



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(MUSINGA, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 219 OF 2017**

**BETWEEN**

**JOHN MUTUA KANDAU.....APPLICANT**

**VERSUS**

**NDOO MATENZWA.....RESPONDENT**

*(Application for extension of time to file and serve notice and record of appeal from the judgment of the Environment and Land Court of Kenya at Garissa (E.C. Cheronu, J.) delivered on 31<sup>st</sup> July, 201*

**in**

**H.C.C.C. No. 26 of 2012)**

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**RULING**

1. This is an application for extension of time to file and serve a notice and record of appeal out of time. It was brought under **rules 4, 75, 77 and 82** of the **Court of Appeal Rules** and **Article 159(2) (d)** of the **Constitution of Kenya, 2010**.

2. In his affidavit in support of the application, the applicant deposed that he was the respondent in the matter that gave rise to this application, **Civil Appeal No. 26 of 2012 at Garissa**, where he was represented by the firm of **Ngala Mulonzya & Company Advocates**; that judgment in the said matter was delivered on 31st August, 2017; that he was dissatisfied with the judgment and immediately thereafter instructed his advocates to appeal against the decision; that his advocates prepared a notice of appeal and filed it on 1st August, 2017 and even gave the applicant a copy of the same.

3. However, sometimes in September 2017 the applicant went to his advocates' chambers and learnt that the notice of appeal had not been served. That is when he decided to instruct **M/S Olando Udoto & Okello Advocates** to act for him in place of his erstwhile advocates, through whom he filed this application.

4. The applicant believes that his intended appeal is meritorious and has exhibited a draft memorandum of appeal. He also believes that the respondent shall not be prejudiced if this application is granted.

5. When the application came up for hearing on 17<sup>th</sup> April, 2018, only the applicant's advocate, **Mr. Okello**, was in attendance. The respondent's advocates, **M/S C.K. Nzili & Company**, were served with the application sometimes in October 2017. They were also served with a hearing notice, albeit late, on 16th April, 2018. The respondent did not file any replying affidavit.

6. The principles that guide this Court in an application of this nature are well settled. The Court exercises its unfettered discretion and in so doing, it considers the period of delay; the reason for the delay; the chances of success of the intended appeal if the application is granted; and the degree of prejudice that the respondent is likely to suffer if the application is allowed, among other considerations. See **STANLEY KAHORO MWANGI & 2 OTHERS v KANYAMWI TRADING COMPANY LIMITED**

**[2015] eKLR.**

7. The applicant herein instructed his former advocates to file an appeal against the High Court's decision. That they did on the same day the impugned decision was delivered. As he went back to his home, the applicant must have been confident that the process of appeal was well in motion since he had in his hands a copy of the notice of appeal that had been lodged in the High Court at Garissa.

8. The applicant cannot be faulted for his former advocates' mistake in failing to serve the notice of appeal and to prepare the record of appeal.

9. The length of the delay was not inordinate, the application for extension of time was filed on 25<sup>th</sup> September, 2017.

10. A perusal of the impugned judgment and the draft memorandum of defence does not give me a prima impression that the intended appeal is frivolous. I cannot say more regarding the chances of success of the intended appeal.

11. Lastly, there is nothing to show that the respondent shall be prejudiced if the orders sought by the applicant are granted. Consequently, I hereby grant leave to the applicant to file and serve the notice and record of appeal out of time.

12. The notice of appeal should be filed and served within fourteen days from the date of delivery of this ruling. The record of appeal should be filed and served within thirty days from the date of service of the notice of appeal. As the respondent did not file any replying affidavit or oppose the application, I make no order as to costs of the application.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of April, 2018.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**