



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 213 OF 2015 (UR 176/2015)

BETWEEN

EDWARD GATIBA MBUGUA.....APPLICANT

AND

BARCLAYS BANK (K) LTD.....RESPONDENT

*(An application for extension of time to file and serve a notice of motion and a record of appeal out of time in an intended appeal from the ruling/decision of the High Court at Nairobi (**Havelock, J.**) dated 16th day of July, 2014*

in

H.C.C.C No. 734 of 2010)

RULING

1. This is an application brought under rule 4 of the **Court of Appeal Rules** and section **159 (2)(d)** of the **Constitution of Kenya**. The applicant seeks leave to file and serve a notice of appeal and record of appeal out of time. He further seeks to have a notice of appeal that he filed on 6th August, 2014 declared as having been filed and served within time.
2. The ruling sought to be appealed against was delivered by Havelock, J. on 16th July, 2014. The applicant filed and served a notice of appeal on 6th August, 2014. On 30th July, 2014 the applicant applied for certified copies of the proceedings and the impugned ruling. The certificate of delay that is on record shows that the proceedings were ready for collection on 19th March, 2015, although the certificate was issued on 28th April, 2015.
3. This application for extension of time was filed on 10th August, 2015, 104 days after the certificate of delay was issued.
4. The applicant's explanation for that delay is contained in paragraphs 3 and 4 of his supplementary affidavit and is as follows:-

“3. That my lawyer informs me that he did not get the extracted order of 16th July, 2014 until about July 2015 as he required an original certified copy.”

4. That I have also had serious personal health problems of gout which handicapped me from regularly and persistently following up on the issue of typed certified proceedings originally certified order and compilation of the record of the instant application.”

5. In his brief submissions, **Mr. Mbugua**, learned counsel holding brief for **Mr. Khamati** for the applicant, stated that the delay in filing the record of appeal is not inordinate; that the intended appeal has high chances of success; and that the applicant will suffer tremendously if leave to appeal out of time is not granted.

6. The respondent opposed the application. **Fredrick Ochura**, an advocate in the firm of Muriu Mungai & Company Advocates, who are on record for the respondent, swore a replying affidavit. He deponed, *inter alia*, that there was inordinate delay in filing the application; that there was no sufficient explanation for the inordinate delay; that the intended appeal stands little chance of success; and that the respondent stands to suffer great prejudice if the application is granted.

7. **Mr. Musyoka**, learned counsel for the respondent, made brief submissions to buttress the above averments by Mr. Ochura. Counsel pointed out that the applicant was guilty of laches and that the explanation for the delay was totally wanting.

8. Regarding the chances of success of the intended appeal, Mr. Musyoka submitted that the draft memorandum of appeal revealed that the applicant was allegedly attacking Justice Havelock’s finding that the sale of the property in issue was properly conducted, whereas the said ruling had nothing to do with the manner in which the public auction had been conducted.

9. Further, the property in issue had been lawfully sold and transferred to the purchaser, who ought to have been served with the notice of appeal, counsel added.

10. I have given due consideration to the affidavits on record as well as submissions by counsel. It is not in dispute that in considering an application of this nature the Court exercises its unfettered discretion. The discretion must, however, be exercised judicially. The main factors that the court has to take into account are the length of delay; the reason(s) for the delay; the chances of success of the intended appeal; and the degree of prejudice the respondent stands to suffer if the application for extension of time is granted. See **PAN AFRICAN PAPER MILLS E.A. LTD versus OLAKA [2001] KLR 8**.

11. It is against these principles that I have to determine this application. The delay in filing the application can only be computed from the date when the certificate of delay was issued, which was 28th April, 2015. I have already stated that the application was filed on 10th August, 2015. The delay of 104 days is inordinate.

12. The explanation proffered by the applicant is not satisfactory. The applicant’s advocates did not explain why they did not file the record of appeal immediately upon receipt of certified copies of the proceedings. As for the applicant himself, even if he suffers from gout, he was not hospitalized such that he was unable to contact his advocates and follow up the progress of his intended appeal. He could even have kept in touch with his advocates electronically. He did not do so.

13. I do not think the intended appeal has good chances of success. I have read the impugned ruling as well as the draft memorandum of appeal. I agree with Mr. Musyoka that the proposed grounds of appeal seem to challenge the manner in which the public auction was conducted. The ruling by Havelock, J. related to the interested party’s application seeking lifting of prohibitory orders issued against the Land Registrar, Thika, prohibiting him from registering a transfer pertaining to the subject property, **Chania/Kairi/876**. The application also sought an order that the said property be registered in the name of the interested party, the purchaser. The orders sought were granted and that is the ruling sought to be appealed against.

14. The respondent's advocate submitted that following delivery of the impugned ruling the subject property had been transferred to the purchaser, which Mr. Mbugua said he was not aware of. **Rule 77(1)** of this **Court's Rules** require that a notice of appeal be served upon any person who may be affected by the appeal. The purchaser of the subject property is clearly a person who is directly affected by the intended appeal, whether the property has already been transferred to him or not. He ought to have been served with the notice of appeal as well as the application for extension of time. That was not done.

15. I find this application devoid of merit and dismiss it with costs to the respondent.

Dated at Nairobi this 16th day of September, 2016.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR