



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 286 OF 2017 (UR 226/2017)

BETWEEN

DAVID ROWLAND MATENDE & ANOTHER.....APPLICANTS

AND

JOSHUA AKEYO OGENDO.....RESPONDENT

(An application for extension of time to file a Notice of Appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (S. Okongo, J) dated 29th September 2017

in

E.L.C No. 72 OF 2015)

RULING

[1] *David Rowland Matende* (applicant) and *City County of Nairobi*, were respondents in an appeal filed in **Environment and Land Court Appeal No 72 of 2014**. By a judgment delivered by **Okongo, J.**, dated 29th September 2017, a decree that was in favour of the respondents was set aside and substituted with a judgment in favour of *Joshua Akeyo Ogendo* (respondent). The applicant is desirous of appealing against the said judgment and decree thus the application before me seeks an order extending time within which to file a Notice and Record of Appeal out of time.

[2] Although the applicant has cited the Provisions of **Article 159** of the Constitution and all manner of other sections of the law, it is essentially a matter to be considered under **Rule 4** of this Court which deals with extension of time in the following terms;

“The Court may, on such terms as it thinks just, by an order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”

[3] This Rule gives a Judge an unfettered discretion to extend time. However, such discretion must be exercised judiciously. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Appeal No. Nai. 255 of 1997**, the Court gave guidance on the exercise of this discretion as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled in general the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of delay, secondly, the reason for the delay, thirdly (possibly) the chances for the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”.

[4] That said, the reasons given by the applicant for the delay in filing the Notice and Record of Appeal are stated in the supporting affidavit sworn on the 24th November, 2017 and elaborated further by **Mr. Khalwale** his learned counsel in his submissions made during the hearing of this application. It is stated that the applicant was not aware that judgment was delivered on 29th September, 2017; that the judgment was delivered in his absence and he and his advocate were not issued with a notice of delivery of judgment by the court. The applicant claims that he learnt about the judgment on 16th October, 2017 when some strangers were seen taking photographs of the suit premises and when they were questioned they made reference to the case. This was two days after the expiry of 60 days provided in the law for filing an appeal.

[5] The applicant further explained that when he got to know the judgment was delivered, he was upcountry in Bunyore area of Vihiga County. He immediately approached his former advocate to file an appeal, but they demanded fees in the sum of Ksh. 150,000 which he could not raise promptly but when he sought help from the firm of **Khalwale & Company Advocates**, they moved in haste and filed the present application on 8th December, 2017. The applicant also contends that he has an arguable appeal which can be gleaned from the draft memorandum of appeal where he proposes to raise about eight (8) grounds of appeal challenging the said judgment on points of law. According to counsel for the applicant, the delay in filing the application was not inordinate; the dispute is over ownership of a plot known as **Plot No D7904 Dandora Phase 2 Area 4** which the applicant contends is not the same as what is on the ground is an arguable point of law. For these reasons counsel pleaded that leave be granted and if the respondent is inconvenienced, he can be awarded costs of the application.

[6] Opposing this application was **Mr. Okoth** learned counsel for the respondent who relied on his client's replying affidavit sworn on 28th May, 2019. In addition, counsel submitted that the applicant's advocates knew the date when the judgment was to be delivered since it was given in court in his advocate's presence; that it was the applicant's duty to follow-up with his advocates and obtain all the information; that the application for extension of time to file an appeal was filed on 8th December 2017, but was only served on the respondent on 3rd April 2019, a period of more than one year and that this amounted to inordinate delay for which the applicant had failed to give sufficient reason.

[7] Learned counsel urged this Court to consider the principles to be applied in determining an application for extension of time to file Notice of Appeal as discussed in the case of **Donald Raballa vs. Judicial Service Commission & another [2018] eKLR** and find this application lacking in merit. In a brief reply, **Mr. Khalwale** sought to distinguish the said case of **Donald Raballa vs. Judicial Service Commission** (supra) as the circumstances were different from the present application in that the delay was caused by the applicant's former advocates, and not the current advocates. Moreover that was a decision of a full Bench following a reference under **Rule 55 (1) (b)** of the Court Rules.

[8] I have considered the motion, the affidavits, and submissions of both counsel as well as the law as cited in the preceding paragraphs. The length of delay must be considered in light of the explanations that have been advanced by the applicant. The applicant attributes his failure to file the Notice and Record of Appeal to the fact that neither he nor his advocates were notified of the date the judgment was delivered which was on 29th September, 2017. Although counsel for the respondent vehemently denied this, he did not attach any document to show that the date for judgment was given in the presence of counsel for the applicant or that a judgment notice was sent notifying all the parties of the date set for the delivery of the same.

[9] The applicant also seems to pass blame to his erstwhile advocates who demanded that he pays a sum of KSh. 150,000 as legal fees before they could take instructions to appeal which sum he could not raise. This forced him to seek out the firm of **Khalwale & Co. Advocates** but by then time had lapsed and hence the application for extension of time was eventually filed on 8th December, 2017. This is not a valid reason as it has been said time without number and indeed I tend to agree with counsel for the respondent that parties have a duty to take an interest and follow up their cases even when they are represented by counsel. It is not enough simply to accuse an advocate of failure to give information to a party as if there is no duty on the client to pursue his matter and obtain an update. (See **Bi-Mach Engineers Ltd vs. James Kahoro Mwangi [2001] eKLR**, and **Habo Agencies Limited vs. Wilfred Odhiambo Musingo Civil Appeal (Application) No. 124 of 2004 (2015) eKLR**).

[10] I have however, born in mind that there is no limit as to the number of factors that a court should consider in an application for extension of time, so long as they are relevant. Of paramount importance is the overarching objectives in the administration of justice that justice should be administered without undue regard to procedural technicalities and without undue delay as encapsulated under **Sections 3A and 3B** of the **Appellate Jurisdiction Act**. As demonstrated above, the delay in this matter was not inordinate, there were lapses or mistakes as it is not clear whether the judgment date was duly communicated to the applicant. Counsel for the applicant also failed to serve the instant application on the respondent. Nonetheless, the fact that it is not clear whether parties were notified of the judgment date and the grounds raised in the intended memorandum of appeal far more outweigh the inconvenience caused to the respondent if the leave sought is granted.

[11] The respondent has been dragged to court to defend this application and in my view this inconvenience should be compensated with costs. For the forgoing reasons, I allow the application and extend time for filing and serving both the Notice of Appeal and the Record of Appeal. In this regard, the applicant shall file and serve the Notice of Appeal within seven (7) days from date hereof and to file and serve the Record of Appeal within thirty (30) days of the service of the Notice of Appeal. I give the costs of this application assessed at KShs.15, 000 to the respondent.

Dated and delivered at Nairobi this 11th day of September, 2019

M. K. KOOME

.....

JUDGE OF APPEAL.

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR