



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: KARANJA, J.A [IN CHAMBERS]**

**CIVIL APPLICATION NO. NAI. 144 OF 2012**

**BETWEEN**

**ALBERT KIHIMA.....APPLICANT**

**AND**

**EZEKIEL RUGUT.....1<sup>ST</sup> RESPONDENT**

**DANIEL KOGEI.....2<sup>ND</sup> RESPONDENT**

**RICHARD KORIR.....3<sup>RD</sup> RESPONDENT**

**THE CHAIRMAN,**

**SOY LAND DISPUTES TRIBUNAL.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

*(An Application for extension of time within which to serve a notice of appeal as well as file and serve the record of appeal arising from the ruling of the High Court of Kenya at Eldoret (Anga’wa, J) dated 21<sup>st</sup> April 2012*

*in*

***H.C. MISC. CIVIL APPL. NO. 585 OF 2006)***

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**RULING**

**Albert Kihima** (applicant) has moved this Court by way of a notice of motion Application dated 20<sup>th</sup> April, 2012 under **Rule 4 of Court of Appeal Rules** for extension of time to serve the notice of Appeal dated 5<sup>th</sup> October 2011, as well as to file and serve the record of appeal within such time the Court shall deem fit.

The application is premised on twelve grounds on its face and supported by the applicant’s affidavit in support sworn on 20<sup>th</sup> April 2012.

According to the applicant, when the notice of motion dated 14<sup>th</sup> August 2006 came up for hearing before the High Court (Anga'wa, J) she directed his counsel to avail a copy of a Kenya gazette notice which they wanted to rely on for purposes of opposing the application, the following morning at 8.30 am.

Apparently, they were not able to comply and so the application proceeded in their absence and a ruling was delivered in which the notice of motion was allowed. According to the applicant, the learned Judge held on to the file for three (3) months and for one reason or another, the applicant was unable to file and serve the notice of appeal within the timelines permitted by the Court of Appeal Rules. The record shows that the notice of appeal was lodged in Court on 5<sup>th</sup> October 2011 which was almost eighteen (18) months after delivery of the impugned ruling.

The other reason/excuse advanced by the applicant for the delay in filing the notice of appeal is that he had filed applications to have the said ruling set aside but which applications were not successful. It is worth of note however, that the applications referred to were filed between October 2010 and the time he filed the notice of appeal which was still several months after he received the Court's Ruling which he says was in July 2010 (as his affidavit sworn on 19<sup>th</sup> October 2010) in support of an application to review or set aside the said ruling which application was dismissed.

He also blames scarcity of finances on his part for the delay. He urged that he has a good appeal and he should therefore be allowed to ventilate the same. It is noted that although his appeal is purely predicated on the gazette notice dated 21<sup>st</sup> November 2003, no such copy was annexed to the supporting affidavit in his application. I have nonetheless managed to see a copy of the same which is annexed to the affidavit in support of the notice of motion dated 19<sup>th</sup> October 2010. The same is nonetheless illegible and I am totally unable to decipher the contents thereof.

The notice of motion is opposed by the respondent vide his replying affidavit sworn on 11<sup>th</sup> February 2013 and the grounds of opposition dated the 14<sup>th</sup> February 2013.

According to the respondent, no sufficient grounds have been advanced to enable the Court grant the orders sought. According to the respondent the inordinate delay has not been sufficiently explained; the paucity of the applicant's financial resources cannot be an excuse for the delay; the draft memorandum of appeal does not identify any triable issues and finally that the filing of the notice of appeal and this application is just an afterthought and abuse of the process of the Court. According to the respondent, the applicant just wants to avoid paying the balance of costs which have already been taxed and partly paid.

Mr. Omusundi, learned counsel for the applicant and Mr. Limo, the learned counsel for the respondent, in their oral submissions in Court echoed the contents of the rival affidavits.

On her part, Ms Mbiyu, learned counsel for the 4<sup>th</sup> respondent supported the submissions made on behalf of the other respondents. She submitted that the delay of almost two years had not been sufficiently explained. She reiterated that the application was only meant to derail the course of justice and urged the Court to dismiss it. She was nonetheless not asking for costs.

I have considered the application along with the rival affidavits and submissions of all counsel. I have also considered the authorities tendered by learned counsel for the 1<sup>st</sup> respondent.

The Court's power to enlarge time under **Rule 4** of this Court's Rules is discretionally. There are nonetheless, some established principles which guide the court in deciding on whether to extend time or not.

First and foremost, the Court must consider the reasons advanced for failure to comply with the timelines provided for in the Rules. In this case, the applicant says that he got the court's ruling in July 2010. Even assuming that is so, he ought to have filed the notice of appeal shortly thereafter or have very good

reasons for not doing so. His notice of appeal was lodged on 5<sup>th</sup> October 2011 which was still nine (9) months later. His explanation that the respondent had filed other applications in the same file does not hold water because that could not have stopped him from filing this application. The insufficiency in the explanation and the delay fortifies the respondent's submission that this application was only filed as an afterthought with the clear intention of derailing the process of committal to civil jail for non-payment of the taxed costs.

On the second issue of the applicant's paucity of financial resources, that is not convincing either. I say so because he never made any attempt to move this Court for leave to file the application as a pauper which is allowed by the Rules. The reason for delay has not in my view been sufficiently explained. The delay was inordinate and the applicant is therefore, guilty of laches. As the often cited doctrine of equity goes, "*Equity does not aid the indolent*". The delay in this case is inexcusable and cannot be countenanced.

The other principle to offer guidance to the Court is whether the intended appeal is arguable or not, as stated earlier on, no legible copy of the Kenya Gazette notice which is said to contain the names of the members of the Lands disputes tribunal was annexed to the supporting affidavit. I am therefore unable to see if indeed the learned Judge erred by making the finding that the said members were not gazetted.

Lastly, as to whether the applicant would suffer any prejudice, we note that he is the author of the predicament he now finds himself in. If he will suffer any prejudice following the dismissal of his application, then he has only himself to blame. In my view however, the orders of the High Court did not bar the applicant from seeking recourse in the civil courts if he had any justiciable claim subject of course to the relevant law and Civil Procedure Rules.

All in all therefore I find no convincing reasons for me to allow the orders sought. The applicant has dismally failed to satisfy me that he deserves the positive exercise of this Court's discretion in his favour. This application therefore fails. The same is hereby dismissed with costs to the 1<sup>st</sup> respondent.

***Dated and delivered at Eldoret this 11<sup>th</sup> day of April, 2014.***

**W. KARANJA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

*;rm*