



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 27 OF 2015 (UR 74/2013)

BETWEEN

JOSEPH CHEPKOECH CHEMOR.....APPLICANT

AND

KIMAIYO CHEMOR.....1ST RESPONDENT

BARNABA CHUMO CHEMOR.....2ND RESPONDENT

(An Application for extension of time within which to file and serve a Notice of Appeal and Record of Appeal out of time arising from the Ruling of Sila Munyao, J dated 25th September 2014 at the Eldoret Land and Environment Court,

in

ELC No. 499 of 2012)

RULING

This application relates to a Notice of Motion dated 24th April 2015 seeking orders for extension of time to be granted under **Rule 4** of the **Court of Appeal Rules 2010** within which to file and serve a Notice and of appeal out of time against a ruling of Sila Munyao J, delivered on 25th September 2014.

In the Notice of Motion the applicant prayed for the following orders:

- 1. That the time limit to file and serve the Respondents with the Notice of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the court shall deem fit.*
- 2. A stay of execution and any further proceedings arising out of the decision the Honourable Munyao Sila Judge given at Eldoret on 25th day of September 2014 at Eldoret in the Eldoret Environmeny and land case No. E & LC No. 499 of 2012 between Kimaiyo Chemor and Barnaba Chumo Chemor (Plaintiffs) versus Joseph Kipkoech Chemor (Defendant) pending the hearing and determination of this application and/or until the intended appeal has been determined should this court allow the applicant's application as prayed in prayer 1 of this application.*

3. *Costs of and incidental to this application abide the result of the application.*

Briefly, the dispute relates to a parcel of land known as Moiben/Moiben Block 9 (Barsombe)/319 measuring 4.41 Ha (***the suit property***) belonging to Chemor Chesigary Koibelel (deceased) where the respondents were the administration ad litem of estate of the deceased. It was the respondents' case that the applicant had intermeddled with the suit property by unlawfully transferring it to himself and subsequently charging it to AFC as a security for the sum of Kshs. 110,000/-.

The learned judge found that the applicant was not entitled to the suit property, and ordered the cancellation of the title in the name of the applicant, and registration of the title in the name of the respondents as administrators of the estate of the deceased.

In the affidavit in support of the Notice of Motion the applicant averred, that he filed a Notice of Appeal on 1st October 2014, and on the same day requested to be supplied with the certified copied of the proceedings, judgment and pleadings. He further contended that he was supplied with a Notice of taxation dated 30th October 2014 in respect the respondents' Bill of costs. A ruling in respect of taxation was issued by the Deputy Registrar in 10th March 2015. The applicant complained that the despite this the application for the certified proceedings is yet to be acted upon.

In his replying affidavit sworn on 24th September 2015, Barnaba Chumo Chemor averred that the matter has been pending before this court, and since delivery of the judgment they have been denied the fruits of his judgment. That the applicant has not exercised due diligence in the follow up of the proceedings, and no reasonable explanation given for this delay, and as a result the court should not grant the orders sought.

When the application came up for hearing, the parties consented to the withdrawal of prayer 2 which was not a matter for determination by a single judge under rule 4 of the Court of Appeal rules.

Mr. Cheptarus learned counsel for the applicant submitted that that he had filed and served the Notice of appeal within the specified 14 days. The record of appeal has not been filed and served as the certified proceedings were yet to be supplied.

Mr. Kagunza learned counsel for the respondents opposed the application, contending that it was an afterthought. Since the judgment, the applicant has yet to file the and serve the record of appeal. Counsel further submitted that the applicant had not informed the court what steps he had taken to expedite the supply of the proceedings, and this application was only prompted by the ruling for taxation. Counsel urged the court to dismiss the application with costs.

As correctly stated in the case of *Mwangi v Kenya Airways Ltd [2003] KLR 48*,

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

The Notice of Appeal was filed and served within the stipulated period. At the same time the applicant wrote to the deputy registrar requesting for the certified proceedings on 1st October 2014, and served the respondents' advocates with the letter on 22nd October 2014. From the time the request was made for the certified proceedings until the date of this application is a period of six months.

Rule 82 states in relevant part;

“.....Provided that in an application for a copy of the proceedings in the superior court has been made in accordance with sub rule (2) within thirty days of the date of the decision against which

it is desired to appeal, there shall in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

With regard to the record of appeal, it is evident from the provision that, time for filing and serving of the record of appeal stops running once the request for proceedings is made to the deputy Registrar, and served on the respondents.

The applicant contends that there has been a delay in issuance of the certified proceedings and the judgment due to other ongoing proceedings in respect of the same matter. They cannot therefore be said to be entirely responsible for the delay.

But having said that, since the Notice of appeal was filed and served within the period specified, it is deemed to have been properly filed. With respect to the record of appeal, I order that it be filed within the next 30 days from the date hereof. I make no orders as to costs.

DATED and DELIVERED at ELDORET this 29th day of October, 2015.

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR