



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 57 OF 2017

BETWEEN

DIOCESE OF ELDORET TRUSTEES(REGISTERED).....APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

TRUSTEES OF KIPLOMBE KAPTICH SCHOOL.....2ND RESPONDENT

LAND REGISTRAR UASIN GISHU COUNTY.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU...4TH RESPONDENT

(Being an application for extension of time for the filing of Memorandum and Record of Appeal from the judgment/decree of Environment and Land Court at Eldoret (Hon. A. Ombwayo, J.) dated 1st April, 2016

in

ELC NO. 2 OF 2015

RULING

[1] By a notice of motion dated 8th June, 2017, the applicant Diocese of Eldoret Trustees (Registered), seeks to have time extended to enable it file and lodge a memorandum of appeal against the judgment delivered in ELC No. 2 of 2015 on 1st April, 2016. The application is supported by an affidavit sworn by Bishop Cornelius Kipng'eno Korir on 8th June, 2017, a further affidavit sworn by Bishop Korir on 9th October, 2017 and a further affidavit sworn by the applicant's advocate one T. T. Tum on 3rd November, 2017.

[2] During the hearing of the motion, the applicant was represented by Ms Tekla Tum. The 1st respondent did not participate in the proceedings in the lower court nor was it represented in the hearing of this motion. The 2nd respondent who was represented by Mr. Tororei, opposed the application through a replying affidavit sworn by its Vice Chairman, Fredrick Kiptarus Kemei. The 3rd respondent who was represented by a State Counsel, Mr. Kuria, opposed the application but did not file any replying affidavit. The 4th respondent who was represented by Mr. Mitei, also opposed the application relying on the affidavit sworn by its Legal Officer, Kenneth Kibiwot Mutai.

[3] The applicant who is dissatisfied with the judgment of the Land and Environment Court, (Ombwayo J) filed a notice of appeal on 7th April, 2016 but failed to file the memorandum of appeal and record of appeal within the required time. The applicant pleads with the Court to extend time to enable it lodge the appeal contending that the failure to file the memorandum of appeal and record of appeal within time was caused by inability to obtain certified copies of proceedings and judgment, despite having applied for them immediately after the judgment on 5th April, 2016. The applicant urges the Court that it has an arguable appeal as the dispute involves public land that has been unlawfully acquired to the detriment of the public. In his further affidavit, Bishop Korir relying on information from his advocate, explains that the court file was missing for a long time hence the inability to obtain the proceedings.

[4] In opposing the motion, Mr. Tororei, learned counsel for the 2nd respondent, maintains that the applicant has not adequately explained the

delay in filing the appeal; that the application was brought out one year after an application for stay of execution was determined; and that even relying on the certificate of delay belatedly produced no explanation has been given for the period 19th December, 2016 to 8th June, 2017. The court was urged to find the delay unreasonable and unexplained.

[5] For the 3rd respondent, it was argued that there was laxity on the part of the applicant as the application for extension of time was brought after an inordinate period. It was contended that the application was an afterthought only intended to delay the conclusion of the litigation, and that the delay was prejudicial to the public.

[6] For the 4th respondent, it was also argued that the application lacked merit, that despite the copies of proceedings having been ready by 19th December, 2016 it took another six months before the application was filed.

[7] This being an application under Rule 4 of the Court Rules, this Court has discretion to extend time provided that the discretion is exercised judicially. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others**, (Supreme Court Application No. 16 of 2014), laid down the following as the under-lying principles that a Court should consider in the exercise of that discretion to extend time:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- ***Whether the application has been brought without undue delay; and***
- ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.***

[8] In this case, judgment was delivered on 1st April, 2016, proceedings applied for on 5th April 2016, and a notice of appeal was lodged on 6th April, 2016. According to a letter dated 24th March, 2017, the proceedings were supplied to the applicant on 19th December, 2016. Under Rule 82(2) of the Court Rules, once a party has filed a notice of appeal, the party is required to lodge the memorandum and record of appeal within sixty(60) days from the date when the notice of appeal was lodged. However, where an application has been made for certified copies of the proceedings, and a copy of the letter bespeaking the proceedings was been served on the respondent, the period certified by the Registrar as necessary for the preparation and delivery of the proceedings may be excluded from the computation of time. Thus the period can only be excluded where the Registrar of the Court has issued an appropriate certificate.

[9] The 2nd respondent has annexed a letter dated 31st March 2017, which was a response to the applicant’s letter dated 24th March, 2017 in which the Registrar of the Court indicated that he was unable to sign the certificate of delay since the proceedings were typed within time. The advocate for the applicant annexed to his further affidavit a certificate of delay, which indicated that the time taken for filing of proceedings was from 28th September, 2016 to 19th December, 2016. This means that there is no explanation for the time taken from 19th December 2016 to 8th June, 2017 when the applicant filed his motion. The delay of about six (6) months is inordinate and has not been explained.

[10] In addition the Certificate of delay indicates that although the request for proceedings was made on 5th April 2016, no action was taken on that request until payment of the required fees was made on 29th September 2016, hence the certification of the period 29th September to 19th December 2016. In his further affidavit Bishop Korir appears to attribute delay in this regard to an application for stay of execution that the applicant had filed in the High Court, and in regard to which an order for stay of execution was issued on 3rd June 2016. This does not provide any explanation for the delay in paying the court fees. In any case even after 3rd June 2016 payment was not made for a further 3 months. The attempt to lay the blame on the court registry by claiming that the court file was missing was categorically denied by the Registrar of the Court in the letter dated 31st March 2017 that was annexed to the replying affidavit of Fredrick Kiptarus Kemei. I find that the applicant has failed to provide a tenable explanation as to why it took more than 5 months to pay the court fees, and this delay cannot be condoned.

[11] Further, the applicant has not availed any draft memorandum of appeal or demonstrated to the court that it has an arguable appeal that is not frivolous. The applicant only availed to the Court a copy of the judgment intended to be challenged on appeal, after it was pointed out that this was not provided. Availing a judgment on its own is not sufficient, as the court cannot be expected to read the judgment and conjure up some grounds of appeal.

[12] I find that the applicant has been lackluster in the prosecution of this application and has not laid any basis upon which I can exercise my discretion in his favour. There is no merit in this application and no justification for prolonging this litigation any further. Accordingly the motion is dismissed with costs.

Dated and delivered at Eldoret this 19th day of April, 2018.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.