

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KANTAI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 27 OF 2018 (UR 25/2018)

BETWEEN

KENYA POST OFFICE SAVINGS BANK.....APPLICANT

AND

SIMIYU ABIUD WASIKE.....RESPONDENT

(Being an Application for leave to file Notice of appeal out of time from the judgment of the Environment and Land Court of Kenya at Nairobi, (Hon L. Gacheru) delivered 7th September, 2017 in

ELRC NO. 2834 OF 1995)

RULING

The applicant, Kenya Post Office Saving Bank prays in the Motion on Notice said to be brought under various provisions of law including **rule 4** of the rules of this court that I grant leave to the applicant to file and serve a Notice of Appeal out of time against the decision of the Environment and Land Court delivered on 7 th September, 2017.

In grounds in support of the application and in a supporting affidavit of one Peter Kioni who is the Assistant Legal Manager of the applicant, it is stated amongst other things that judgment was delivered as stated, that the applicant was not aware of delivery of judgment as no communication was made to the applicant and that no notice was served on the applicant; that the applicant wrote various letters dated 15th March, 2017, 19th June, 2017, 11th April, 2017, 13th April, 2017 and 19th September, 2017 to the Deputy Registrar of that Court asking to be notified of Judgment date but no response was ever received by the applicant; that the applicant became aware that judgment had been delivered when its Advocates learnt from the respondent's Advocates clerk that judgment had been delivered on 7th September, 2017 in the absence of the applicant.

It is further stated that the applicant then wrote to that court requesting for certified proceedings and judgment; that the applicant then instructed its advocates to appeal; that the intended appeal raises serious points of law and has an overwhelming chance of success; that the subject matter involved ownership and possession of a parcel of land where the applicant which is a financial institution was at the material times the registered owner and that there has not been inordinate delay and that, if I grant the application , it will not prejudice the respondent.

The application is contested through various affidavits. **Simiyu Abiud Wasike**, the respondent in his replying affidavit confirms that he was informed that judgment had been delivered in the absence of the applicants' advocates; that the applicant has not disclosed when it came to know of the delivery of the judgment; that there are procedural flaws in the application; that the application is incompetent because it cites other rules like **rule 5 (2) (b)** of the rules of this court, that the application has been filed late, and, according to his information and belief, he believes that the applicant knew of the delivery of judgment much before.

There is then a replying affidavit of Eddy Aluga Lihasi, a court clerk and court process server at the law firm of S. Musalia Mwenesi Advocates who were and are on record for the respondent. He says amongst other things that he attended court accompanying an advocate from that firm on 7th September, 2017 when judgment was delivered. He further states that there was no representation by counsel for the applicant; that he knows a clerk from the law firm of the applicant and that he had met him at the court premises soon after judgment had been delivered and had enquired of him why the applicants' counsel had

not attended court for delivery of judgment; that he had perused the application for extension of time and did not agree with the reasons given; that he doubts the physical address of the applicants advocates law firm;

The Clerk Eddy Ahuga Lihasi swore another affidavit where he says that the applicant's advocates had not provided a proper physical address to Court; that the letters stated in the applicant's application which were written to the Deputy Registrar of the Environment and Land Court were not copied to the Judge; that he had met a clerk from the applicant's lawyers on 14th September, 2017 and had discussed the issues of delivery of judgments in the case where the applicant intends to appeal.

Then there is an affidavit of Simon M. Mbinda, a law clerk and a process server employed by the applicant's advocates who says that he knows his colleague Lihasi. He denies that he was informed by that clerk of delivery of judgment on 7th September, 2017 but states that, that clerk informed him of the said judgment on 5th October, 2017 when they met within the corridors of the court premises. And that when he received that information he passed it on the 6th October, 2018 to a lawyer in their office which according to him prompted the letter to the Environment and Land Court dated 9th October, 2018.

I have considered the application and I am surprised by the ammunition that has been employed by the applicant and the respondent in support or opposition to the motion. My understanding of a **rule 4** application is that it is not to be accompanied by complex issues or matters which may require an investigation. I should be given basic material by parties to make a decision whether to exercise my discretion to grant or refuse extension of time. When counsel for the parties ask their clerks to give me contradictory factual information on whether they met or what they discussed at a meeting how am I to rule on the issue? Neither the applicant nor the respondent applied to cross-examine the clerks on their depositions in the affidavits where contradictory information is given and I did not find much use in the depositions in the affidavit of the court clerk. I do not have the material or capacity to give the contradictory claims a judicial interpretation and decision and I would say that it was not helpful to me at all.

In a **rule 4** application like the one before me, it is settled that the decision whether or not to extend time for appealing is a discretionary one and it is also well settled as was stated in the case of **Leo Sila Mutiso vs Rose Hellen Wangare Mwangi Civil Application, No. Nai 255 of 1977** that in general, the matters which I need to consider or take into account in deciding whether to grant an extension of time are: firstly, 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 respondents if the application is granted.

I note that judgment here was delivered on 7th September, 2017. I have noted the averments in the affidavit of the applicant and the annexures thereto showing that by various letters which I have already enumerated, the applicant wrote to the Environment and Land Court enquiring when the judgment would be delivered, it having been to be delivered on notice. I am informed and the record appears to confirm this, that the Deputy Registrar of the Environment and Land Court did not respond to any of these letters. That alone shows a weakness on the part of that court and it is a weakness that should be addressed. Parties or their advocates are entitled to information and letters written in a formal or official manner like the letters I have seen should have been responded to. That would accord with good governance, a practice that a court is enjoined to employ. It is not right or correct for a party to write seeking information and the request is blatantly ignored leaving the party in the dark without any information.

By the letter of 19th June, 2017, advocates for the applicant referred to even other letters they had written and requested to be advised when judgment would be delivered. They even named the Judge who had handled the case in that letter but they were not favoured with a response.

There were other letters but I single out the letter of 19th September, 2017 which repeated the same issues stating, further, that the lawyers had not received any notice of delivery of judgment which had been set for delivery over 8 months earlier. They were not responded to.

The letter of 9th October, 2017 enclosed copies of various letters that had been written and stated that the lawyers had now come to learn that judgment had been delivered. I note that the motion was presented before this Court on 7th February, 2018. I do not think in the circumstances, that there was inordinate

delay in presenting the application.

The applicant was not indolent or laid back – it kept enquiring from the Court when judgment would be delivered. Their efforts were frustrated by lack of communication from the Court.

I have also noted the subject of the matter before the trial court which is land and I note also, that the applicant is entitled to a right to appeal.

I have considered the principles relevant in an application like this one and I am prepared to exercise my discretion in favour of the applicant.

I allow the Notice of Motion dated 7th February, 2018 and order that the applicant shall file and serve Notice of Appeal within 14 days of today. Costs of the motion shall be in the intended appeal.

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

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR