



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 129 OF 2017

BETWEEN

EDWARD KIMITI KAHIU.....APPLICANT

AND

HENRY NJOROGE KAMAU.....RESPONDENT

(An application to file the appeal out of time against the judgment and order of the High

Court of Kenya at Nairobi (L. N. Gacheru, J) dated 21st November, 2014

in

E.L.C No. 151 of 2012 (O.S))

RULING

1. In a judgment delivered on 21st November 2014, the Environment and Land Court decreed that the respondent has acquired title to one acre of the applicant's property known as L. R. No. 4726/33 situated in Kiambu District East of Limuru Township by adverse possession. The applicant, Edward Kimiti Kahiu, intends to appeal that decision.

2. In his application dated 23rd May 2017, the applicant seeks leave to file and serve his record of appeal out of time and for his draft memorandum of appeal bearing the same date to be deemed as duly notice of appeal was filed and served within the prescribed time, the registry in the lower court delayed in providing him with copies of the proceedings and the judgment the subject of the intended appeal.

3. Appearing for the applicant, Ms. Kibebbo, learned counsel for the applicant referred to the application and the affidavit of the applicant in support in which it is deposed that the judgment was delivered by the Environment and Land Court on 21st November 2014; that by a letter dated 26th November 2014 that was copied to the advocates for the respondent, the advocates for the applicant applied for certified copies of the proceedings and of the judgment; that a notice of appeal was filed on 28th November 2014, which was within the period prescribed by the rules of this Court; that the advocates for the applicant followed up on the request for the typed proceedings and judgment and wrote many reminders to the Deputy Registrar; that the proceedings were eventually typed and certified on 21st December 2016 while the judgment was typed and certified on 2nd March 2017; that an application requesting for a certificate of delay was made by a letter dated 20th March, 2017 but the same had not been issued. the respondent. However, in opposition to the application, learned counsel for the respondent Mr. Mbichire referred to grounds of opposition filed on 17th July 2018 that: the application was filed 3 years from the date of judgment and that the delay is prolonged and not excusable; that no grounds have been established to warrant extension of time; that the application is prejudicial to the respondent; and that the intended appeal is not meritorious.

5. I have considered the application and the rival submissions. In Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai.255 of 1997) (unreported) the Court stated 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.”

6. The categories of factors to be considered when exercising that discretion are not closed and circumstances vary from case to case, it is not in doubt that the notice of appeal was filed and served promptly on 26th November 2014 after the impugned judgment was delivered on 21st November 2014. It is also not in doubt that by a letter dated 26th November 2014 that was copied to the advocates for the respondent, the advocates for the applicant applied for typed proceedings and the judgment. Subsequent numerous reminders to the court to expedite the typing of the proceedings and the judgment were exhibited to the applicant's affidavit in support of the application and have not been challenged. It was also not contested that typed judgment was certified on 2nd March 2017 and a certificate of delay subsequently sought by a letter dated 20th March 2017 which was however not filed with the Environment and Land Court until

17th May 2017. The present application was filed on 9th June 2017.

7. As already noted, in the intended appeal, the applicant plans to challenge findings and the holding by the lower court that the respondent has acquired title to one acre of the applicant's property known as L.R. No. 4726/33 by adverse possession. It is the applicant's case that the learned trial judge misdirected herself on the facts and on the applicable legal principles, substantially caused by the court in not providing the proceedings and the judgment in a timely fashion. I am also unable to conclude, as I was urged to do by the respondent, that the intended appeal is one that is not worthy of consideration by the Court. I am therefore inclined to exercise my discretion in favour of the applicant by allowing the application. I accordingly grant prayer 1 of the application. The applicant shall file and serve his memorandum of appeal and record of appeal within 45 days from the date of delivery of this ruling. The costs of this application shall abide the outcome of the intended appeal.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of December, 2018.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is

The true copy of the original.

DEPUTY REGISTRAR