



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 291 OF 2017

BETWEEN

GEORGE MUNIU KINUTHIA.....APPLICANT

AND

SAMWEL WAWERU MWANGI.....RESPONDENT

(Application for extension of time to file and serve the record of appeal in an intended appeal from the ruling and order of the Environment and Land Court at Nairobi (L.N. Gacheru, J.) dated 7th July, 2014

in

ELC No. 402 of 2012)

RULING

On 7th July, 2014 the Environment and Land Court (Gacheru, J.) struck out the applicant’s defence holding that it did not raise any triable issue. The respondent’s suit then proceeded for formal proof and judgment slated for 21st November, 2018. The applicant was aggrieved by this outcome and has filed a notice of appeal evincing an intention of challenging that decision. The notice was filed within the time stipulated by procedure. The applicant was however not able to get, within the required time, certified copies of the ruling and typed proceedings in order to lodge an appeal. In the end, the applicant was accordingly supplied with these documents on 28th June, 2017. However, the certificate of delay was not issued until 11th October, 2017. It acknowledged a delay of 1075 days.

On 14th December, 2017 the applicant took out this motion under **Rule 4** of the Court of Appeal Rules for an order:

“b) THAT this Honourable Court do hereby make an order that the applicant be granted leave to file record of appeal out of time and that the time for filing and serving the said record of appeal be enlarged.”

For the applicant, Mr. Thuita, learned counsel, submitted that the delay was not inordinate; that he filed the notice of appeal within the prescribed time, but it took a prolonged period of time for the court to furnish his firm with the ruling and proceedings as confirmed by the certificate of delay for 1057 days; and that by the time the certificate of delay was issued, the applicant was already out of time. Counsel urged the Court to find that, since the application was filed approximately 1½ months after receipt of the certificate of delay, the delay was not inordinate; and finally that the respondent stands to suffer no prejudice.

Mr. Mugo, learned counsel for the respondent, opposed the application and submitted that the application had been overtaken by events as the court had reserved the judgment for 21st November, 2018; that upon delivery of the judgment, there will be no opportunity to hear the appeal challenging the striking out of the defence; and that in any case, the delay was inordinate as it took the applicant 65 days to bring this application after collecting the certificate of delay.

The principles established by this Court upon which the judicial discretion under **Rule 4** may be exercised are laid out in the case of **Mwangi V Kenya Airways Ltd** (2003) KRL 486, in a long line of cases as follows:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application

for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

‘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 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 reason 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.’

Whether a delay is prolonged and inordinate is a question of fact and will depend on the peculiar circumstances of each case and whether despite the delay justice can still be done. Leave will also be granted if the applicant demonstrates to the satisfaction of the Court that, for plausible reasons, he was unable to lodge the appeal within the time stipulated in law; and that the intended appeal has a chance of success.

This application was brought 62 days after the applicant received the certificate of delay, and therefore, in my judgment, there has been no delay that can qualify as being inordinate. I am, however, concerned about two competing interests. The trial in the court below has reached an advanced stage and judgment was due on 21st November, 2018. If time is enlarged for the applicant to challenge the striking out of his defence, will this be prejudicial to the respondent? With the striking out of the defence, the applicant’s grievance that has kept him and the respondent (and perhaps their parents) in court since 1993 or even earlier, came to an end, the substratum having dissipated. He believes that his claim to the suit property has a reasonable chance of success; that his counterclaim in **Nbi HCCC No. 2863 of 1993** was not considered on its merit but proceeded *ex parte* and was dismissed. Being a land dispute, it is always in the interest of justice, where possible, to determine the merits of the controversy. On the other hand, after the defence was struck out and there being no stay of proceedings, the respondent proceeded to formally prove his claim and is awaiting or has received the outcome of the trial. To grant leave and enlarge the time for bringing the appeal will have the effect of winding back the clock on the respondent, considering that the defence was struck out in 2014. From the correspondence, it is apparent to me that the delay between 2014 and 2017 when this application was filed cannot be attributed to the applicant. The certificate of delay discounts the period between the whole of 18th July, 2014 and 28th June, 2017.

It took another four months up to October just to issue the certificate. This application was taken out on 14th December, 2017 and though brought under certificate of urgency was listed for the first time when it was canvassed before me on 23rd October, 2018, almost one year later. How can the applicant be blamed when it is the courts that have taken this long to determine this dispute at each stage?

Without being definitive on the arguability of the appeal intended to be brought, and looking at the draft memorandum of appeal, it is my view that the appeal is not frivolous. The delay that the respondent may experience by this application being granted can be compensated in damages.

For these reasons, I allow the application and order the applicant to lodge and serve the appeal within 14 days from the date of this ruling. Costs to the respondent.

Dated and delivered at Nairobi this 23rd day of November, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR