



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 232 OF 2018**

**BETWEEN**

**SALOME NJOKI NJUGUNA.....APPLICANT**

**AND**

**JACOB MURIUNGI MUREA.....RESPONDENT**

*(An application to file an appeal out of time from the whole judgment of the*

*Environment and Land Court of Kenya at Nairobi Milimani*

*(E.O. Obaga J.) dated 28th June 2018*

**in**

***Civil Appeal No. 82 of 2015)***

\*\*\*\*\*

**RULING**

The applicant Salome Njoki Njuguna by her notice of motion dated 6th August 2018 brought under Rule 4 of the Court of Appeal Rules 2018 seeks “leave to file appeal out of time” against the judgment of the Environment and Land Court at Milimani (Obaga, J.) dated 28th June 2018.

In the grounds supporting the motion which appears on its face it is stated that;

“(b) That the applicant did not contact us for further instructions despite being informed of the judgment and its delivery thereto.

(c) That by the time the applicant approached her advocate and instructions given as to the filing of an appeal, the 14 days statutory period had already lapsed hence the need to seek leave to file appeal out of time.

(d) That having been aggrieved by the decision by the learned judge E.O. Obaga, the applicant intends to file an appeal for which she has high chances of success.

(e) That the delay is not inordinate and/or this intentional which mistake is excusable.”

The supporting affidavit is sworn by Anthony Kangiri the advocate on record from the applicant and he swears as follows;

“2. That judgment was delivered on 28th June 2018 and decree issued on 2nd July 2018 in ELCA appeal No. 82 of 2015 at Nairobi, Milimani Law Courts by the learned Justice E.O Obaga. (Annexed is a copy of judgment and decree marked “A” and “B” respectively.)

3. That we informed our client, the applicant herein on the developments in the case and that she gives us further instruction on the way forward. (Annexed is a copy of the letter informing the applicant of the outcome of the High Court case

marked "C")

4. That we gave her time to think it with a view of filing an appeal and by the time she gave us instructions, the statutory 14 days of filing appeal had already lapsed as is evident from the copy of notice of appeal marked D and hence the need to seek leave of court to file appeal."

By a replying affidavit sworn on 13th September 2018 the respondent Jacob Muringi Murea opposes the application and gives a background of the dispute leading to the impugned judgment by which the learned Judge reversed on appeal the decision of the Magistrate's Court and ordered that the applicant do specifically perform the agreement between the parties for the sale of a house to the respondent. He expresses the view that given all the facts the applicant's intended appeal has no chances of success.

Those opposing views of the matter were argued before me by Mr. Ndungu who held brief for Mr. Kangiri and Mr. Mituga, respective learned counsel for the parties. Mr. Ndungu maintained that the delay in filing the notice of appeal of about four days was because the applicant delayed in giving them instructions. He conceded though that they were aware time was running out. He prayed that I exercise my discretion and extend time.

On his part, Mr. Mituga pointed out that the delay had not been explained and in the absence of such explanation it would make nonsense of this Court's Rules to extend time. He submitted that the applicant's clients were trying to wash their hands off her and there lies no word from her as to why she did not give instructions in time. The advocates were not blameless either because even though they swore that they received instructions on 13th July 2018, they did not file the notice of appeal until 16th July 2018 some 3 days later. As if that was not enough, they did not serve the said notice of appeal until 27th July 2018 which was outside the 7 days with which they should have done so. There is also no evidence that they requested for proceedings meaning they really are not serious about filing the appeal and they also did not file the application before me until 8th August 2018 which was nearly a month after filing the notice.

In answer to those instructions Mr. Ndungu maintained that they were awaiting the applicant's instructions and urged that extension of time would not occasion the respondent any prejudice.

I have considered the application and all the material placed before me including the cases cited by the respondents. My discretion in this matter is wide and unfettered but it is exercised in the basis of principle not whim, caprice or personal idiosyncrasy on the part of a Judge. My thinking on matter such as is before me is as I rendered it in JOHN WAWERU & ANOR vs. NATIONAL IRRIGATION BOARD & ANOR [2016] eKLR cited by the respondent

*"A judge considers a number of factors which, from authorities without number, can be reduced into the following;*

- a. The length of the delay;
- b. The explanation for the delay;
- c. Possibly, the merits of the appeal or intended appeal; and
- d. The prejudice that a grant of the application may occasion on the respondent(s)

See MWANGI vs. KENYA AIRWAYS LTD [2003]KRL 486.

The list is, from the nature of things indicative and is not exhaustive.

It is a trite that delay, however small, must be explained. It is not enough for a party to say. "I am late, let me in". He must say why he got late. Anything else would make nonsense of the rules that impose timelines for the doing of certain things. The timelines speak to the need for efficiently, expeditiousness and cost-effectiveness which are all part of the overriding objectives of the justice system. They also introduce certainty and rationality in the conduct of Court business and help to ensure that there is a level- playing field. All parties must abide by the rules. A cavalier and presumptuous disregard for rules must be firmly and resolutely resisted and rejected lest the justice project be reduced to a chaotic free-for-all in which caprice and chaos rule supreme. In short, all efforts must be made to obey the times set and if a party falls short, and seeks accommodation, he must place some material before the Court that will unlock the foundation of discretion his way. This is not a fettering of discretion but a logical effectuation of it."

In the case before me, the applicant herself has not filed an affidavit. She has made absolutely no attempt to explain why she did not instruct her advocates on time. The advocates themselves do not explain why they chose to write a letter instead of calling their client if at all they required their clients express instructions to file a notice of appeal. Such a notice is one they could have file as a matter of course to protect her interests. It was always open to them to withdraw it should it have turned at that she had no desire to appeal.

They concede that they knew time was running out but make no attempt to explain why no urgency attended their dealing with the matter. That they should have given their client "time to think about it" before filing the appeal in some kind of open-ended manner is not consistent with good practice or a respect for the rules and the timelines they impose.

As the applicant is seeking an equitable relief I need to look at her entire conduct as well as that of her legal advisers and what I see is that they have been slow and cavalier in their approach to this matter. They felt no questions about overshooting time lines and this extended to their belated service of the late notice of appeal and their failure to copy and serve the letter bespeaking proceedings.

I maintain that a delay no matter how slight must be explained in order for it to be excused. There is no explanation worth the application before me. Rules are to be obeyed and it cannot be right that a serial defaults and delays should be glossed over as insignificant.

When I consider also that what the learned Judge did is order that the applicant do honour her contractual obligations to the respondent freely entered. I find that to overlook without reason her latest default would be to visit further injustice and prejudice upon the respondent.

The upshot of my consideration is that this application is devoid of merit and it is dismissed with costs.

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

**P.O. KIAGE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**