



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: D. K. MUSINGA, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 30 OF 2015**

**IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**JOEL TIROP BUSIENEI ..... APPLICANT**

**AND**

**DAVID RANDICHI ..... RESPONDENT**

*(An Application for Extension of time within which to lodge and serve the Notice of Appeal and the Record of Appeal from the Ruling of (OMBWAYO, J.) dated 5<sup>th</sup> May, 2015*

**in**

**ELDORET E & L NO. 998 OF 2012)**

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**RULING**

1. This application dated 2<sup>nd</sup> June, 2015 seeks extension of time for filing and service of the notice of appeal as well as the record of appeal.
2. In the applicant's affidavit in support of the application, he set out the brief history of the matter that gave rise to this application. He stated, *inter alia*, that in the High Court the respondent had filed a suit against him seeking to have a sale agreement between them in respect of land parcel number **NANDI/KAMOYIWO/1114** ("the suit land") rescinded and the applicant be refunded part of the purchase price. The respondent also sought to evict the applicant from the suit land.
3. The trial court granted the orders sought. The part of the purchase price that was ordered to be refunded was **Kshs.550,000/=**. The sum was to be paid within 90 days from the date of the judgment, which was 10<sup>th</sup> July, 2014.
4. The basis of the learned judge's finding was that consent of the area Land Control Board in respect of sale of the suit land had not been obtained.

5. The applicant was aggrieved by the High Court decision and filed an application for review, on the basis that there was indeed a consent issued by the area Land Control Board, evidenced by the chairperson who had sworn an affidavit to that effect. The application for review was dismissed on 5<sup>th</sup> May, 2015. The Court held, *inter alia*, that the applicant, who was the defendant, had testified that no consent had been issued by the Land Control Board, yet in his application for review he was alleging that he had discovered that a consent had actually been issued. The judge expressed serious doubt about the consent that was sought to be produced.

6. The applicant averred that the refund ordered by the trial Court, Kshs. 550,000/=, had not yet been made, yet the respondent had sold the suit land to a third party. He stands to suffer irreparable loss unless orders sought are granted, the applicant added. He also argued that the intended appeal has good chances of success.

7. In his replying affidavit, the respondent stated, *inter-alia*, that the delay of four (4) months from 5<sup>th</sup> May, 2015 when the ruling in the review application was given had not been explained.

8. The respondent contended that since the applicant had opted to seek a review of the trial Court's judgment, an appeal could not lie against the said ruling.

9. Further, the applicant had not demonstrated that he has a *prima facie case* and in the circumstances, the orders sought ought to be declined, the respondent stated.

10. In his brief submissions, **Mr. Bittok**, learned counsel for the applicant, said that there was a delay of 27 days from the date of delivery of the ruling in the application seeking review of the judgment to the date of filing of the application seeking extension of time. That was due to the Court's delay in providing certified copies of the proceedings. The applicant was also trying to have the dispute resolved amicably, counsel added.

11. **Mr. Choge**, learned counsel for the respondent, submitted that the intended appeal had no prospect of success, since the Land Control Board consent for sale of the suit land was obtained after the hearing.

12. Regarding delay in refund of the sum of Kshs.550,000/= as ordered by the trial court, counsel submitted that it had been occasioned by numerous post judgment applications filed by the applicant; including an application for stay of execution of the judgment which had not been determined as at the date of arguing the present application before this Court.

13. Mr. Choge further submitted that the suit land is now occupied by third parties.

14. I have considered the application, the affidavits on record, submissions by counsel and the authorities cited. Under **rule 4** of this **Court's Rules**, the Court exercises its discretion in considering an application such as the one before me. That discretion must be exercised judicially. The factors that the Court must take into account include the period of delay, the reasons for the delay, the degree of prejudice that may be occasioned to the respondent if the application is granted and the chances of success of the intended appeal. See **MWANGI V KENYA AIRWAYS LIMITED [2003] KLR 486**.

15. The applicant seeks to appeal against the ruling of **Ombwayo, J.** delivered on 5<sup>th</sup> May, 2015. Under **rule 75 (2)** of the **Court of Appeal Rules**, the notice of appeal ought to have been lodged within fourteen days of the date of the decision against which it is desired to appeal. Service of the notice is supposed to be effected within seven days after lodging the notice. See **rule 77 (1)**. **Rule 82 (1)** stipulates that the record of appeal, among others, should be lodged in the registry within sixty days of the date when the notice of appeal is lodged.

16. Following delivery of the impugned ruling, the applicant's advocate, vide a letter dated 11<sup>th</sup> May, 2015, applied for certified copies of the proceedings, ruling and the judgment. The letter was, however, not copied to the respondent's advocate. The aforesaid documents are not required for purpose of filing a

notice of appeal. The applicant's advocate did not state any reason for the delay in filing a notice of appeal. The notice that is attached to the application is dated 2<sup>nd</sup> June, 2015 but it was not lodged at the court registry.

17. The only attempt to explain the delay is contained in the grounds in support of the application. It is as follows:

**“That the time for filing appeal, record and notice of appeal has since lapsed owing to the mistaken belief that the Respondent would abide by the judgment of the Court.”**

18. That purported explanation for the delay implies that the applicant believed that the respondent would repay him the sum of Kshs.550,000/= within 90 days after delivery of the judgment, and if he had done so the applicant would not have bothered to take any further step.

19. It is trite law that before this Court can exercise its discretion under **rule 4** of its Rules, every delay must be explained by a party at fault. See **RAEL MUNYAKA & 6 OTHERS V WAITALUK LAND DISPUTES TRIBUNAL & 3 OTHERS [2007] eKLR**.

20. Similarly, in **GACHUHI MUTHANJI V MARY NJUGUNA [2014] eKLR**, this Court held that extension of time is not a right of a party but a discretionary remedy that is only available to a deserving party who has discharged the burden of laying a basis to the satisfaction of the court that the court should exercise its discretion to extend time in his favour. Each case depends on its own merit. Delay, even if it is for one day, must be explained; otherwise the court would be acting arbitrarily if it were to grant extension of time without reason. I may add that the explanation for the delay must be plausible and satisfactory.

21. The timelines prescribed under this Court's Rules are not ornamental, they are important if timely dispensation of justice is to be achieved. They provide predictability and level playing field. Where a party has been unable to comply with the same, he has to offer an appropriate explanation before the Court can allow extension of time. I am afraid the applicant has failed to do so.

22. All the other relevant factors that this Court ought to take into account also seem to be weighing heavily against the applicant. Firstly, he told the Court that the suit land has been sold to a third party; a fact that was confirmed by the respondent's advocate. That person(s) is not a party to these proceedings.

23. If the application for extension of time is granted, the respondent will be prejudiced. The respondent will have to spend time and money defending the appeal over ownership of the suit land, which has since been sold to a third party who is said to be in occupation.

24. Furthermore, considering the reasons stated in the impugned ruling, the chances of success of the intended appeal cannot be said to be overwhelming, they are at best fifty-fifty.

25. Having taken all the relevant factors into account, I am not inclined to exercise the Court's discretion in favour of the applicant. Consequently, this application is dismissed with costs to the respondent.

**DATED and delivered at Eldoret this 10<sup>th</sup> day of March, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**