



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 126 OF 2017 (UR 97/2017)

BETWEEN

PETER MBURU NJOROGE.....APPLICANT

AND

BARCLAYS BANK OF KENYA LTD.....RESPONDENT

*(An application for leave to appeal out of time from the judgment/decree of the High Court of Kenya at Nairobi (Kamau, J) dated 23rd March, 2015*

in

H.C.C Suit No. 3155 of 1994)

\*\*\*\*\*

**RULING**

1. The record of the application before me shows that the applicant, as a guarantor, charged his properties, Title Numbers Lari/Kirenga/1179 and Lari/Kirenga/1180 to the respondent to secure loan facilities extended to one Raphael Kinyanjui Gichinga, the principal debtor. It would appear that the principal debtor defaulted in the repayment of the loan facilities whereupon the bank, exercising its power of sale sold the applicant's said properties. In his suit before the lower court, the applicant sought, among other reliefs, nullification of what he contended was illegal sale and transfer of his properties by the bank. In a judgment that is the subject of the intended appeal that was delivered on 23rd March 2015, the High Court rejected the applicant's prayer seeking the nullification of the sale but ordered the bank to provide the applicant with a clear statement of account including the sale price and the utilization of the proceeds of sale.
2. The applicant was aggrieved by that decision and on 9th April 2015 he lodged a notice of appeal dated 7th April 2015 in the High Court. He now seeks, by his application dated 5th May, 2017 but lodged in Court on 6th June 2017, an order that he be allowed to file his appeal out of time.
3. Appearing before me on 11th October 2018, learned counsel for the applicant Mr. O. H. Momanyi referred to the motion, the grounds in support and the supporting affidavit urged that subsequent to the delivery of the judgment by the High Court on 23rd March 2015, the applicant applied for typed proceedings and the judgment; that the court file went missing and was not traced 26th June 2015; that parties were notified that the proceedings were ready for collection on 26th September 2016 and upon collection of the same, a certificate of delay was issued on 28th September 2016; thereafter the present application was filed on 6th June 2017.
4. Opposing the application, learned counsel for the respondent Mr. William Muthee referred to the replying affidavit sworn by Nereah Okanga, a Senior Legal Counsel of the respondent and urged: that the notice of appeal should have been filed and served on or before 6th April 2015 but the same was filed out of time on 9th April 2015 without leave; that the applicant's advocates letter dated 31st March 2015 to the Deputy Registrar and filed in the lower court on 9th April 2015 applying for proceedings and the judgment was not copied to the respondent; that time for the applicant to file the appeal started running on 9th April and lapsed on 8th June 2015; that no explanation has been given by the applicant why the appeal was not filed within time and why the present application was filed after two years; that the litigation in the matter started in 1994 and the judgment intended to be appealed has been executed.
5. I have considered the application, the affidavits and the submissions.

In Leo Sila Mutiso Vs. 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 are not closed and the Court is entitled to consider any other relevant factors. [see ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR.***] What then are the circumstances under which the applicant seeks exercise of discretion in his favour? To start with, the applicant asserts that the delay is attributable to the court file in the lower court having gone missing. He does not however offer material, whether by showing that letters were written to the court in that regard or an application for reconstruction of the court file made. He made a similar claim in the High Court but did not substantiate it.

7. The record of the application shows that the typed proceedings were ready on 10th September 2015 and notification to that effect was given to the advocates for the applicant by a letter from the Deputy Registrar High Court dated 20th September 2016. A certificate of delay was issued by the Deputy Registrar on 28th September 2016. The present application was then filed on 6th June 2017. In effect, a period of over 8 months lapsed from the time the certificate of delay was issued to the time the present application was filed. The applicant says that he had financial constraints that compelled him to apply to act in person in the High Court and to seek leave to appeal out of time. In that regard, his application to the High Court seeking leave to file an appeal to this Court out of time and to act in person was filed on 6th December 2016. In that application, he said that he was notified on 20th September 2016 that the proceedings and judgment were ready “*after a long struggle through different firms of advocates to trace the file*” and that he required leave to act in person as he had no money to engage the services of a lawyer. In a ruling delivered on 20th March 2017, the High Court determined that it had no jurisdiction to entertain the application for extension of time and stated that “the applicant is well advised to pursue the application herein” before this Court. The High Court did however allow the applicant to act in person. It was to take the applicant over two months before presenting the present application on 6th June 2017. He attributes the delay in presenting the application to the death of his brother who he says died two days before the delivery of that ruling and that he was engaged in burial engagements that caused him to delay filing the application. No material was exhibited to support that claim.

8. Although I am sympathetic that the applicant, after obtaining a certificate of delay, embarked on a seemingly futile exercise of applying to the High Court for extension of time, he has not satisfactorily demonstrated, why it took him over two months after the High Court refused his application to make the present application. Furthermore, beyond the statement in a certificate of delay that the judgment of the lower court was contradictory and his averment that he continues to “*suffer irreparable loss and damage as his properties were sold illegally*”, the intended grounds of appeal are not disclosed. It is also manifest from the judgment intended to be appealed that there has been other litigation, namely HCCC No. 2134 of 1992 and HCCC No. 2052 of 1989 between the same parties over the same subject matter.

9. All in all, I am not persuaded that I should exercise the court’s discretion in favour of the applicant. I accordingly dismiss the applicant’s application dated 5th May 2017 and filed in court on 6th June 2017 with costs to the respondent.

Orders accordingly.

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

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

*I certify that this is The true copy of the original.*

**DEPUTY REGISTRAR**