



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 139 OF 2013

BETWEEN

BENARD KIONGO NJAU (Suing on his own behalf and on behalf of all residents and members of
Kimathi Estate Welfare Association) **APPLICANT**

AND

CITY COUNCIL OF NAIROBI **1ST RESPONDENT**

GEORGE KIARIE NG'ANG'A **2ND RESPONDENT**

SANTA BARBARA PARK LIMITED **3RD RESPONDENT**

COMMISSIONER OF LANDS **4TH RESPONDENT**

*(Appeal from the Ruling of the High Court at Nairobi (Muchelule, J.) dated 9th December, 2010
in*

H.C. ELC NO. 495 OF 2009)

RULING

The applicant **BENARD KIONGO NJAU**, a losing plaintiff at the High Court and who had sued on his own and the behalf of all residents and members of the Kimathi Estate Welfare Association, applies for an extension of time for filing an appeal against the ruling and order of the High Court (Muchelule, J.) dated 9th December 2010. He has already filed and served a record of appeal, albeit late, in Civil Appeal No. 134 of 2013 which he prays be deemed to have been properly filed.

By way of explaining the late filing of the record of appeal, the applicant has by the grounds appearing on the motion and by his affidavit sworn on 27th June 2013 as well as in submissions by his learned counsel Mr. Njau, stated, in a nutshell, that he applied for certified copies of proceedings and ruling in time and even followed up by a letter dated 16th January 2013. His advocates were notified of the readiness of the proceedings by a letter dated 22nd January 2013 whereafter they paid and collected the same on 15th March 2013 and a copy of the ruling on 2nd April 2013. A certificate of delay was duly issued on 19th

April 2013. The applicant's advocates then prepared the record of appeal but on attempting to lodge it at this Court's registry on 17th June 2013, their clerk one Hiram Kamau Mwangi "was informed that the record of appeal was too big (697 pages) and had to be split into two volumes". The process of "splitting of the record from 9 to 18 books" was time consuming, it is averred, and it became impossible to file the record within the prescribed time.

The applicant thus urges me to find that the delay of seven days is not inordinate in the circumstances and is moreover explained. He cited in aid several decisions of this Court including the ruling of my learned brother Waki JA where he extended time notwithstanding a ten-year delay in filing a notice of appeal or record of appeal in PAULA WAHETI MUCHINA Vs. HENRY WANJOHI MUCHINA, Civil Application No. Nai 178 of 2003.

The 1st, 2nd and 3rd respondents opposed the application with the latter two filing affidavits in reply. Mr. Wanjohi, the 1st respondent's learned counsel submitted simply that the applicant was undeserving of my favourable discretion because the proceedings having been ready on 22nd January 2013, the applicant "paid for them on 11th May 2013" representing a 4 month delay which, in Counsel's view is inordinate and unexplained.

The theme of delay was amplified by MR. WACHIRA, learned counsel for the 2nd and 3rd respondents who submitted that not only did the applicant take two months to make payment for the proceedings after notification, but he also took five months to lodge the present application that is meant to regularize the appeal filed out of time and in both instances no explanation is given for delay. Counsel also took issue with the applicant's failure to copy the letter bespeaking the proceedings to the 3rd and 4th respondents an omission that counsel characterized as fatal as it robs the certificate of delay of efficacy and renders the appeal "hopelessly out of time". Mr. Wachira urged me not to grant this application as the 2nd respondent had already sold the suit property the applicant claims to have been public land reserved for a children's playground and nursery school.

A prayer for extension of time under **Rule 4** of the Court of Appeal Rules is a plea to a single Judge's exercise of discretion. The discretion is wide and unfettered but is not to be exercised capriciously, whimsically or to feed any idiosyncratic inclinations. It is a discretion judicial in character to be exercised in accordance with principle and reason, not sympathy, but always with an eye to the doing of substantial justice in each case. The applicable considerations were succinctly put by Lakha JA in MAJOR JOSEPH MWETERI IGWETA Vs. MUKIRA N'ETHARE & ATTORNEY GENERAL, Civil Appl. Nai 8 of 2000;

"The application made under Rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. Several factors ought to be taken into account. Among these factors is the length of any delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal), the effect of the delay on public administration."

See also MURAI Vs. WAINAINA (No 4) [1982] KLR 38, though decided when the Court's discretion was not as wide and free as under Rule 4).

Given the certificate of delay exhibited by the applicant, it would seem that the effective period of delay that falls for my consideration is that between 18th June 2013 or thereabouts, (being the expiry of 60 days from the date the proceedings and ruling were ready for collection) and 25th June 2013 when the record of appeal was lodged. I am unable to agree with the respondents' contentions that such a delay, which is but a week in length, is in the circumstances inordinate.

What is more, the applicant has attempted to explain and give reasons for the delay namely that his advocates' clerk was turned away when he attempted to file the record within time and was told to go split it with the attendant delay in getting the ensuing eighteen volumes of the record of appeals. The reason is not exactly illuminating or earth-shaking but it need not be. It suffices that it is plausible.

I note that the appeal itself has been filed and served within the required time. I do not see and nor has it been claimed that the respondent will be exposed to any prejudice that is beyond compensation by an appropriate order of costs were the said appeal to proceed to a merit-based determination. This is the more so when the applicant's complaint on appeal seems to be that his and his fellow residents' grievance about irregular and unlawful alienation of public utility land has not been accorded an effectual hearing. The conjunction of public interest and land as the substratum of the appeal appears to me to be a significant matter for my consideration in exercising a discretion in favour of regularizing the appeal instead of shutting it out altogether by declining the application.

Being of that mind, I hold that the application dated 27th June 2013 is for granting. The time for filing the record of appeal against the ruling and order of the High Court dated 9th December 2010 is extended to 25th June 2013. The record filed in Civil Appeal No. 134 of 2013 is accordingly deemed to have been filed and served within the prescribed time.

The costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 23rd day of January, 2015.

P.O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR