



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GATEMBU, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 40 OF 2016**

**BETWEEN**

**WILSON CHEBOI YEGO ..... APPLICANT**

**AND**

**SAMUEL KIPSANG CHEBOI ..... RESPONDENT**

*(Application for extension of time to appeal and validation of the notice of appeal from the Judgment and decree of the High Court of Kenya at Eldoret, (Hon. G. Ngenye – Macharia, J.) dated 22/7/2015 in HCCC NO. 144 OF 2002)*

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**RULING**

1. The applicant, Wilson Cheboi Yego, has applied under Rule 4 of the Rules of the Court for the time within which he ought to have lodged and served a notice of appeal to be extended; that a notice of appeal dated 21<sup>st</sup> April 2016 lodged in Court on 22<sup>nd</sup> April 2016 be deemed to have been duly lodged and served; and that the time for lodging the memorandum and record of appeal be extended. He intends to challenge the decision of the High Court at Eldoret in HCCC No. 144 of 2002 dated 22<sup>nd</sup> July 2015 that decreed a portion of approximately 2 to 3 acres should be hived off from the applicant's property known as Title Number Elgeyo/Marakwet/Kapsowar/428 and be registered in the name of the respondent.
2. Appearing for the applicant, learned counsel Mr. Wambua Kigamwa, referred to the grounds appearing on the face of the application and the affidavit in support and submitted that the judgment of the High Court was delivered without notice to the parties; that the applicant only became aware that judgment had been delivered in March 2016 when the respondent sought to execute; that by the time the applicant changed advocates and raised fees to instruct new advocates, time was lost and it was not until 18<sup>th</sup> May 2016 that the present application was filed; that meanwhile on 22<sup>nd</sup> April 2016 the applicant lodged a notice of appeal and served the same on the respondent and prays that as the same was out of time, it be validated and time be extended for lodging the memorandum of appeal and the record of appeal. According to counsel, the intended appeal raises substantial complaints as demonstrated in the draft memorandum of appeal.
3. Opposing the application, learned counsel for the respondent, Mr. Silas Kibii, referred to the replying affidavit sworn by the respondent and submitted that the applicant's application has no merit; that although the judgment of the High Court was delivered without notice to the parties, the advocate for the

applicant should have been vigilant and should have followed up on the matter with the court and perused the court file; that the reasons advanced by the applicant for the delay in filing the intended appeal are baseless; that in any event the intended appeal is a sham and has no chances of success and the respondent should be permitted to enjoy the fruits of the judgment; and that there has been inordinate delay in filing the present application.

4. I have considered the application, the affidavits and the submissions by counsel. Rule 4 of the Rules of the Court under which the applicant has made this application provides that:

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

5. An application for extension of time involves the exercise of judicial discretion. Waki, JA summarized the principles applicable in exercising such discretion in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR where he stated:

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”**

6. What then are the circumstances in this case? It is common ground that the judgment the applicant intends to appeal from was delivered without notice to the parties. The applicant says, and there is no reason to doubt him, that he first became aware in March 2016 that the judgment had been delivered when his advocates sought instructions from him concerning a reply to an application for execution of the decree by the respondent. He has explained that the advocates who were acting for him at the time withdrew their services and by the time he engaged new advocates who then sought the consent of the previous advocates to take over the matter, sometime was lost and it was not until 13<sup>th</sup> April 2016 that a consent to that effect was filed in court and a notice of change of advocates subsequently filed on 18<sup>th</sup> April 2016. He explained that a notice of appeal was then lodged by his newly instructed advocates on 22<sup>nd</sup> April 2016; and that further delay was experienced as he was raising legal fees until 18<sup>th</sup> May 2016 when he presented this application.

7. The applicant has explained to my satisfaction the circumstances that prevented him from lodging and serving the notice of appeal within the prescribed time frames. I am not prepared to hold, as I was urged to do by the respondent, that the intended appeal is frivolous. While I acknowledge that a party is entitled to enjoy the fruits of a favourable judgment, the respondent has not demonstrated what prejudice he will suffer by reason of the applicant pursuing his appeal.

8. The result is that I allow prayers 1 and 2 of the applicant’s application dated 18<sup>th</sup> May 2016. The applicant shall file and serve its memorandum of appeal and record of appeal within 45 days from the date of delivery of this Ruling.

9. The costs of the application shall abide by the outcome of the intended appeal.

Orders accordingly.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of November, 2016**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**