



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KIAGE, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 10 OF 2019 (UR 6/2019)**

**BETWEEN**

**CHEPKOOE KOSKEI.....1<sup>ST</sup> APPLICANT**

**LEVI LUBANDALE NANDONYA.....2<sup>ND</sup> APPLICANT**

**AND**

**JOHN SIMIYU PALANGA.....1<sup>ST</sup> RESPONDENT**

**FRANCIS WAMALWA WERE.....2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to lodge notice of appeal against a ruling by Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 22<sup>nd</sup> October, 2017*

*in*

**ELC No. 230 of 2017)**

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**RULING**

By the motion dated 17<sup>th</sup> December, 2018, the applicants **Chepkooe Koskei** and **Levi Lubandale** seek an order that leave be granted for them to file appeal out of time against a ruling of the Environment and Land Court (Matheka, J.) made on 22<sup>nd</sup> November, 2017 by which their application to reinstate an earlier dismissed application was disallowed. The motion is premised on curious grounds appearing in its face including;

- **The dismissal of the application was for non-attendance and not on merit thereby visiting counsel's mistake on the clients.**
- **The order against the applicants was extremely prejudicial to them. The intended appeal may be rendered nugatory.**
- **The intended appeal is plausible with good chances.**
- **The applicant is brought without unreasonable delay.**

**prejudicial to them.**

Those grounds are curious because on an application for extension of time the matters for a single judge's consideration are quite different from those for stay of execution which they seem to be speaking to.

The motion is supported by the affidavit of **Levi Luvandale Nandoya** expressed as sworn on 17<sup>th</sup> December, 2018, and it essentially repeats the grounds on the motion. Strangely again, the deponent at paragraph 8 swears as follows;

***"8. That I know of my own knowledge that the applicants meets (sic) all the criteria for the grant of a stay pending appeal."***

The respondents was opposed the motion by a replying affidavit sworn on 20<sup>th</sup> May, 2019 by **Francis Wamalwa Were**. He swore that the litigation herein commenced way back in 1991 by way of originating summons and a judgment was delivered on 5<sup>th</sup> November, 2015 against which the applicants did not appeal only to file a review application some six months later. The applicant failed to attend its hearing leading to its dismissal on 27<sup>th</sup> June 2017. An application to reinstate that application was dismissed and the applicant seeks to challenge the same on appeal. The respondent has moved to execute the judgment and the present application is belated having been brought some 391 days later and with no explanation. He questioned the applicant's failure to apply for proceedings or to file a notice of appeal against the judgment.

At the hearing of the application **Mr. Omondi**, the applicants' learned counsel readily conceded that the delay was over 13 months, some 391 days to be precise. He also admitted, as he had to, that there is no reason given for that delay which he, however, defended as '*not unreasonable*'. He urged that the intended appeal is a plausible one.

**Mr. Ondieki**, the respondent's learned counsel reiterated that no reason for the delay had been given and no request for proceedings had been made. Contending that this is an old matter, counsel urged that litigation especially such an old one, must come to an end. He submitted that the respondent has already executed the judgment and the applicants even participated in post-judgment proceedings clearly indicative that they had not plans of appealing.

Briefly replying, **Mr. Omondi** defended participation in the post-judgment proceedings as he was opposing the execution of judgment. He expressed the view that a party has an option to either file a review application or appeal, and his client initially chose the former. He asked me to exercise my discretion judicially and made an offer to pay costs for any inconvenience allowing this application might cause the respondent.

I have given due consideration the application, the rival affidavits and the submissions made before me. On an application for extension of time under **Rule 4** of the Court of Appeal Rules, I have a wide and unfettered discretion intended to be exercised in a manner that serves the ends of justice. So that where it is shown that there has been delay or omission in the doing of something or the taking for an essential step within time due to inadvertence, mistake or other persuasive reason, I should enlarge time to facilitate the regularization of any such default or omission. Even though my discretion is wide and unfettered, however, it is not without the restraint of reason as it is, and must remain, a judicial discretion to be exercised judicially and judiciously in accordance with settled principles, not capriciously or whimsically.

Those principles have long been established as including a consideration of the length of the delay, the reasons for the delay, (possibly) the chances of the appeal succeeding, and the degree of prejudice that the grant of the application may occasion the respondent. See **LEO SILVA MUTISO vs. ROSE HELLEN WANGARI MWANGI** Civil Application No. 251 of 1997. The Supreme Court has endorsed those considerations and added that extension of time is not a right of a party, but is an equitable remedy only available to a deserving party on a case-by-case basis, and an application for extension should be brought without undue delay. See **FAHMI YASIN TWAHA vs. TIMAMY ISSA ABDALLA & 2 OTHERS [2015] eKLR**.

Bearing those considerations in mind, I find it to be uncontested that the applicant's delay was for over a year: 13 months or 391 days to be precise. That delay appears to me to be on the face of it quite inordinately long. It therefore called upon the applicant, for it is they who bear the burden of persuading me to explain the said delay. Only with a plausible explanation can a judge be said to have material upon which he can exercise his discretion favourably towards an applicant. Did the applicants herein proffer any explanation? No they did not. In fact, I see no discernible effort to explain the delay in the application and supporting affidavit. As earlier stated, their learned counsel readily conceded that there were no reasons given for the delay.

I think, with respect, that in that state of things, I am left with no choice but to disallow the application. To do otherwise would be to make of no effect the rules that require that certain actions be taken within specified timelines. It would also amount to a rewarding of inaction and a prolonging of litigation endlessly. Such a decision would fly in the face of good sense and the constitutional command that justice be done in an expeditious and fair manner. I doubt not that it would be unfair and unjust to grant an application such as before me that fails to meet the basic threshold of explanation, even at the level of plausibility.

In the result, I find this application to be devoid of merit and accordingly order it dismissed with costs.

**Dated and delivered at Kisumu this 3<sup>rd</sup> day of July, 2019.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**