



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 35 OF 2019

BETWEEN

MUKURU MUNGE.....APPLICANT

AND

GILLIED MWANYAZI.....RESPONDENT

*(Being an application for extension of time to file and serve a Notice of Appeal and*

*Record of Appeal out of time from ruling of Environment and Land Court,*

*Omollo, J. delivered on 19<sup>th</sup> December, 2018 in*

*Mombasa Environment and Land Court Case No. 387 of 2016)*

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RULING

**The applicant, Mukuru Munge** is seeking leave under **rule 4** of this Court's rules to extend time to file a Notice and record of appeal out of time against a ruling of Omollo, J. delivered on 19<sup>th</sup> December 2018.

In this regard, the applicant filed a Notice of Motion dated 13<sup>th</sup> May 2019, premised on grounds that he was unable to file the Notice of Appeal within the prescribed time because after the ruling of Omollo, J., he fell ill and his doctor ordered him to rest for a period of three months. A copy of a medical report dated 29<sup>th</sup> April 2019 was attached. He further contended that after the three months lapsed his doctor allowed him to return to work.

He further contended that he had filed *Civil Case No. 387 of 2016* which was struck off by Komingoi, J. for reasons that it was time barred and *res judicata*, yet the appeal merely sought to enforce the judgment (Njagi, J) in *Civil Appeal No. 93 of 2005* which had been delivered on 29<sup>th</sup> December 2005, where the respondent had sued him for demolishing a structure on the **Plot No. 4118/148 (suit property)**; that the respondent had not appealed against Njagi, J.'s judgment; that by the respondent paying him costs for the demolished structure, the applicant had proved that he owned the suit property.

In a replying affidavit sworn on 11<sup>th</sup> July 2019, the respondent opposed the application and averred that the application was an abuse of the court process as it was one of many proceedings instituted by the applicant seeking to obtain undeserving orders in respect of ownership of the suit property; that the applicant had exhausted all possible channels from the Magistrates' court to this Court, and it was time for him to concede to his fate and allow the respondent to enjoy the fruits of his judgments; that the application herein was yet another ploy to deprive the respondent of his property.

As a brief background, in 2005 the respondent obtained orders from the Magistrates' court against the applicant for payment of Kshs. 57,600 being the cost of a structure that was situated on the suit property which the applicant had demolished. The applicant appealed the decision in *Civil Appeal*

*93 of 2005*. In the judgment the court (Njagi, J) found that the respondent's claim for damages was not established and allowed the appeal.

In 2008, the applicant instituted *Civil Case No. 16 of 2008* against the respondent and his two siblings in the Senior Resident Magistrates'

court seeking injunctive orders on the suit property. He sought to be allowed to pay the monies demanded by the County Council of Taveta and thereafter have the suit property to be registered in his name. Following a preliminary objection filed by the respondent, the suit was struck out, and being dissatisfied with the decision, the applicant appealed the decision in the High Court, in *Mombasa Civil App No 176 of 2008* which also dismissed the appeal on 26<sup>th</sup> January 2011. The applicant filed Civil Appeal No. 191 of 2011 in this Court which was similarly dismissed on 7<sup>th</sup> October 2013. An application for certification to the Supreme Court was also dismissed on 9<sup>th</sup> October 2014.

Having reached the end of the road with *Civil Case No. 16 of 2008*, the applicant instituted another suit, this time in the Environment and Land Court, under *ELC Case No 387 of 2016* where he sought eviction and injunction orders, as well as orders to compel the respondent to pay the County Council of Taveta all arrears relating to the suit property. Once again the respondent filed a preliminary objection to the effect that the claim was time barred and *res judicata* as against the judgments of the Magistrates' court, the High Court and this Court, which objection was allowed by Komingoi, J. The applicant was dissatisfied with that decision and sought to have the decision reviewed and set aside, which application Omollo, J dismissed.

During the hearing of the application, the applicant relied entirely on the contents of the application, while learned counsel *Ms. Mwainzi* holding brief for *Mr. Odiaga* for the respondent outlined the averments in the respondent's replying affidavit, but added that the doctor's letter was not sufficient to explain the delay in filing the Notice and Record of Appeal, and further, that the appeal had no chance of success.

Under *rule 4* of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where this Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”***

As to whether the delay has been adequately explained. It is not in dispute that the ruling was delivered on 19<sup>th</sup> December 2018, and this application was filed on 13<sup>th</sup> May 2019. Essentially, the length of delay was about 146 days.

The applicant contends that had it has not been for his doctor's orders indicated in a letter dated 29<sup>th</sup> April 2019 that required him to rest for three months, he would have filed the appeal within the period specified by the rules. But when his explanation is considered, glaring fissures in his explanation become apparent, as no explanation was provided for the period between the date of the ruling and the date of the doctor's letter.

In *Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98*, this Court stated thus;

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

In explaining the delay, it was incumbent upon the applicant to set out the reason or reasons for the delay for the entire period. The applicant has sought to explain the delay by producing a doctor's letter which explains the delay after the 29<sup>th</sup> April 2019, but no particulars were provided for the period before the letter ordering that he rest for three months. Without any explanation for this period, there was no material upon which this Court could exercise its discretion to extend time for filing of the appeal.

In so far as the success of the intended appeal is concerned, I am not persuaded that there is any certainty in this respect. This is because, the applicant's claim under *ELC Case No. 387 of 2016* which sought an injunction to restrain the respondent from disposing of the suit property was found to be time barred and *res judicata*. A review before the same court also found the application to have been time barred. And this was after the trial magistrates' court, the High Court and this Court had also found that the dispute on ownership of the same subject matter to have been time barred. Though the applicant's complaint is that the learned judge did not consider the decision in *Civil Appeal No. 93 of 2005* which dismissed the respondent's claim for damages for demolition of the respondent's structure, it is most apparent that his claim predominantly remains one of ownership of the suit property, a matter which all the courts had already declared was time barred. These premises beg the question why a similar fate would not befall an intended appeal in respect of *ELC Case No. 387 of 2016*. I also find that the same question continuously raised in the various courts is of extreme prejudice to the respondent.

Accordingly, having taken all the requisite factors into account, I come to the conclusion that the application for extension of time is not merited, and I decline to exercise my discretion to allow it. Accordingly, the Notice of Motion dated 13<sup>th</sup> May 2019 be and is hereby dismissed with costs to the respondent.

***It is so ordered.***

***Dated and Delivered at Mombasa this 26<sup>th</sup> day of September, 2019.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**