



IN THE COURT OF APPEAL

AT NYERI

CORAM: OTIENO-ODEK J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NYR, 24 OF 2014

BETWEEN

CHARLES MAINA MURIUKI APPLICANT

AND

JAMLECK MUCHIRA WANJAU.....RESPONDENT

(An application for extension of time to file Appeal out of time against the judgment of the High Court of Kenya of Kenya at Nyeri (Sergon, J) delivered on 15th October, 2010

in

H. C. Civil Case No. 2 of 1998)

RULING

1. By a Notice of Motion dated 25th September 2014, the applicant seeks two orders under rule 4 of the Court of Appeal Rules 2010 that:-
 1. ***That time to file the appeal be extended***
 2. ***Costs of this application be provided for.***
2. The background facts are that the respondent, Jamleck Muchira Wanjau, through an Originating Summons dated 5th January 1998 applied for orders that he had become entitled by adverse possession to half portion of ***Land Parcel L.R. Mutira/Kaguyu/1049***, registered in the name of the applicant, Charles Maina Muriuki. Upon hearing the parties, the trial court (Sergon, J.) by judgment dated 15th October, 2010, declared that the respondent had acquired two (2) acres by adverse possession within ***LR No. Mutira/Kaguyu/1049***. The applicant was directed to sign the necessary transfer documents to cause two (2) acres to be excised from ***LR No. Mutira/Kaguyu/1049*** and thereafter transfer the same to the respondent. In default, the Deputy Registrar was authorized to execute the documents in place of the applicant. Being aggrieved by the orders of the High Court, the applicant intends to appeal against the same. The applicant filed a Notice of Appeal on 21st October, 2010, and no other step or action has been taken to file the record of appeal. In the present application, the applicant seeks for orders to extend time to file the record of appeal.

3. The grounds in support of the application for extension is that the then advocate for the applicant, Messrs Gathara Mahinda & Co. Advocates, were unwilling to file the appeal despite asking and receiving money from the applicant to file the appeal; that the applicant's former advocate's failure to file the appeal led to lapse of time; that the applicant has all along been interested in this appeal and is keen to have the same determined within the shortest possible time.
4. Learned Counsel **Mr. Kimunya** appeared for the applicant while learned counsel **Ms Lucy Mwai** appeared for the respondent.
5. The present application is supported by an affidavit deposed by the applicant. It is deposed that upon judgment being delivered by the High Court on 15th October, 2010, a Notice of Appeal was filed on 21st October, 2010 and a request for certified copies of the proceedings was made. That by letter dated 14th June, 2012, the Deputy Registrar indicated that the typed and certified copies of the proceedings were ready for collection; that the proceedings were collected by the former advocate for the applicant Messrs Gathara Mahinda & Co. Advocates on 6th July, 2012; that since 6th July, 2012, the former advocate took no step to file the appeal and this has occasioned lapse of time; that Ruth Thira Ruguru, a legal clerk in the employment of Gathara Mahinda & Co. Advocates in her affidavit in support of the instant application deposed that she collected the certified copies of the proceedings and unfortunately placed the client file in the archive shelf which is for closed files instead of placing the file on pending matters shelf; the applicant deposed that between 4th August, 2010 and 16th May, 2013, he paid a total of Ksh. 13,000/= to his former advocate to file the appeal. That on 24th March, 2014, the applicant's former advocates Messrs Gathara Mahinda & Co. Advocates, made an application to cease acting for the applicant and this prompted him to engage the present counsel who has now applied for extension of time. That the present application was filed on 26th September, 2014. In support of the averments made in the affidavit, the applicant attached a certificate of delay, payment receipts from his former advocate and the Notice of Appeal filed in this matter. Counsel submitted that mistake of counsel should not be visited upon a client; that the applicant is a lay person and did not appreciate why the appeal was not filed within time.
6. Counsel for the respondent in opposing the application stated that the period of delay in this matter is over two (2) years. That the certificate of delay indicates that the proceedings were ready and collected on 6th July, 2012; that the present application was filed on 26th September, 2014 and no reasonable explanation for the delay between 6th July, 2012 and 26th September, 2014 has been given. The respondent submitted that the applicant's attempt to blame his former advocate on record does not hold water; that even if the former advocate was to be blamed, on 24th March, 2014, the former advocate made an application to cease acting for the applicant; the period of delay between 24th March, 2014 and 26th September, 2014, when the present application was filed has not been explained.
7. The respondent in his replying affidavit deposes that the applicant has been indolent and should not be granted extension of time; that despite filing a Notice of Appeal, the applicant failed to file the appeal within the requisite 60 days and this prompted the respondent to file before this Court **Civil Application No. 13 of 2012**, seeking orders to have the Notice of Appeal struck out; that the applicant in reply to the application to strike out the notice of appeal indicated that he was not aware that the typed proceedings had been collected by his advocate; that after knowing that the appeal had not been filed, the applicant did not personally taken any steps to ensure that his appeal was filed; that the applicant was prompted into action when the respondent filed a notice of motion dated 24th January, 2014, at the High Court seeking to discharge the stay of execution orders issued on 11th February, 2011; that if the applicant lays blame on his former advocate, then he can have redress against the said advocate; that the proceedings were ready in 2012, and the delay is for a period over 2 years which is inordinate, unexplained and ought not to be excused; that there must be an end to litigation.
8. I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under **rule 4** is unfettered and does not require establishment of "*sufficient reasons*". Nevertheless, it ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent

if the application is granted, and whether the matter raises issues of public importance, amongst others – see ***Fakir Mohamed v Joseph Mugambi & 2 Others, Civil Application Nai. 332 of 2004*** (unreported). In the case of ***Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others, Supreme Court Application No. 16 of 2014***, it was stated that extension of time being a creature of equity, one can only enjoy it if he acts equitably: *he who seeks equity must do equity*. There is also a duty now imposed on the Court under **sections 3A and 3B** of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

9. The Supreme Court in ***Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others, Supreme Court Application No. 16 of 2014*** laid down the following as the under-lying principles that a Court should consider in exercise of discretion to extend time:

- ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- ***Whether the application has been brought without undue delay; and***
- ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

10. In the instant case, the applicant was represented by Counsel at the High Court when judgment was delivered on 15th October, 2010. A notice of appeal was duly filed within time on 21st October, 2010. The applicant gives the reason for delay in filing the appeal as unwillingness on the part of his former advocate. Applying the guidelines for extension as given by the Supreme Court, I find that over 2 year delay period has not been satisfactorily explained; as late as 24th March, 2014, the applicant was aware that his former advocate had not filed the appeal; no reasonable explanation has been given for this period of delay; the applicant has not demonstrated what steps he took to ensure that his appeal was filed within time; payment of money to his former advocate is not an adequate explanation for the delay; a client must follow up to ensure that his legal matters are diligently prosecuted. Whereas it is a general principle that mistake by counsel should not always be visited upon a client, I do find that in the present case, the indolence on part of the applicant is inexcusable. The affidavit evidence on record shows that when ***Civil Application No. 13 of 2012***, was filed on 22nd May, 2012, by the respondent to strike out the Notice of Appeal, the applicant was aware that his appeal had not been filed. The delay in the intervening period of 22nd May, 2012, to 26th September, 2014 remains unexplained.

11. In total, I am not satisfied that the over two (2) year period of delay has been reasonably explained. I decline to exercise my discretion in favour of granting leave to file the appeal out of time. The Notice of Motion application dated 25th September, 2014 is hereby dismissed with costs.

Dated and delivered at Nyeri this 8th day October, 2014

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR