



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: MURGOR, JA.**

**CIVIL APPLICATION NO. 18 OF 2016**

**BETWEEN**

**ROBERT WALUSEKHE WASIKANA.....APPLICANT**

**AND**

**JOHN DIANGA OBASO (Suing as Guardian**

**ad Litem of SAMUEL AWOUR TONGO)..... RESPONDENT**

***(Application for extension of filing a Notice of Appeal out of time from the judgment/ decree and or order of Obaga J, delivered on 1<sup>st</sup> December 2016 in Kitale***

***in***

***Env & Land Court Civil Suit No 84 of 2012)***

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**RULING**

By a Notice of Motion dated 3<sup>rd</sup> March 2016, **Robert Walusekhe Wasikana**, the applicant applied under **Rule 4** of the **Court of Appeal Rules 2010** for time to be extended to file and serve a Notice of appeal against a judgment of Obaga J., dated 1<sup>st</sup> December 2016.

In the dispute the applicant claimed that he had entered into a sale agreement with the respondent on 15<sup>th</sup> January 2008 for the purchase of a portion of Sinyerere/ Kipsaina Block 2/Kipsogen 467 comprising 7.4 acres from the respondent. The respondent's case is that no such sale took place.

The learned judge found that the agreement was invalid and unenforceable, and that the applicant was in illegal occupation of the respondent's land.

The applicant, brings this Motion on various grounds, more particularly that, he did not receive notice of the date of delivery of the judgment; that the judgment was delivered in the absence of both parties to the suit and their advocates; that he was aggrieved by the judgment and intends to lodge an appeal to the Court of Appeal; that he only discovered that judgment had been delivered on 1<sup>st</sup> February 2016 through his personal efforts, and that the delay in filing the Notice of Appeal was occasioned by the failure of his advocate, then on record, to inform him that the judgment had been delivered. His plea was that time be

extended so as to afford him an opportunity to ventilate his grievances in the intended appeal.

The application supported by an affidavit sworn by the applicant was to a great extent a repetition of the grounds expressed in the Motion, save that applicant asserted that he stood to suffer irreparable loss and damage arising from the loss of valuable land that he purchased with his lifelong savings.

The applicant also filed a supplementary affidavit on 11<sup>th</sup> April 2016 with leave of the court annexing a draft memorandum of appeal.

In his submissions, **Mr. Onyinkwa**, learned counsel for the applicant outlined the averments in the supporting affidavit, but added that, though the record showed that the parties were aware of the date that the judgment was to be issued, this was not the correct position, as the date that the judgment was to be delivered was not known to the parties. Counsel submitted that after the proceedings were closed, the court ordered the parties to file their written submissions. A mention was fixed for 5<sup>th</sup> November 2015 to confirm compliance with the court order. No submissions were filed, and neither did the parties attend court for the mention. The court then ordered that the judgment be delivered on 1<sup>st</sup> February 2016. As neither of the parties attended the mention, they would not have known the date when the judgment was due to be delivered, and as a consequence did not attend court on that date.

Counsel further submitted that, the applicant attended the registry on 22<sup>nd</sup> February 2016 only to discover that the judgment had long since been delivered, with the effect that the time for filing the Notice of Appeal had already also lapsed.

Though served, on 4<sup>th</sup> April, 2016 there was no appearance by the respondent.

It is settled that in an application for extension under **Rule 4**, the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not with caprice. 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. In 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 judgment was delivered on 1<sup>st</sup> February 2016, and the applicant discovered that the judgment was delivered on 22<sup>nd</sup> February 2016. This application was filed on 3<sup>rd</sup> March 2016. This would translate into a delay of 31 days.

Was the delay explained? The applicant has stated that the date that the judgment was due to be delivered was not known to him or to his advocate. From the record it is apparent that after the proceedings closed and the learned judge ordered that the parties were to file submissions, neither party filed the submissions nor attended the mention that fixed the date for delivery of the judgment. Since the applicant's former counsel, one Mr. Barongo did not attend court on the material date, it comes as no surprise that the judgment date would have been known to him, and by extension to his client, the applicant.

The applicant further stated that through his own efforts, he discovered that the judgment was delivered when he visited the registry on 22<sup>nd</sup> February 2016. By then, time for filing of the notice of appeal had already lapsed. No doubt, the sequence of events culminating in the delay in filing of the Notice of appeal points to a failing on the part of the applicant's advocate, whose omissions should not be visited upon the applicant. In **Kenya Cannery Ltd vs. Titus Muiruri Doge** - **Civil App. No. Nai. 64 of 1990 (unreported)** this Court stated:-

***“This Court has held on many occasions that any litigant who wishes to be heard by this Court should not be prevented or penalized due to the mistakes of his Counsel.”***

It would take another 8 days for this Notice of Motion comprising *inter alia*, copies of the proceedings and the judgment to be filed. I would be prepared to accept that the time taken to prepare, assemble, attest and file the necessary documents would account for the delay here. That said, I find that the delay, which I do not consider to have been inordinate or unreasonable, has been explained to my satisfaction.

Concerning the likely success of the intended appeal, the applicant has filed a draft memorandum of appeal specifying 11 grounds. The main complaint is that the learned judge did not properly evaluate the evidence, particularly in relation to the documentary evidence produced by the applicant to support the alleged sale of the portion of land in question. Without addressing the chances of success of the appeal, I consider that it is the applicant’s entitlement to have material that was before the lower court reevaluated by this Court.

On the question of whether an order of extension will prejudice the respondent, in the case of *Mwaniki Njoroge Kamau & Another vs Lee Sheth Poong Civil Application No Nai 55 of 1998 (unreported)* Lakha, JA stated,

***“As it often happens, the application highlights two principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”***

Disputes concerning land are deep-seated and emotive, and as such should be ventilated, heard and determined conclusively. Finality in matter such as this can only be for the benefit of all concerned parties, and not one party at the expense of the other. The only inconvenience to the respondent envisaged is that he will remain embroiled in litigation upto the time that the intended appeal is heard and determined.

For this reason, I will exercise my unfettered discretion to allow the application. I order that the time for filing and serving a Notice of Appeal is hereby extended by fourteen (14) days from the date hereof.

***Dated and delivered at Eldoret this 29<sup>th</sup> day of April, 2016.***

**A.K. MURGOR**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**