



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: MURGOR J.A. (IN CHAMBERS)**

**CIVIL APPEAL (APPLICATION) NO. 26 OF 2015**

**BETWEEN**

**IBRAHIM MWENY KOTIT.....APPLICANT**

**AND**

**ALEMUSIA KOTIT.....RESPONDENT**

*(Application for extension of time within which to file and serve a Notice of Appeal and a Record of Appeal out of time from a Judgment of the High Court of Kenya of Obaga, J delivered on 14<sup>th</sup> January 2014 in HCCC No. 81 of 2011)*

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**RULING**

By a Notice of Motion dated 28<sup>th</sup> April 2015 the applicant, applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** within which to lodge and serve a notice of appeal and a record of appeal against a ruling of Obaga, J delivered on 14<sup>th</sup> January 2014.

The application was brought on the grounds that;

- i. *The proceedings were supplied out of the statutory period to file an appeal out of the 60 days granted;*
- ii. *That the applicant was unable to raise the requisite fee for counsel to take up the appeal;*
- iii. *That being an inherited property two brothers have benefited to the exclusion of the appellant;*
- iv. *That extreme injustice would be occasioned should this appeal be struck out or ignored.*

In an affidavit in support of the Notice of Motion sworn by **Michael K. Chemwok**, learned counsel for the applicant, it was deponed that following instructions from the applicant, he filed a Notice of Appeal on 27<sup>th</sup> January 2014 which was served on the respondent on 28<sup>th</sup> January 2014. By a letter dated 20<sup>th</sup> January 2014, he sought to obtain the typed proceedings and a certified copy of the judgment; that the proceedings when ready were certified by the Deputy Registrar on 2<sup>nd</sup> April 2014, by which time the period for filing of the record of appeal had already lapsed. It was at this point that counsel for the applicant realised that he had failed to serve the respondent with the request for proceedings, which letter was also not acknowledged by the registry. It was deponed that this was an error or a mistake on the part of counsel which should not be visited upon the applicant.

In a replying affidavit sworn on 9<sup>th</sup> October 2105 by **Moriasi Moses Kaosa**, the respondent, it was deponed that there is no evidence showing that the applicant applied for the certified proceedings from the High Court Registry, as the copy of the letter requesting for proceedings on the record did not bear the court registry stamp. Furthermore, it was not supported by an Official receipt showing payment for the proceedings. It was the respondent's position that no explanation was provided for the failure to serve the request for proceedings in compliance with the rules. The respondent concluded that the purported copy of the letter requesting for proceedings that was produced was intended to mislead the court, and that the applicant had failed to exercise due diligence in filing of the intended appeal.

In his submissions before me, **Mr. M. K. Chemwok** learned counsel for the applicant reiterated the averments in his supporting affidavit, but also added that the delay was not inordinate. It was counsel's submission that the dispute concerned land, and that the appeal was arguable; that further no prejudice would be occasioned to the respondent if time was extended for filing and serving the notice and record of appeal. It was counsel's contention that due diligence had been exercised in obtaining of the certified copies of the proceedings, the certified judgment and in the filing of this application. Counsel conceded that no certificate of delay had been issued by the registry due to the delay on counsel's part in the collection of the proceeding.

**Mr. Zablon Mokuu**, learned counsel for the respondent submitted that the application was an abuse of the court process as no letter applying for the proceedings had been served on them todate. The judgment was delivered on 14<sup>th</sup> January 2014, and this application was filed on 28<sup>th</sup> April 2015, which amounted to a delay of over one year. It was counsel's contention that the delay in preparation of the proceeding could have been taken into account if the letter applying for the proceedings had been served on the respondent, but that this was not the case. Counsel contended that the application and the intended appeal had since been overtaken by events as execution had been effected, and the ensuing costs had been paid, as no stay of execution had been obtained by the applicant.

Counsel further submitted that, even after the proceedings were ready, there was clearly a delay in their collection, which was a demonstration that the applicant had no interest in pursuing the appeal. On the contention that the appeal was arguable, counsel was of the view that as the property had already been transferred and distributed to each of the beneficiaries who had obtained title, and as a consequence the subject matter of the dispute was no longer in existed.

In considering the application, this Court has stated time and again that under **rule 4** of this Court's rules, it is settled that, the single judge's discretion is wide and unfettered in determining whether to extend time or not, which discretion should be exercised judiciously and not capriciously. In this regard, the principles are as set out in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

In the application before me, the applicant has prayed for time to be enlarged to file and serve the notice of appeal and record of appeal out of time. In considering whether or not to extend time, the applicant must provide a satisfactory explanation, for the delay in filing the intended appeal.

It is not in dispute that the judgment was delivered on 14<sup>th</sup> January 2014. This application was lodged on 28<sup>th</sup> April 2015, and therefore the period of delay is in excess of one year.

To begin with the record shows that a Notice of Appeal dated 28<sup>th</sup> April 2015 was purportedly filed. The Notice of Appeal is not stamped by the High Court, and bears no evidence that it was lodged with the Registrar. The applicant's problems are further compounded by the omission to serve the Notice of

Appeal on the respondent, contrary to the stipulations of **Rule 76 (1)** of this Court's rules. No explanation has been provided for the failure to file the Notice of Appeal within the period stipulated period, while the failure to serve the notice on the respondent, was attributed to inadvertence on the part of counsel.

Turning to the request for proceedings, the record does not show that any request was made by the applicant. It follows that if no request for proceeding was lodged with the registry, such request could not have been served on the respondent.

Despite this, the applicant has conceded that there was a delay in collecting the proceedings from the registry, and in attempting to explain this delay, the applicant's counsel owned up to this as a mistake on its part. Yet, while conceding that the delay was counsel's mistake, there has been no explanation offered that would account for the inordinate delay. No effort was made to provide particulars such as when it was discovered that the proceedings had not been collected, when they were eventually collected, and what steps counsel took to mitigate against the delay that had already been occasioned.

While this Court has variously excused mistakes of counsel in the filing of appeals, a candid and satisfactory explanation requires to be offered, particularly where the period of delay is so extensive or inordinate, so as to provide sufficient material upon which a single judge's discretion may be exercised.

Having considered the application, the averments and the submissions, I consider the length of the delay to be inordinate, and I find that no sufficient material or reasons have been provided to explain the delay in either filing the Notice of Appeal or in collection of the proceedings from the registry.

While it is possible that an appeal might have succeeded, there is no certainty, and I do not consider this to be a sufficiently strong factor to cause me to exercise my discretion in favour of an extension. Furthermore, there would inevitably be prejudice suffered by the respondent arising from such a lengthy delay in finalizing this dispute.

Accordingly, having taken all of the required factors into account in the exercise of my discretion under **rule 4** of this Court's rules I have come to the conclusion that the application for extension of time fails.

I hereby order that the application by Notice of Motion dated 25<sup>th</sup> April 2014 is dismissed with costs.

***DATED and DELIVERED at ELDORET this 10<sup>th</sup> day of December, 2015.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**