....1ST RESPONDENT

MINJU KARIUKI.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

(Application for leave to Appeal out of time against the Judgment of the Environment and

Land Court at Nairobi (K. Bor, J.) dated 6th November, 2018 in ELC NO. 2486 OF 1997)

RULING

The Supreme Court in the following passage in the case of **Nicholas Kiptoo Arap Korir Salat V. Independent Electoral and Boundaries Commission & 7 others**, Supreme Court Application No. 16 of 2014 regarding the exercise of discretionary powers in extending time to file pleadings, said;

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

The dispute before the trial court involved the ownership of land Nairobi Block 82/2380 in Green Field Estate. The court below found that

the 1st respondent was the owner of the property and the applicant was directed to give vacant possession of the suit property to the former within 120 days of the said judgment. Naturally, being aggrieved by this decision, the applicant intends to challenge it in this Court but has not done so because the time limited for filing the notice of appeal has elapsed and she requires leave of the Court to do so, hence this application.

The applicant now seeks that time within which to file the notice of appeal be enlarged on the grounds that the judgment of the court below was given on 6th November, 2018 and this application brought on 6th December 2018; that due to oversight the notice of appeal was not filed within the time limited by the rules. It is not contested that the applicant applied for a copy of the judgment together with the typed proceedings immediately.

Mr. Owaga for the respondent has explained candidly that, though he had prepared the notice of appeal which is annexed to the affidavit in support of this application, due to an oversight the notice was not filed in time. On 28th November, 2018 he realized the omission and quickly brought the instant application. The last day of filing the notice of appeal was 14th November 2018 being the 14 day period from the date of the decision challenged as required by **Rule 75(2)** of this Court's Rules. The period of delay was therefore only 8 days. This is not inordinate but excusable as the applicant has satisfactorily explained the reason for delay.

The respondents, though served with the hearing notices of this application did not attend court or file a replying affidavit to explain prejudice, if any that will be occasioned to them if time was to be extended.

Without being definitive on the chances of success of the intended appeal, the applicant has filed a draft memorandum of appeal evincing the grounds upon which she intends present on appeal. I can only say of these grounds that they are not idle or frivolous.

For the reasons above I allow this application and order that the notice of appeal be filed and served within seven (7) days from the date hereof and thereafter within thirty (30) days from the date of filing and serving the notice, the appeal be filed and served.

I make no orders as to costs.

Dated and delivered at Nairobi this 5th day of July 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR