



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 56 OF 2018

BETWEEN

RICHARD KIPKEMEI LIMOAPPLICANT

AND

HASSAN KIPKEMBOI NGENY.....1ST RESPONDENT

LAND REGISTRAR – UASIN GISHU.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

ELDORET MUNICIPAL COUNCIL.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

ENOCK KIBIWOT KIPTANUI.....6TH RESPONDENT

(Being an Application for extension of time for the filing of memorandum and record of appeal from the judgment of the High Court of Kenya, Environment and Land Court at Eldoret, (Ombwayo, J.) dated 9th day of February, 2018 in **E & L Petition No. 4 Of 2013**)

RULING

[1] This is an application for extension of time for filing a memorandum of appeal and record of appeal and for an order that the memorandum of appeal and record of appeal already filed be deemed as duly filed.

The application is brought under **Section 3A** and **3B** of the Appellate Jurisdiction Act, Rule 4 of the Court of Appeal Rules (*Rules*) and **Article 48** of the Constitution of Kenya.

[2] The application is supported by the grounds on the body of the application. It is also supported by the affidavit of the applicant sworn on 14th May, 2018; a supplementary affidavit sworn on 16th August, 2018 and two affidavits of service sworn by **Pella Amugune Tsisaga** – a licensed process server.

The 1st respondent opposes the application on the grounds contained in his replying affidavit sworn on 29th May, 2018, and a further affidavit sworn on 2nd October, 2018. The 2nd, 3rd and 5th respondents oppose the application on the grounds contained in the grounds of opposition dated 12th September, 2018. The 4th respondent has also filed grounds of opposition dated 11th September, 2018.

Enock Kibiwot Kiptanui, the 6th respondent supports the application although he did not file any document. The respective counsel for the applicant, 1st respondent; 2nd, 3rd and 5th respondents and for the 4th respondent have filed written submissions and list of authorities.

[3] By a judgment delivered on 9th February, 2018, the Environment and Land Court (*ELC*) dismissed the applicant's petition for various declaration orders including a declaration that he is a legal owner of **plot No. Eldoret Municipality Block 7/178 measuring 0.0697 Hectares** and that the title documents held by Enock Kibiwot Kiptanui (*the 6th respondent in the ELC*) was invalid and should be cancelled.

It transpired that **Hassan Kipkemboi Ngeny**, the 1st respondent in this application had also a lease in respect of the same property. The ELC was confronted with a situation where the applicant, 1st respondent and the 6th respondent had a lease certificate in respect of the same property. Each of the registered leaseholders explained how he acquired the plot.

Ultimately, the ELC after considering the evidence and the law adjudged that the certificates of lease produced by the applicant and the 6th respondent were not procedurally obtained and that the certificate of lease produced by the 1st respondent was procedurally obtained. Pursuant to that finding the court nullified the certificates of lease held by the applicant and one held by the 6th respondent.

[4] The undisputed facts show that the applicant filed a notice of appeal within the 14 days stipulated by **Rule 75(1)** of the Court of Appeal Rules. By a letter dated 22nd February, 2018, the applicant applied to the Deputy Registrar for certified copies of the proceedings and judgment to enable him to file the appeal.

The notice of appeal indicates that it was to be served on the advocates for the parties. Similarly, the letter bespeaking the proceedings shows that it was copied to the advocates for the parties.

By a letter dated 12th April, 2018, the Deputy Registrar informed the applicant's advocates that the proceedings were ready for collection upon payment of the requisite fees. The applicant's advocates paid the requisite fees on 13th April, 2018.

The proceedings were certified by the Deputy Registrar on 20th April, 2018 and collected by the applicant's advocates on 24th April, 2018. On 4th May, 2018, the applicant lodged **Civil No. 17 of 2018** and filed the present application on 16th May, 2018.

[5] The 1st respondent opposes the application on the grounds, *inter alia*, that, the Notice of Appeal was not served within the stipulated 7 days or at all; that the letter dated 22nd February, 2018 bespeaking the proceedings was never served on the 1st respondent's advocates; that the record of appeal was filed on 4th May, 2018, which was 14 days outside the stipulated 60 days; that filing an appeal out of time and thereafter applying for extension of time is to remedy an illegality and that the appeal is not arguable. The other respondents raise similar grounds for opposing the application.

[6] Pella Amugune Tsisaga, a process server has deposed that he served the Notice of Appeal and the letter dated 22nd February, 2018 on the offices of the respondents' advocates on various dates between 27th February, 2018 and 2nd March, 2018.

This service was disputed particularly by the 1st respondent's advocates.

[7] The broad principles governing the discretion to extend time have been restated by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 others [2014] eKLR** Under **Rule 4** of the Court of Appeal Rules, the Court has unfettered discretion to extend time which discretion should be exercised judicially. The purpose of that discretion is primarily to serve the ends of justice. As **Article 159 (2) (d)** of the Constitution, provides justice, should be administered without undue regard to technicalities of procedure.

[8] By **Rule 82(1)**, an appeal should be filed within 60 days from the date the Notice of Appeal was lodged. In this case, the Notice of Appeal was lodged on 20th February, 2018. The appeal was lodged on 4th May, 2018 which was approximately 14 days out of time.

Firstly, that is not an inordinate delay. Secondly, the present application was filed on 16th May, 2018 which again is not an inordinate delay. Thirdly, the applicant has given a reasonable explanation for delay in filing the appeal.

The documents produced by him show that the proceedings were not ready until 12th April, 2018, and that he paid for the proceedings on 13th April, 2018. He has explained that the proceedings were certified on 20th April, 2018 and that he collected them on the same day.

[9] There is a dispute whether the applicant served the letter of 22nd February, 2018 to the respective advocates as stipulated by proviso to Rule 82(1).

Further, the Deputy Registrar has not certified the time required for the preparation and delivery of the copy of the proceedings.

There is therefore uncertainty as to whether time for the preparation and delivery of proceedings could be excluded from computation of time. Had the applicant complied with the provisions of Rule 82(1) and its proviso it would have meant that the appeal filed on 4th May, 2018 would have been filed within time.

But that is not the applicant's case. By filing the present application, the applicant implicitly concedes that the appeal was filed out of time. The compliance with Rule 82(1) could have precluded the time from running but the non-compliance does not bar the applicant from applying for extension of time to file the appeal.

[10] By **Rule 12(1)** the Deputy Registrar cannot reject any document filed out of time by a party. The Deputy Registrar is obliged to accept the document and mark the document as "*lodged out of time*". Thus, the lodging of the appeal out of time is not an illegality as alleged. Furthermore, Rule 4 permits extension of time whether before or after the doing of the act for which extension of time is sought.

Moreover, there is no provision in the Court of Appeal Rules which bars a party from lodging a document out of time and thereafter applying

for extension of time to file the document.

[11] The copy of the Memorandum of Appeal filed shows that the appeal is arguable on points of law and fact. The lengthy judgment of the ELC shows that the court had to consider disputed issues of fact and weighty issues of law.

There was evidence that the disputed plot had been offered for sale for Shs. 35,000,000/=. Thus, the appeal relates to a valuable property. In the interest of justice the applicant should be afforded an opportunity to exercise his right of appeal.

[12] The respondents have not demonstrated that they would suffer undue prejudice if time is extended. On the other hand, the applicant would suffer prejudice as his title was registered first and as he claims to have constructed rental buildings in the disputed plot.

[13] Having considered the application and the case of the respective respondents as disclosed in the materials before the Court, I am satisfied that the Court should exercise its discretion in favour of sustaining the appeal.

Accordingly, the application is allowed. Time is extended for filing the memorandum of appeal and the record of appeal. The appeal already filed is deemed as duly filed. The costs of the application shall be costs in the appeal.

I so order.

DATED and Delivered at Eldoret this 8th day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR