



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KIAGE, JA.)

CIVIL APPLICATION NO. 98 OF 2019

BETWEEN

JACOB MWANZI INYUMBA APPLICANT

AND

ELLAM NYAMBOKA ONDURE RESPONDENT

(Application for extension of time to lodge an appeal arising from the judgment of the Environment and Land Court at Eldoret (Ombwayo, J.) dated 30th day of May, 2019

in

Environment & Land Court No. 894 of 2012

RULING

The applicant **Jacob Mwanzi Inyumba** asks me by his motion dated 13th August, 2018 brought under **Rule 4** of the **Rules of this Court** for orders that;

“c) This Honourable Court be pleased to grant the applicant an extension of time within which to lodge a Notice of Appeal and Record of Appeal against the judgment of Honourable Justice A. Ombwayo delivered on 30th May, 2019 in Eldoret Environment and Land Court Case No. 894 of 2012 - Jacob Mwanzi Inyumba -vs- Ellam Nyamboka Ondore.

d) The Notice of Appeal attached herein be deemed as duly filed.”

Grounds appearing on the face of the motion include the following;

“2. The applicant was unable to lodge an appeal within the prescribed period on account of his serious and debilitating illness which necessitated prescription of a prolonged bed rest for medication during the months of June and July, 2019;

3. The applicant was financially drained as he had spent a lot of money as legal fees during the period he had appointed advocates to act for him in the matter;

4. The intended appeal has high chances of success as demonstrated below;

i. The applicant is the registered owner of land parcel known as KAKAMEGA/LUMAKANDA/2061.

ii. The implementation/execution of the decree in Eldoret Environment and Land Court Case No. 894 of 2012 will substantially reduce the acreage of land the applicant owns as the sale agreement, transfer documents and title deed show that the applicant bought land measuring 2.05 Ha.

iii. The judgment was erroneous and unfair as its implementation will render the applicant homeless and destitute.

5. A substantial miscarriage of justice shall occur unless this appeal is heard and determined;

6. It is in the interest of justice that his application be allowed”

In his affidavit supporting the application the applicant swore that he was not represented by an advocate during the latter stage of the suit at the court below (par.4) but that after judgment his advocates applied for typed and certified proceedings and judgment. He attached the letter from B. I. Otieno & Company Advocates. He also attached copies of hospital treatment chits to show that he was “suffering from a serious and debilitating illness” which necessitated his being bed ridden between June and July, 2019 and that is the reason he did not instruct his advocates to lodge the appeal in time. He attached a draft memorandum of appeal to show he has an appeal with high chances of success and prayed that it is in the interests of justice that his application be allowed.

The respondent **Ellam Nyamboka Ondore** filed a replying affidavit sworn on 7th October, 2019 opposing the application. He was dismissive of the application terming it as having no merit hence no chance of success and a waste of the Court’s time. He stated that in execution of the judgment the County Surveyor has already visited the land parcel in issue and confirmed earlier survey findings so that the intended appeal “intends to challenge a scientific fact,” and so has no merit. He also denied the applicant’s claim to have been ill as he is his neighbour and has not been taken ill. Moreover, he had not been admitted to any hospital.

When arguing the application before me, **Mr. Kipkurui**, the applicant’s learned counsel explained that the applicant was acting in person and was not well-versed with the procedures hence his lateness, which was however not inordinate and had been explained. He conceded, however, that the applicant first visited hospital on 5th June, 2019 and he was not hospitalized.

On his part, **Mr. Lilan**, the respondent’s learned counsel submitted that the applicant had not placed before court material that would enable the court to favourably exercise its discretion. He pointed out that what the appeal seeks is a determination of boundaries yet this was granted in the judgment of the court below and each party has his own title and occupies his own land. Reiterating that the delay on the applicant’s part was inordinate yet he is neither literate nor was he admitted in hospital, counsel urged me to dismiss the application.

I have given this application with its supporting and opposing affidavits and the rival submissions due consideration. An application under Rule 4 is a plea to a single Judge of this Court to exercise his discretion so as to allow a party who has run afoul the time lines imposed by the Rules to be able to file or lodge documents out of time. The discretion is a judicial one to be judiciously exercised on the basis of principle, not capriciously.

The discretion is of course wide and unfettered but in deciding whether or not to extend time, some of the matters I consider include the length of the delay; the reason for the delay, (possibly) the likelihood of the appeal or intended appeal succeeding, and the prejudice, if any, that the respondent may be subjected to. As it is an equitable intervention that is sought, I would also consider the full circumstances of the application including the conduct of the applicant. See MWANGI -vs- KENYA AIRWAYS [2003] KLR 486.

Whereas the judgment sought to be appealed against was delivered on 30th May, 2019 and the applicant was required under **Rule 75(2)** of the **Rules** to have lodged a notice of appeal within fourteen days of the said date, he did not do so and has not done so, to date. He also did not file the present motion until 13th August, 2019, some two and a half months later.

That delay though significant may not be necessarily inordinate depending on what reasons are given. The applicant says that he was taken ill with a depilating illness that prevented him from giving instructions. I have looked at the treatment chits exhibited and observe that he first visited Lumakanda County Hospital on 5th June, 2019. He complained of dizziness, headache and confusion occasionally. He was at the time confused and depressed. He made two other visits on 12th June, 2019 and 9th July, 2019. He was given medication, advised to take bed rest and to undergo counselling.

Given that it is averred without serious controvert that the applicant was at the critical time acting in person though he had previously been represented by counsel, and considering the particulars of the illness he swears to have been under, I am inclined to give him the benefit of doubt that even though he was not admitted in hospital, he was prevented from taking appropriate steps by his health condition. This appears to me to be a plausible explanation, which, coupled with the fact that the delay was not so long to render extension of time unjust, I am persuaded the applicant is deserving of my favourable discretion.

In the result the motion dated 13th August, 2019 is allowed. I accordingly extend time to the end that the notice of appeal shall be lodged within seven (7) days of today and the applicant shall lodge and serve the record of appeal within thirty (30) days of this order.

Costs shall be in the intended appeal. Orders accordingly.

DATED and delivered at Eldoret this 28th day of November 2019

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.