



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR, JA.

CIVIL APPLICATION NO. 3 OF 2016

BETWEEN

DAVID SIMIYU WANYONYI.....APPLICANT

AND

JOHN SILAKWA..... 1ST RESPONDENT

SAMUEL AKIFUMI.....2ND RESPONDENT

(Application for extension of for filing an Appeal out of time from the judgment/ decree and or order of Obaga J, delivered on 23rd September 2015 in Kitale

in

Env & Land Court Civil Suit No 36 of 2010)

RULING

By a Notice of Motion dated 29th December 2015, **David Simiyu Wanyonyi**, the applicant applied under **rule 4** of the **Court of Appeal Rules 2010** for time to be extended to file and serve a Record of appeal against a judgment of Obaga J., dated 23rd September 2015 out of time.

The suit concerns a claim by the applicant that the respondents, who are his neighbours, had encroached on his land known as LR. Kapkoi/Mabonde Block 1/Ex Prison 264.

In the decision the learned judge dismissed the suit having found that on a balance of probabilities, the applicant had not proved that the respondents had encroached upon his land. It is his judgment that he intends to appeal against.

The applicant, brings this Motion on grounds, that, he did not receive any notification from his previous advocates that the judgment had been delivered, and that by the time he was in a position to brief his current advocates to file an appeal, the period for filing had already lapsed.

In the affidavit in support of the Motion, the applicant deposed that, he had instructed the firm of Millimo, Muthiomi & Co Advocates to represent him in the suit in the High Court who did not inform

him when the judgment was to be delivered. He stated that it was on 17th October 2015 when he received information that the judgment had already been delivered, whereupon, he instructed his advocates to release his file to one Isreal Mulongo. On 22nd October 2015, his current advocates filed a Notice of Appeal, and simultaneously requested for certified copies of the proceedings and a copy of the judgment, which he says are yet to be issued to him. It was his plea that since the period of delay for filing of the appeal was only 45 days, the time for filing be extended by this Court. He implored this Court should not find him to have been indolent, but find that the delay was occasioned by a breakdown in communication with his former counsel. He deponed that he would suffer prejudice if the period to file the appeal was not extended as, the respondents' continued encroachment would result in his being alienated from his land.

In his replying affidavit sworn on 10th February 2016, **John Silakwa**, the 1st respondent averred that he was present in court when the judgment was delivered, together with the applicant, and that as a consequence, the contention that the applicant's former counsel failed to inform him of the date of delivery of the judgment was not feasible. It was further deponed that the Notice of Appeal dated 21st October 2015 was invalid as it was filed out of time, and without leave of the Court. It was the 1st respondent's position that the applicant's case lacks merit, and has no chance of success as, he is the third owner of the land in question, which he purchased through an auction after ascertaining its boundaries. As such, he should be content with the land he purchased together with its existing boundaries and beacons.

On 16th February 2016, **Samuel Akifumi**, the 2nd respondent, also swore an affidavit where he averred that he was present in court with John Silakwa when the judgment was delivered, where the applicant who was a person known to him was also present in court. He supported the 1st respondent's averments that the Notice of Appeal was filed out of time and that the appeal lack merit.

When the application came up before me, learned counsel for the applicant **Mr. Bundi** stated that he would rely on the contents of the Motion and the supporting affidavit of the applicant. Both **Mr. Wafula** learned counsel for the 1st respondent and holding brief for Mr. Katama and **Mr. Nyarotso** learned counsel for the 2nd respondent also informed me that they would rely on the replying affidavits of their respective clients. Mr. Nyarotso added that, since the Notice of Appeal was filed out of time and its filing had not been regularized, the position was that there was no valid appeal before the Court as a result of which, the applicant's application should be dismissed.

Beginning with the preliminary point raised by the respondents' on the validity of the Notice of Appeal, it will be appreciated, that what is before me is a Motion for time to be extended to file and serve a Record of Appeal out of time, which application is required by **rule 53** of this Court's rules to be heard and determined by a single judge. The same rule also stipulates that questions on the validity of the Notice of Appeal are the preserve of a full bench of this Court. Therefore, as a single judge, I am not at liberty to deal with this issue.

Turning to the application under **rule 4**, it is settled that under this rule, the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercise 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.”

It is not in dispute that the Judgment was delivered on 23rd September 2015 and the Notice of Appeal

filed on 21st October 2015. Simultaneously with the Notice, the applicant requested the registry for certified proceedings and served this request on the respondents.

According to my computation, the period of delay from the date the Notice of Appeal was lodged to the date of this application is 69 days. After filing the Notice of Appeal, the applicant had 60 days within which to lodge and serve the Record of Appeal. That would leave 9 days as the relevant period of delay to be explained. The question at this juncture is whether the delay was satisfactorily explained.

The applicant began by attributing the delay in filing of the Record of Appeal to a breakdown in communication between himself and his counsel Millimo Muthomi & Co Advocates whom he claims failed to inform him of the date the judgment was delivered. He contends that as a result, neither himself nor his counsel were in court on that day, so that he only came to learn that the judgment had been delivered on 21st October 2015, the day he filed the Notice of Appeal.

The respondents refute this. They both claim that the applicant was in court when the judgment was delivered, and therefore this Court should not believe the notion that he did not know that the judgment was delivered. If indeed the respondents are to be believed, and the applicant was in court on the material day, the explanation by itself, would fail to meet the threshold requirements.

But having said that, the applicant's supporting affidavit further discloses that the certified proceedings have yet to be supplied to him by the registry. I would take this to mean that up to the time of filing this application, the applicant was still in pursuit of the certified proceedings, and with them, the Certificate of Delay, which had not been issued to him. In effect, **rule 82** of this Court's rules is yet to be complied with.

Rule 82 requires that once an appellant has requested for proceedings and served the notification 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, which period is excluded when computing delay.

From the above it is quite apparent that, until the proceedings and the Certificate of Delay are supplied to the applicant, he will not be in any position to prepare and lodge the Record of Appeal, and neither would he be in a position to ascertain the period taken to prepare the certified proceedings so as to compute any delay. This, in my view would satisfactorily explain why the Record of Appeal has not been filed.

On the likelihood of success of the intended appeal, a draft memorandum of appeal has been included in the application that specifies 15 grounds appeal with particular focus on the court's findings on the surveyor's evidence. As the pleadings, the proceedings and or even the surveyor's report were not made available for the Court's consideration, I find that the material before me is insufficient to determine the possibility of success of the appeal.

All factors considered, I am persuaded to exercise my unfettered discretion to allow the application, which I do not consider will be of significant prejudice to the respondents, save a prolonged period of litigation as the intended appeal is pending hearing and determination.

Accordingly, I order that the time for filing and serving of the Record of Appeal is hereby extended by thirty (30) days from the date hereof.

Dated and Delivered at Eldoret this 13th day of May, 2016.

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR