



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. NAI. 19 OF 2015

BETWEEN

TOM DAVID WANYONYI APPLICANT

VERSUS

BEN MUKHWANA WEPUKHULU RESPONDENT

(An Application for extension of time within which to file and serve a Notice of Appeal as well as the Record of Appeal out of time, arising from a Judgment of the High Court of Kenya at Kitale, (Obaga, J.) dated 17th September, 2013

in

H.C.C.C. NO. 87 OF 2010)

RULING

1. On 17th September 2013, the High Court at Kitale delivered judgment in a suit between the parties and ordered the eviction of the applicant from the respondent's property known as title number Trans- Nzoia/Nyasi/49 on the basis that the applicant had no legal basis for occupying the same. The applicant was allowed three months to relocate from the land failing which the respondent would be at liberty to evict him. As already indicated that order was made on 17th September 2013.
2. Intending to appeal that decision, the applicant filed the present application on 20th January 2015. That is approximately sixteen months later, seeking an order that the time limited for filing and serving the Notice of Appeal and the Record of Appeal be enlarged.
3. The application is based on grounds set out on the face of the application, namely that the applicant filed an application for extension of time in the High Court on 18th February 2014 (about five months after the decision intended to be challenged was given) and that he was later informed that the application should be filed in this Court.
4. In his supporting affidavit the applicant deposes that he filed an application in the High Court on 2nd December 2013 that he was acting in person by then and was not aware that the

application should have been filed before this Court; and that he instructed his lawyer on 8th October 2014.

5. In his replying affidavit in opposition to the application, the respondent deposes that the application by the applicant to the High Court was dismissed on 27th February 2014 and no explanation is offered by the applicant why he took no steps until 20th January 2015 when he filed the present application; that the applicant has not acted diligently and is guilty of unreasonable delay that has not been explained; that the intended appeal has no merit and that the judgment of the lower court has already been executed.
6. Learned counsel Mrs. A. L. Khayo argued the application on behalf of the applicant and urged me to allow it on the basis of the grounds disclosed on the face of the application and in the supporting affidavit to which I have already referred.
7. On his part, learned counsel for the respondent Mr. D. N. Onyancha referred me to the replying affidavit and submitted that the reasons for delay given are not satisfactory; that no explanation is given for inactivity; that the intended appeal has no merits and is overtaken by events as the judgment was given effect and the applicant evicted from the respondent's property.
8. I have considered the application, the affidavits and submissions by learned counsel. Rule 4 of the Court of Appeal Rules, 2010 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.”

9. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

10. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** Waki JA stated:

“The exercise of this Court’s discretion under Rule 4... 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.”

11. What then are the circumstances in the present application in view of those principles? Apart from the reason given by the applicant that he mistakenly applied for extension of time in the High Court instead of applying to this Court and that he was unrepresented, no other reason has been advanced for the delay. The respondent has exhibited the ruling of the High Court dismissing the applicant's application in the High Court. It was dismissed on 27th February 2014. Since that time, what did the applicant do? He has not stated. He says that he instructed his

advocates on 8th October 2014. Even if I accept that he instructed his advocates on 8th October, 2014, why was the present application not filed until January 2015? There is no explanation. The inordinate delay in bringing this application is therefore not explained.

12. There is also no indication whether the applicant ever applied for copies of proceedings of the lower court. The applicant did not state what grievances he has with the judgment he intends to appeal against. In other words the intended grounds of appeal are not mentioned.

13. In those circumstances, I do not have any justifiable basis on which to exercise my discretion in favour of the applicant, as there is no material on which I can do so. I accordingly dismiss the applicant's application dated 14th January 2015 with costs to the respondent.

Dated and delivered at Eldoret This 10th day of December, 2015.

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