



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT ELDORET**  
**(CORAM: MUSINGA, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. 58 OF 2016**

**BETWEEN**

**SIMON KIPROTICH ..... APPLICANT**

**AND**

**JAMES KIPTOO CHEMJOR .... RESPONDENT**

*(Application to enlarge time within which the applicant can file and serve record of appeal against the judgment delivered by (Ombwayo, J.) dated 9<sup>th</sup> October, 2015 in Environment And Land Court Case No. 19 Of 2015)*

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**RULING**

1. This is an application for leave to file and serve the record of appeal out of time. It is brought under **section 3A** of the **Appellate Jurisdiction Act** and **rule 4** of the **Court of Appeal Rules**.
2. The judgment sought to be appealed from was delivered by **Ombwayo, J.** on 9<sup>th</sup> October, 2015. The applicant neither provided a copy of the said judgment nor the decree that was extracted from the said judgment.
3. In his brief affidavit in support of the application, the applicant stated that after delivery of the judgment his advocates applied for the proceedings but they were not ready for collection until 28<sup>th</sup> June, 2016. He annexed to his affidavit a certificate of delay that was issued on 8<sup>th</sup> July, 2016. It certifies that the period from 29<sup>th</sup> October, 2015 to 28<sup>th</sup> June, 2016 was required for the preparation of the proceedings.
4. **Mr. Chebii**, learned counsel for the applicant, told the Court that between 28<sup>th</sup> June, 2016 when the proceedings were ready for collection and 27<sup>th</sup> July, 2016 when the application was filed, he was waiting for the applicant to sign the affidavit that was to accompany the application. Counsel added that the respondent would not suffer any prejudice if the application is allowed since he is enjoying use of the land in dispute.
5. The respondent opposed the application. In his replying affidavit, he deposed that there was no

evidence as to when the proceedings were paid for; the delay in filing the record of appeal had not been well explained; the applicant had not demonstrated in any way that the intended appeal had good chances of success and therefore the application ought to be disallowed.

6. The principles that guide this Court in dealing with an application of this nature are well settled. The factors to be considered in exercising the court's discretion include the length of the delay, the reasons for the delay, whether the applicant has an arguable appeal, and the degree of prejudice to the respondent if time is extended. See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS [2005] eKLR**.

7. The applicant's advocate wrote a letter dated 14<sup>th</sup> October, 2015 requesting for certified copies of the proceedings and judgment but the letter was not delivered to the court until 21<sup>st</sup> October, 2015. There is no evidence that any deposit was paid for the typing of the proceedings.

8. The proceedings were ready for collection on 28<sup>th</sup> June, 2016. Between that date and 27<sup>th</sup> July, 2016 when the application was filed there is no satisfactory explanation for the delay. I am however prepared to accept Mr. Chebii's explanation that he had written to his client to go to his chambers to swear the affidavit in support of the application.

9. The applicant did not, however, make any effort to demonstrate that the intended appeal has any chances of success. Apart from disclosing that the dispute was over a parcel of land, the applicant's counsel did not provide any other information at all. Neither a copy of the impugned judgment nor a copy of the proposed grounds of appeal was provided to the Court. The applicant has therefore failed to satisfy the court that he has an arguable appeal. This Court has severally held that failure to file a draft memorandum of appeal or to specify the intended grounds of appeal is fatal to an application for leave to file an appeal out of time. See **ELDORET WATER AND SANITATION COMPANY LIMITED V WILSON K. TUIGONG [2016] eKLR**.

10. Consequently, I am unable to exercise my discretion in favour of the applicant, with the result that the application for extension of time is hereby dismissed with costs to the respondent.

**DATED and Delivered at Eldoret this 16<sup>th</sup> day of February, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**