



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: MURGOR J.A.**

**CIVIL APPEAL NO. 45 OF 2016**

**BETWEEN**

**1. LUCAS MWITA MACHERA**

**2. NYANSIVI HABUBA MWITA.....APPLICANTS**

**AND**

**1. GATI MAROA WANGERA**

**2. ESTHER MBONE.....RESPONDENTS**

*(Application for extension of time within which to lodge and serve the Notice of Appeal and Record of Appeal from the Ruling of C. Mrima, J, dated 7<sup>th</sup> March, 2016 and delivered in Migori*

*in*

*ELC No. 595 of 2014)*

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**RULING**

By a Notice of Motion lodged on 14<sup>th</sup> June 2016, **the applicant, Lucas Mwita Machera** has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** to file a Notice and Record of Appeal.

The motion was brought on the grounds that the applicant was aggrieved by the decision of the High Court which dismissed his application wherein the applicant had sought to introduce a new witness; that the appeal had a high chance of success; that the application should be granted in the interest of justice.

The application was supported by the applicant's affidavit of the same date where he deponed that the respondents sought to evict him from Land reference No. Bukira/Buhiringera/101 (*the suit land*). In a further supporting affidavit of 28<sup>th</sup> August 2016, the applicant deponed that he had applied for the proceedings but, the registry was yet to supply them.

In a replying affidavit sworn by the 1<sup>st</sup> respondent, it was deponed that the applicant did not seek leave to introduce a new witness in the matter before the trial court, but instead had sought joinder of new

applicant/objectors by way of a Notice of Motion dated 5<sup>th</sup> July 2016 which application is pending before the trial court; that the intended appeal is a sham, vexatious and frivolous and an abuse of the court process.

In his submissions, the applicant stated that he was unable to file the notice of appeal and the record of appeal since he was unable to obtain the proceedings which were yet to be released by the learned judge of the trial court; that furthermore, at the time, he was facing financial challenges and was not in a position to file the appeal.

In reply, **Mr. C. Ayienda**, learned counsel for the respondents opposed the application and submitted that, he would be relying on the replying affidavit of Gati Maroa Wagera. Counsel stated that, the applicant's submissions were substantially different from the averments on the face of the application; that the supporting affidavit did not specify that the Migori High Court had delayed in supplying the proceedings; that when the Notice of Motion of 5<sup>th</sup> January 2017 filed by the applicant came up for hearing on 25<sup>th</sup> January 2017, the applicant sought to withdraw it, and instead prayed for leave to file an application for distribution of the estate; that leave to file the application was granted, and the applicant was ordered to file the application within 30 days. That the applicant did not file the application for distribution as ordered, and as a result, the matter was stood over generally. Counsel urged the Court to dismiss the application.

The application is brought under **rule 4** of this Court's rules, where it is settled, the Court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought. The case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** these principles were set out thus;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”***

The applicant stated that the reason for delay in filing the notice of appeal and the record of appeal was his inability to obtain the proceedings, which he submitted, were yet to be released by the learned judge. In his view, this sufficiently explained the delay, so as to warrant the grant of extension of time.

To begin with, the ruling was delivered on 17<sup>th</sup> March 2016. This application was lodged on 14<sup>th</sup> June 2016. The rules of this Court stipulate that the notice of appeal should be filed within 14 days from the date of the ruling or judgment. Considering that the notice of appeal is a fairly simple document, there is no reason why it could not have been filed within the prescribed time, and furthermore, the applicant has not provided any explanation for the failure to file the notice of appeal.

With regard to the record of appeal, **Rule 82** of this Court's rules require that once an appellant, in this case the applicant, has requested for proceedings from the registry, and served a copy of such request on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant or applicant, which period shall be excluded when computing delay.

An examination of the supporting affidavit does not disclose that a request for the proceedings was lodged in the High Court registry, and there is nothing to show that a copy was served on the respondents. There is also no copy of a Certificate of delay evidencing the length of time it took for preparation of the proceedings. Since neither the letter requesting for the proceedings, nor the Certificate of delay were produced, I am unable to discern whether a request was indeed made for the proceedings. There is also no evidence showing that the delay was occasioned by the registry, or the learned judge, as alleged by the applicant.

On the contention that he was facing financial constraints, there is nothing on the record to show that this was infact the position. But having said that, in the case of Francis Mwai Karani vs Robert Mwai Karani, Civil Application No. NAI. 246 of 2006, Omolo, J.A. in his ruling delivered on 11<sup>th</sup> May, 2007 in a similar matter addressed the issue thus:-

***“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time.”***

As a consequence, I find that the applicant has not provided any satisfactory explanation for the over two months delay in filing of the notice of appeal, and the over two weeks delay in filing of the record of appeal, when the 60 days period for filing is taken into account.

The applicant has not filed a draft memorandum of appeal, and the application does not disclose the nature of the intended appeal. For the reason that the grounds of his intended appeal cannot be ascertained, I am unable to determine whether the intended appeal is likely to succeed.

In conjunction with this, as the applicant has not advanced any reason for appealing the decision of the learned judge, I am unable to establish any basis for this application. With this in mind, if I were to order that time be extended to file the intended appeal, I am of the view that extreme prejudice would be visited upon the respondents, particularly as there is a succession cause pending in the High Court which continues to be unjustly prolonged.

Consequently, for the aforestated reasons, I decline to allow the application, and hereby order that the Notice of Motion dated 16<sup>th</sup> June 2016 be and is hereby dismissed with costs.

***It is so ordered.***

***DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of March, 2017.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**