IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 32 OF 2014

BETWEEN

JOHN MICHAEL WANJAO …..... APPLICANT

AND

GEORGE KIMETTO ….....1ST RESPONDENT

ALUBALA ABENAYO ANDAMBI…..... 2ND RESPONDENT

COUNTY LAND REGISTRAR (UASIN GISHU) ..... 3RD RESPONDENT

(An Application for leave for extension of time to file and serve the Record of Appeal arising from the Ruling and Order of the Environment and Land Court of Kenya at Eldorect (Munyao, J.) dated 20th February, 2014

in

ENVIRONMENT & LAND NO. 263 OF 2013)

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RULING

On 20th February 2014, the Environment and Land Court at Eldoret *(Munyao Sila, J.)* delivered a ruling in E & L 263 of 2013 in which he dismissed the entire suit with costs to the defendants who are the respondents in this Notice of Motion dated 8th May 2014 and filed on the same day. The applicant was not amused. He felt aggrieved. He moved to this Court by way of Notice of Appeal filed on 27th February 2014. That was timeously done. He also, through his firm of advocates, Marube & Company wrote a letter to the Deputy Registrar, High Court of Kenya at Eldoret dated 20th February 2014 bespeaking the certified copies of proceedings. That letter was not copied to the respondents. In any event, as this Court has stated time and again, there was no need for certified copies of proceedings. All that was necessary were copies of proceedings. Be that as it may, there was no response or at least no written response from the court as to when those proceedings sought were ready for collection as the court never informed the applicant as is required by the rules of courtesy. However, Mr. Marube says he made visits to the court and on 29th April 2014, he collected the copies of the proceedings. It was at that time of collecting the same copies that he was told the same were ready for collection and were certified

on 22nd April 2014. Having collected the copies of the proceedings, he then realised the sixty days required by the rules of this Court for filing the record of appeal had expired and as he had not copied the letter bespeaking the proceedings to the respondents, Certificate of Delay would serve no useful purpose. It therefore became necessary, if I understand Mr. Marube, to apply for the extension of time to file the record of appeal and hence this application filed on 8th May 2014, about nine (9) days after receipt of proceedings. The applicant has annexed to the same application draft Memorandum of Appeal. The application is seeking only two orders which are:

> *"1. That Honourable Court be pleased to grant the applicant leave to file and serve record of appeal out of time.*
>
> 2. *That costs of and incident to this application do abide the result of the said appeal."*

The grounds in support of the application are in brief that the delay period is nine days which was caused by the intervening matters beyond the applicant's control; that the applicant's advocates acted on a mistaken belief that the provisions of Rule 82 (1) of the Court of Appeal Rules, granted extension of time where there is a delay to obtain certified proceedings; that the intended appeal has high chances of success; and that the respondent will suffer no prejudice which cannot be compensated by costs. The application was opposed by the second respondent ***Alubala Abenayo Andambi***, who, through his firm of Advocates Annasi Momanyi & Co., filed Replying Affidavit in which he maintained that the applicant has not produced anything before the court demonstrating that the proceedings were not ready for collection on 22nd April 2014; that the applicant did nothing after seeking proceedings and filing Notice of Appeal; that no genuine reasons have been advanced for the delay in filing the record of appeal and that the intended appeal has no chances of success as the applicant appeared to be pursuing his claims piecemeal.

Mr. Marube, in his address to me, mainly highlighted the grounds set out in the two affidavits in support of the application, the which affidavits on the main expanded and explained the grounds in support of the application, a summary of which I have cited hereinabove. In the same way Mr. Momanyi, apart from stating that his client would be prejudiced as he had felt the matter had been brought to a conclusion only to find that it is still continuing all be it in a different aspect did not add much to the Replying affidavit. The other two respondents, though served did not appear in court nor did they file any replying affidavits.

I have carefully perused the application, the affidavits in support of the application and that in reply to the Notice of Motion. I have also considered the ruling and the draft Memorandum of Appeal together with the able submissions by the learned counsel for the parties that were before me and lastly the law. This Court, in considering an application made under rule 4 of this Court's rules, exercises unfettered discretionary jurisdiction which like all other judicial discretions, must be exercised upon reasons and not upon the courts whims nor capriciously. In so exercising the same discretionary powers the court is guided by certain principles. These principles are that the court has to take into account firstly the delay period; secondly the explanation or reasons for that delay; thirdly the chances of the appeal succeeding but without going into the merits and fourthly the degree of prejudice to the respondent if the application is granted. This list of matters to be taken into account is not exhaustible and cannot be exhaustive for the main reason that to have a definite list would in itself interfere with the unfettered discretion that the court enjoys when considering such an application.

In the often cited case of **Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi** - *(Civil Application No. Nai. 251 of 1997 (ur)* this Court stated:

> **"It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled 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."**

The above matters were also cited in the case of **Major Joseph Mweteri Igweta v. Mukira M' Ethare & Attorney General** – *Civil Application No. NAI. 8 of 2000 (ur)* when Lakha, JA *(as he then was)* states as follows:-

> **"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the 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, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."**

I have cared to cite the two authorities above only to demonstrate that the matters to be considered can be as many as the circumstances and factors of a particular case dictates.

In this application, the period of delay is not in dispute. It is 9 days, as Notice of Appeal was filed on 27th February 2014 and thus sixty days that applicant needed thereafter for filing record as per rules expired on 29th April 2014. The reason for that delay is that the court did not respond to applicant's letter bespeaking the proceedings and thus it was not certain as to when the proceedings sought were ready for collection. I say so because, as a matter of fact, it is that court's response that determines the date for purposes of collecting the copies of proceedings. Without it, the applicant's delay may not be visited upon him as he would have no reason to visit the courts for purposes of collecting the copies. If however the delay in receiving that response becomes inordinate then the applicant would be expected to send a reminder and possibly to visit the Registry. In my mind and I take judicial notice of what goes on in the Registry, I cannot say that time had been reached. In short I do accept the explanation for the delay in this matter. The respondent says the appellant's delay of 9 days ie from 29th April 2014 when he collected the copies of the proceedings to 8th May when he filed the application, was in ordinate. In response to my question, Mr. Momanyi says about three days would have been enough to prepare the record and to file the same. With respect, I think that is to one extent ignoring realities in every day life and practice. In my view, after collecting the copies of the proceedings, the applicant's advocate had to call his client, take instructions and then prepare the record. That could certainly take sometime and whereas I think nine days was on the higher side, I cannot rule it as altogether unreasonable. I accept it as reasonable in the circumstances of this matter.

I have seen and perused the draft Memorandum of Appeal. In my view, it raises matters that this Court may need to ventilate at a full hearing. Lastly the prejudice alleged by Mr. Momanyi is in my considered view, with respect not the prejudice meant for purposes of the application under rule 4. Of course any party would like a matter to be disposed of in his favour and once that is done, would not want to see it back to nag him, but that is not prejudice referred to in law under rule 4. Prejudice referred to is for example whether by the time the matter proceeds on appeal after the period has expired, the respondent will have lost something that may not be recovered after the appeal even if the appeal were dismissed. That prejudice has not been alleged in this case.

All in all, I am satisfied that this is an application that calls for the exercise of my discretion and I do exercise it in favour of the applicant. The application is allowed. The applicant is granted fifteen (15) days from the date hereof to file and serve record of intended appeal. Costs to be in the intended appeal.

Dated and Delivered at Kisumu this 25th day of July, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR