



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 42 OF 2015

BETWEEN

COUNTY GOVERNMENT OF VIHIGA APPLICANT

AND

MARY MWAKI MASINDE RESPONDENT

AND

THE COUNTY GOVERNMENT OF VIHIGA.....INTERESTED PARTY

THE NATIONAL LAND COMMISSION INTERESTED PARTY

(Application for extension of time to lodge a notice of appeal out of time against the judgment and decree of the High Court of Kenya at Kakamega, (Mrima, J.) dated 9th July, 2015

in

PETITION NO. 25 OF 2014)

RULING

1. By an application dated 1st September, 2015, the applicant sought leave to file a notice of appeal out of time. The judgment that the applicant wishes to appeal against was delivered on 9th July, 2015. The respondent had sued the applicant and the interested parties for discrimination and sought general damages.
2. The Governor of Vihiga County had forwarded to the County Assembly of Vihiga for approval names of candidates who had been interviewed and selected to serve as members of Vihiga County Land Management Board. The County Assembly Committee on Lands, Housing and Urban Planning, which carried out the approval proceedings, rejected the respondent on the ground that, even though born in Emuhaya within Vihiga County, she was married in Mumias within Kakamega County and was therefore not suited to serve the people of Emuhaya.
3. After a full trial, the High Court/**Mrima, J.**) found for the respondent and awarded her

Kshs.3,000,000/= as damages for discrimination. The sum was ordered to be paid by the applicant. The learned judge held that the reasons for discriminating against the 1st respondent amounted to violation of **Articles 27 and 28 of the Constitution of Kenya, 2010.**

4. In the affidavit sworn by **Daniel Chitwah Chegenye**, the Speaker of Vihiga County Assembly in support of the application herein, he deposed that the County Assembly was not aware of the judgment until 20th July, 2015 when he received a letter from the County Attorney. He annexed a copy of the said letter to his affidavit.

5. The reason for the delay in filing the notice of appeal was the late advice of the judgment by their Attorney, Mr. Chegenye stated. He further contended that the applicant's intended appeal had high chances of success. **Mr. Didi**, the applicant's learned counsel, made brief submissions in support of the application.

6. The respondent opposed the application. In her replying affidavit, she deposed, *inter alia*, that the reason for the delay in filing a notice of appeal was not plausible, given that the offices of the County Attorney and the applicant are in close proximity; that the County Attorney had advised against an appeal; that the High Court had granted the applicant conditional stay of execution of the judgment but the applicant had failed to meet the set conditions and is therefore undeserving of a discretionary order, and that the application had not been made in good faith.

7. **Mr. Namatsi**, learned counsel for the respondent, submitted that the delay had not been well explained by the applicant, that the applicant had defaulted in paying to the respondent a sum of Kshs.1,500,000/= within 45 days from 19th October, 2015 and depositing the balance of Kshs.1,500,000/= in a joint account in the names of the parties advocates as ordered by the High Court. The applicant paid to the respondent the sum of Kshs.1,500,000/= after five months from the stipulated date but the balance of the judgment sum was yet to be deposited as directed by the court.

8. In an application of this nature, the Court, in exercise of its discretion, takes into consideration the length of the delay, the explanation for the delay, the merits of the intended appeal and the prejudice that the respondent is likely to suffer if the application is granted. See **MWANGI V KENYA AIRWAYS LIMITED [2003] KLR 486.**

9. The judgment that is sought to be appealed against was delivered on 9th July, 2015 in the presence of counsel for the applicant and the respondent. The applicant's counsel/County Attorney did not explain why he waited until 16th July, 2015 to write to the applicant about the outcome of the case. There is also no evidence that the said letter was not delivered to the applicant until 20th July, 2015. And even assuming that the said advice actually reached the applicant on the aforesaid date, there is still no explanation as to why the applicant did not instruct its County Attorney to file a notice of appeal by 23rd July, 2015.

10. I cannot accept Mr. Didi's submission from the Bar that at the time of delivery of the judgment there was no substantive County Clerk to call for a Board meeting to pass a resolution to appeal against the judgment. There is no deposition to that effect by Mr. Daniel Chitwah Chegenye. As was held in **RAEL MUNYAKA & 6 OTHERS V WAITALUK LAND DISPUTES TRIBUNAL & 3 OTHERS [2007] e KLR**, every delay must be well explained by an applicant.

11. Turning to the chances of success of the intended appeal, although the applicant has annexed to its application a draft memorandum of appeal, it is not lost to the court's mind that the applicant's own Legal Advisor/County Attorney is not convinced that the intended appeal stands a reasonable chance of success. This is what he stated in his advice to the applicant:

"I have analysed the court's judgment with a view to taking up an appeal at the Court of Appeal but find that there is no or very little (sic) chance of succeeding given that in its resolution captured in the relevant Hansard, the only reason the County Assembly gave for

rejecting the Petitioner was her marital status which criteria was not applied to other candidates vetted with the Petitioner by the Committee. That was open bias and discrimination which is against the provisions of the Constitution and to appeal would portend the risk of enhanced damages or additional costs which would in the end not be in the best interest of the County Government and particularly the County Assembly.”

12. The applicant did not advance any explanation before this Court to show that the position taken by its legal Attorney is not correct. An appeal should not be mounted just for the sake of it, it must have a proper grounding in law. The burden of so proving is higher in the circumstances that the applicant finds itself in, than it would otherwise have been had the applicant’s counsel not, and in my view rightly so, cast serious doubt on the chances of success of the intended appeal. In the absence of any contrary opinion, I am inclined to agree with the applicant’s County Attorney that the intended appeal has minimal chances of success, if at all.

13. The respondent will obviously be prejudiced by an order allowing the application, considering that she will be unable to enjoy the fruits of her judgment for no good reason, if, admittedly, the intended appeal stands on quick sand.

14. Lastly, the applicant’s conduct is not deserving of this Court’s discretionary order. The applicant has repeatedly violated lawful orders of the High Court. No plausible explanation was advanced for that flagrant breach. He who seeks a court’s discretionary relief must do so with clean hands.

15. All in all, I find the applicant’s application lacking in merit. Consequently, I hereby dismiss it with costs to the respondent.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.