



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI 280 OF 2016 (UR 229/2016)**

**BETWEEN**

**PETER GAITHO MACHUA.....APPLICANT/INTENDED APPELLANT**

**VERSUS**

**AGNES WANGECHI MACHUA.....RESPONDENT/INTENDED RESPONDENT**

*(Being an Application for extension of time to file and serve the Notice of Appeal and/or Record of Appeal out of time in the intended appeal from the Judgment of the High Court of Kenya at Nairobi (M.W. Muigai, J.) dated 15<sup>th</sup> February, 2016*

*in*

*H. C. C. No. 71 of 2011)*

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**RULING**

This is an application under section 3A of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules for extension of time for filing a notice of appeal and a record of appeal or alternatively to deem the notice of appeal already filed and served, as duly filed in time.

The application is supported by the affidavit of the applicant who depones that the judgment intended to be appealed against was delivered without notice to the applicant's advocates. The application is opposed on the grounds stated in the replying affidavit of the respondent.

The dispute in the Land and Environment Court related to division of two properties – Nairobi/Block/72/2032 and KJD Kitengela/5770 and shares in a company between two former spouses. The first property was registered in the joint names of former spouses. The second property was registered in the name of the husband – the applicant herein. The wife, the respondent herein, claimed, in essence, that she contributed financially towards the purchase of the two properties. On the other hand, the husband claimed that he brought the said properties without any financial contribution from the wife.

The wife owned 24% of shares in Nespete Enterprises while the husband owned 76%. At the time of hearing the dispute, the shares of the husband had been transferred to his daughter, Elizabeth Wangari. The husband claimed that the transfer was a forgery.

By a judgment delivered on 15<sup>th</sup> February, 2016, the superior court declared the wife as entitled to equal shares of the two properties. The superior court gave a further declaration that the shareholding in the company should remain in the names of the wife and the daughter until the dispute is ventilated in an appropriate forum.

The applicant filed a notice of appeal on 14<sup>th</sup> March 2016 signifying an intention to appeal against the decision.

The court has unfettered discretion under Rule 4 to extend time on such terms it thinks fit. The applicable principles in exercise of such discretion are well established. (See **Wasike v. Swala 1984 KLR 591**).

The applicant's explanation for the delay – that the notice of date of delivery of the judgment was not served on the advocates has not been refuted by concrete evidence. All what the respondent said is that the applicant's advocates knew the date or should have followed up with the court.

It is true that the respondent's advocates notified the applicant's advocates of the fact of the delivery of the judgment and enclosed a copy thereof by a letter dated 14<sup>th</sup> March 2016, and that the applicant's advocates filed a notice of appeal on the same day.

One of the grounds of appeal in the draft memorandum of appeal is that the learned judge erred in law in delivering the judgment without notice and in the absence of the applicant.

I am satisfied that the delay in filing the notice of appeal within 14 days of the delivery of the judgment as stipulated by the rules was *prima facie* due to failure by the court to serve a notice of the date of the delivery of the judgment to the applicant's advocates.

The present application though dated 27<sup>th</sup> October 2016 was not filed until 21<sup>st</sup> December 2016. There is no explanation for that inordinate delay. However, the duty of the court is to do justice. The applicant had evinced an intention to appeal by filing a notice of appeal and applying for a copy of the proceedings on the very date that his advocates were informed that judgment had already been delivered. The applicant's advocate states that the dispute has been emotive. The respondent does not say that she has been unduly prejudiced by the delay. From the nature of the dispute, it is just that it should not unduly weigh against granting the application.

I have perused the proposed grounds of appeal vis-a-vis the judgment. I am satisfied that the intended appeal raised arguable issues of fact and law fit for determination by the Court.

It has not been shown that the respondent would suffer undue prejudice other than the delay in the realization of the fruits of the judgment associated with the judicial process.

In the premises, I allow the application. As the applicant has not filed the application within a reasonable time, he is condemned to pay the costs of the application to the respondent and I so order.

The notice of appeal filed on 14<sup>th</sup> March, 2016 is deemed as filed with time stipulated by the rules. The record of appeal to be filed and served within 30 days

**DATED and delivered at Nairobi this 3<sup>rd</sup> day of March, 2017.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**