IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 153 OF 2018 (UR 128/2018)

BETWEEN

MOHAMMED AZHAR S/O MOHAMED AKRAM.....APPLICANT

VERSUS

HARDEV SINGH KALSI.....1ST RESPONDENT

ILAM DIN S/O UMAR DIN.....2ND RESPONDENT

MOHAMED ASLAM S/O ILAM DIN.....3RD RESPONDENT

ASGIRI D/O ILAM DIN.....4TH RESPONDENT

MOHAMED AKHTAR.....5TH RESPONDENT

(An Application for extension of time to lodge and service Notice of Appeal and Record of

Appeal out of time from the Judgment of the Employment and Land Court

*at Nairobi (**J. M. Mutungi, J.**) delivered on 23rd July, 2015*

in

ELC. No. 186 OF 2012 (OS)

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RULING

[**1**] This application is brought under **Article 159(2) (9) (d)** and **(e)** of the Constitution; **Sections 3A and 3B** of the **Appellate Jurisdiction Act Rule 4** and **5(2)(b)** of the **Court of Appeal Rules** for orders that leave to lodge and serve an appeal out of time against the judgment of **Mutungi, J.** delivered on 23rd July, 2015 be granted; proceedings in **ELC 186 of 2012 (OS)** be stayed pending the hearing and determination of the intended appeal or in the alternative, execution of judgment in ELC No. 186 of 2012 be stayed pending the hearing and determination of the intended appeal

[**2**] A single judge has no power to grant an order of stay of proceedings or stay of execution. Therefore, the two prayers will not be considered. Although the first prayer is not clear as drafted, it is clear that the applicant seeks extension of time principally under Rule 4 of the Court of Appeal for lodging a notice of appeal, record of appeal and memorandum of appeal.

[**3**] Sometimes in 2012, the 1st respondent **Hardev Kalsi Singh** filed an originating summons (OS) against the applicant and the 2nd, 3rd, 4th and 5th respondents in the present application, for a declaration that Plot No. LR 209/4931/21 Nyuki Close (**suit land**) be deemed to belong to the 1st respondent by adverse possession; an order that the 1st respondent be registered as the owner; and an order of injunction to restrain the respondents from trespassing on the suit land. The originating summons was supported by the affidavit of the 1st respondent. He stated in the affidavit, amongst other things, that he forcefully moved into the property in 1987 after **Mohammed Aslam** (**2nd respondent**) failed to pay back the monies he had lent to him; that at that time the suit property was registered in the names Ilam Din s/o Umar Din;

Mohamed Aslam s/o Ilam Din; Asgiri d/o Ilam Din; Mohamed Aslam as a trustee for Mohamed Akhtar (Minor); Ilam Din s/o Umar Din as trustee of Mohamed Azhar s/o Mohamed Akhram (minor); that he had been in occupation without disturbance until January

2012 when **Mohamed Azhar** (**applicant**) tried to forcefully occupy the property, that when the applicant failed to get possession, he filed a suit in the Business Premises Rent Tribunal seeking possession for default in payment of rent of Shs. 15,000,000/- over a period of 25 years, that eventually the applicant levied distress for rent amounting to Shs. 31,470,000/-; that the suit property is now registered in the names Ilam Din s/o Umar Din; Mohamed Aslam s/o Ilam Din; Asgiri d/o Ilam Din; Mohamed Akhtar s/o Mohamed Akram; Mohamed Azhar s/o Mohamed Akram.

[**4**] The applicant's replying affidavit to the OS has not been availed. However, the facts stated in the impugned judgment show that the applicant contended, *inter alia*, that he owned an equal share of the suit property; that he believed the 1st respondent was brought into the property by Mohamed Aslam who was one of the owners of the property as a tenant; that the 1st respondent insisted that he was owed money by Mohamed Aslam and would not vacate the property until he was paid his money; that Mohamed Aslam was deported from the country in 1987 and died in the same year; that the 1st respondent used to pay rent to Mohamed Aslam and later to his daughter; that the applicant was demanding rent from the 1st respondent; that he, the applicant, suffered a stroke in 2006 and slightly recovered in 2011 when he continued to demand rent from the 1st respondent.

[**5**] The OS was heard by way of affidavits. Apparently, the 2nd, 3rd, 4th and 5th respondents did not participate in the trial. After the evaluation of the evidence, the trial court allowed the OS and granted reliefs, *inter alia,* that the 1st respondent had acquired title to the suit land by adverse possession.

[**6**] The appellant stated in the supporting affidavit that he was aggrieved by the decision of the court; that he sought advice from a lawyer who advised him to file an application for review of the judgment which application was dismissed on 22nd September 2017; that he instructed another advocate to file an appeal but could not get money to finance the appeal; that the delay was due to wrong advise and that he has an arguable appeal with high chances of success.

[**7**] The 1st respondent restated the history of the dispute in his replying affidavit and contended that the applicant is estopped from filing an appeal having opted to file a review; that the applicant is guilty of undue delay; that the applicant has not sought leave to act in person and also leave to appeal; and that the application is an abuse of the process of the court as the Court is *functus officio*.

[**8**] The jurisdiction of the Court to extend time under **Rule 4** of the Court of Appeal Rules is discretionary and the discretion is unfettered. The factors which the Court takes into account in deciding whether or not it should exercise its discretion in favour of the applicant include the merits of the intended appeal or appeal, the length of delay, reason for delay, the degree of prejudice that a respondent is likely to suffer should an application be allowed and the duty of the court to administer justice untrammeled by undue technicalities of procedure.

[**9**] As regards the merits of the intended appeal, the applicant has filed a draft memorandum of appeal containing five grounds of the intended appeal. The 1st respondent claimed that he has been in adverse possession of the suit land from 1987. The applicant contended that the applicant was a mere tenant who has failed to pay rent for many years.

The OS was not heard by oral evidence. The applicant intends to challenge the findings of fact by the trial court. The documents presented to the trial court by the 1st respondent showed that the suit property was originally a leasehold from the Government which was owned by five persons as tenants in common in equal shares. Two of them were registered as trustees for two minors. However, on 25th August 2008, a new grant of lease was issued for a term of 50 years from 1st July 2003 to the applicant, 2nd, 3rd, 4th and 5th respondents as tenants in common in equal shares. Although the OS indicated that all the respondents in the OS were to be served in Nairobi, the applicant states that the 2nd respondent, Mohammed Aslam died abroad long before the OS was filed and that the other respondents live abroad.

The impugned judgment does not show that the respondents were served either in Nairobi or abroad. In respect of Mohamed Aslam, the court made a finding that the fact that his legal representative was not joined in the proceedings would not defeat the 1st respondent's claim.

[**10**] It is clear that as regards the merits of the claim for adverse possession against all the respondents, there are factual and legal issues worth investigation by the appellate court. For instance, did the claim for adverse possession relate to the original grant of lease which apparently expired or to the new grant of lease? Could a claim of adverse possession against the share of Mohamed Aslam (deceased) lie without joining his legal representatives in the suit? Could the claim be allowed against the shares of 3rd, 4th and 5th respondents in the suit property without giving them an opportunity to be heard? Did adverse possession relate to undivided share of Mohamed Aslam who allegedly owed the 1st applicant money or to undivided shares of the other co-owners? From the foregoing, I am satisfied that the intended appeal is not frivolous.

[**11**] The impugned judgment was delivered on 23rd July, 2015. The present application was filed by the applicant in person on 22nd May, 2018. That is a delay of nearly 3 years. However, it is clear that the applicant, on advice of his advocates then on record pursued an application for review of the judgment which was determined on 22nd September, 2017. Thus, the present application was filed 8 months since the date of determination of the review application. The applicant explains that he suffered a stroke in 2006 and could not get money to finance the appeal. He appeared in Court in a wheelchair. Much of the delay was caused when the applicant was pursuing another remedy in court. So, this is not a case where the applicant was lethargic.

By article 159(2) (d) of the Constitution, the courts in administering justice are required to be guided by the principle that justice should be administered without undue regard to technicalities of procedure.

From the nature of the dispute, it is in the interest of justice that in spite of the delay, the applicant should be allowed to exercise his right of appeal.

[**12**] It is not apparent that the 1st respondent would suffer undue prejudice if the application is allowed. He is still in possession of the suit property. On the other hand, the applicant will suffer far much greater prejudice if he is debarred from pursuing an appeal.

[**13**] The respondent states that the applicant has not obtained leave to appeal from the judgment of the High Court. **Rule 75(4)** of the **Court of Appeal Rules** provides:

> **"where an appeal lies only with leave or a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal."**

The implication of that rule is that leave to appeal where required may be obtained after the notice of appeal has been lodged. Furthermore, it would be preemptory and indeed inappropriate to rule on competence of the intended appeal at this stage.

From the foregoing, I am satisfied that this is a suitable case for exercising discretion in favour of the applicant.

Accordingly, I allow the application. The applicant to file and serve the notice of appeal within 14 days from the date hereof. The applicant to file and serve the record of appeal and the memorandum of appeal within 21 days of service of the notice of appeal. Liberty to the applicant to file an application for leave to appeal. If such leave is required within 30 days from the date hereof.

The costs of the application shall be costs in the intended appeal.

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

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR