



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 7 OF 2019

BETWEEN

THE KENYA POWER & LIGHTING CO. LTD.....APPLICANT

AND

EVANSON JIDRAPH KAMAU WAITIKI.....RESPONDENT

(Being an application for extension of time to file a notice of appeal from the Ruling of the Environment and Land Court of Kenya at Mombasa (C. Yano, J.) dated 17th December, 2018

in

HCCC NO. 87 OF 2012)

RULING

1. Kenya Power & Lighting Co Ltd the applicant herein, was a defendant in the Environment and Land Court (ELC) at Mombasa in land case no. 87 of 2012, in which Evanson Jidraph Kamau Waitiki the respondent was the plaintiff. The respondent had sued the applicant claiming general damages for trespass on the grounds that the applicant had trespassed onto his properties namely; Mombasa/Mainland South/Block 1363, Mombasa/Mainland South/Block 1/1031, Mombasa/Mainland South/Block V/109, Mombasa/Mainland South/Block V/110, and without his permission consent or authority erected transformers, and laid out electricity cables, for the benefit of illegal trespassers on the respondent's land.
2. Following an application brought by the applicant under **Order 1 Rule 10(2), (4) & (5)** of the **Civil Procedure Rules**, the applicant sought leave to enjoin the National Land Commission, the County Government of Mombasa, and the Hon. the Attorney General, to the respondent's suit, on the grounds that the Ministry of Housing and Lands had shown interest in purchasing the suit property for distribution to squatters who were in occupation of the property.
3. In his ruling delivered on 17th December, 2018 the learned judge (Yano, J.) rejected the application contending that there was no remedy that the respondent was seeking against the persons that the applicant wanted to join in the suit. This is the ruling that has aggrieved the applicant and against which he intends to appeal.
4. By his notice of motion dated 21st February, 2019 filed on 22nd February, 2019 the applicant has moved this Court under **Rule 4** and **75** of the **Court of Appeal Rules** and **sections 3A & 3B** of the **Appellate Jurisdiction Act** seeking to have time enlarged for filing and service of the notice of appeal; and further to have his notice of appeal filed on 23rd January, 2019 deemed as properly filed.
5. The applicant explains that the ruling of the Court was delivered in the absence of his counsel and the period for filing the appeal expired before he became aware of the ruling, that he only became aware of the ruling on 16th January, 2019 when the matter came up for mention; and that he thereafter swiftly filed the current application. The applicant maintains that the parties he wished to have joined in the suit were crucial parties to the suit and that he would be prejudiced by their absence.
6. The applicant maintains that his intended appeal is meritorious. He has filed a draft memorandum of appeal in which he has raised six grounds. In a nutshell the grounds fault the learned judge for refusing to allow the joining of the National Land Commission and the Attorney General as proposed defendants; in failing to appreciate the Government involvement (through the proposed parties) in compulsory acquisition of the suit properties and compensation to the respondent; in misdirecting himself on the law; and in failing to take into account

public policy and the fact that the applicant had been compensated on the trespass on his property.

7. The respondent has filed a replying affidavit in which he opposes the applicant's motion. The respondent contends that the applicant has not been candid in explaining the delay in filing the notice of appeal; that the applicant has not met the conditions that would justify extending time under **Rule 4** of the **Court of Appeal Rules**; that his explanation that he was not aware of the ruling of the court is not true as the parties were given due notice of the date of delivery of the ruling; that had the applicant and his counsel exercised due diligence they would have noted the delivery of the ruling; and that the applicant has not adequately explained the delay in filing the notice of appeal or the delay in filing his application.

8. In addition, the respondent contends that the intended appeal is not arguable. This is because the proposed parties are irrelevant to the respondent's claim which is for trespass and which occurred before the suit property was acquired by the Government and the respondent compensated. Further, that contrary to the respondent's claim of prejudice, it is the applicant who being 76 years old, stands to be prejudiced by any delay in finalizing the suit as his health is now failing.

9. In support of the application **Mr. Muniyithya** counsel for the applicant urged that the explanation given by the applicant for the delay was plausible and that the applicant had an arguable appeal as failure to join the proposed parties may lead to a miscarriage of justice. Counsel relied on Andrew ***Kiplagat Chemarigo vs. Paul Kipkorir Kibet [2018] eKLR***.

10. I have carefully considered this application and the contending submissions made by the parties as well as the authorities cited. As stated in ***Kiplagat Chemarigo vs. Paul Kipkorir Kibet (supra)***:

“Over the years, the Court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

‘It now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay,

secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.’”

11. The first issue that is relevant in considering an application under Rule 4 of the Court Rules is the period of the delay. In this case the ruling subject of the intended appeal was delivered on 17th December, 2018. Therefore, under **Rule 75(2)** of the Court Rules the notice of appeal should have been lodged within 14 days from the date of delivery of the ruling. However, under **Rule 3(e)** of the Court Rules the period of the Court Christmas vacation is not counted in the computation of time. This means that the period from 21st December to 14th January, 2018 which was the Court Christmas vacation has to be excluded from the computation of the fourteen days within which the applicant was required to file the notice of appeal. Thus, the last day for filing the notice of appeal was 25th February, 2018. The notice of appeal having been filed on 23rd February, 2019, it was filed within time, and the application before me for enlargement of time in regard to the filing of the notice of appeal is superfluous.

12. Under **Rule 77(1)** of the Court Rules an appellant is required to serve all persons directly affected by the appeal within 7 days after lodging the notice of appeal, which means that the applicant ought to have served the respondent with the notice of appeal by 2nd March, 2019. In this case the applicant filed and served his notice of motion for extension of time on the 22nd February, 2019. It is not clear when this application was served, nor is it clear when the notice of appeal was served. Nevertheless, delay in service of the notice of appeal is not the issue before me.

13. For the above reasons, I find the application before me superfluous as the orders sought are not necessary. Accordingly, the application is struck out.

Dated and delivered at Mombasa this 26th day of September, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR