



IN THE COURT OF APPEAL
AT ELDORET
(CORAM: MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 61 OF 2016

BETWEEN

WINSTON MAKOKHA.....APPLICANT

AND

AGGREY WANJALA MUSIMA.....RESPONDENT

(Application for extension of time to institute his appeal arising

from the ruling and judgment of (Muchemi, J.)

dated 8th March, 2011

in

BUNGOMA HCCC NO. 41 OF 1996)

RULING

1. This is an application brought under **rules 4, 42 and 43 (1)** of the **Court of Appeal Rules**. It seeks extension of time to institute an appeal from the judgment of Muchemi, J. delivered in Bungoma HCCC NO. 41 of 1996 on 8th March, 2011. The judgment was in favour of the respondent.
2. The applicant's affidavit in support of the application discloses that upon delivery of the judgment, he filed a notice of appeal in person on 14th March, 2011 and on 21st March, 2011 engaged **M/s Otsiula Kweya & Company Advocates** to file an appeal and paid them a deposit of Kshs.15,000/=.
3. Instead of filing a memorandum and record of appeal, the said advocates instead filed an application for extension of time to file and serve a notice of appeal, saying that the one that he had filed had not been taken to the Deputy Registrar for endorsement and lodging in the Court of Appeal. On 14th June, 2016 this Court (**Gatembu, JA.**) determined that application, finding that the notice of appeal that had been filed was valid.
4. The applicant should have filed a memorandum of appeal within 60 days from 14th March, 2011 but did not do so, as he had believed that his former advocates' advice was sound; he stated. He added that

the intended appeal has overwhelming chances of success and annexed to his affidavit a copy of the impugned judgment and the proposed memorandum of appeal.

5. In his replying affidavit, the respondent stated that the application was lodged on 15th August, 2016, a period of over 60 days since the ruling of the applicant's application dated 3rd June, 2011; that there was inordinate delay in filing the application; that the intended appeal has no chances of success; that the intended appeal offends the doctrine of **res judicata** in so far as Bungoma Civil Suit No. 52 of 1989 is concerned and the eviction order granted in that matter in favour of the respondent, together with the orders in Kakamega High Court Civil Appeal No. 154 of 1991 which sought to challenge the eviction orders.

6. Both **Mr. Khakula**, learned counsel for the applicant and **Mr. Anwar**, learned counsel for the respondent, made their respective submissions which I have taken into consideration. I have also perused the ruling of Gatembu, JA. of 14th June, 2016. The notice of appeal filed on 14th March, 2011 was neither withdrawn nor struck out, but the learned judge declined to grant extension of time to file and serve another notice of appeal as doing so would have resulted in having two notices of appeal on record. In essence therefore, there is a notice of appeal on record, what the applicant is seeking is leave to file the record of appeal out of time.

7. In an application of this nature the Court exercises its discretion. The discretion must be exercised judiciously and not arbitrarily or capriciously. The principles that govern the exercise of that discretion are well settled. They include the length of the delay, the reasons for the delay, arguability of the intended appeal and the degree of prejudice that the respondent is likely to suffer if the application is granted. See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS** [2005] e KLR .

8. The ruling by Gatembu, JA. was delivered on 16th June, 2016. The applicant did not file the application for extension of time until 15th August, 2016. There is no explanation at all for that two month's delay. It is trite law that before this Court can exercise its discretion under **rule 4** of its Rules every delay must be explained by the applicant. See **RAEL MUNYAKA & 6 OTHERS V WAITALUK LAND DISPUTES TRIBUNAL & 3 OTHERS** [2007] eKLR, **JOEL TIROP BUSIENEI V DAVID RANDICHI** [2016] eKLR.

9. This further two months' delay compounds the earlier delay that had been discussed by Gatembu, JA. in the earlier ruling. I find the delay to be inordinate, considering that the notice of appeal was filed way back on 14th March, 2011.

10. Regarding arguability of the intended appeal, I have perused the draft memorandum of appeal and I have no doubt that the same is arguable.

11. Lastly, I do not think that the respondent would have suffered great prejudice were this application to be granted since he is already in occupation of the disputed parcel of land. However, since I have come to the conclusion that there was inordinate delay that was not explained, I am constrained to dismiss this application with costs to the respondent, as I hereby do. It is so ordered.

DATED and Delivered at Eldoret this 16th 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.