



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 299 OF 2013

BETWEEN

JOSEPH NJOGU NGOYA.....APPLICANT

AND

MARGARET NYARIARA KIMANI.....

RESPONDENT

(An application for extension of time to file Notice of Appeal against Judgment and Order of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 20th September, 2013

in

HC ELC NO. 217 OF 2010)

R U L I N G

Joseph Njogu Ngoya (applicant), by his notice of motion dated 31st October, 2013 seeks leave to lodge the Notice of Appeal in HC ELC No. 217 of 2010 out of time.

The application is predicated on the grounds on its face and supported by the applicant's affidavit sworn on 31st October, 2013. According to the applicant, the judgment he wishes to appeal against was supposed to be delivered on 13th September, 2013. The same was nonetheless not delivered on that date. Upon enquiry from the court registry, he was informed that the same would be delivered on notice. That was nonetheless not the case and the judgment was delivered on 20th September, 2013 without notice.

He deposes that he was only able to trace the file on 14th October, 2013 by which time the time to file the notice of appeal had already lapsed. He immediately wrote to the court requesting for the judgment and proceedings vide his letter dated 14th October, 2013 (**annexure JNN-B**). He contends that he has a good appeal and further that this application was filed timeously and the delay has been adequately explained. He therefore, urges the court to exercise its discretion in his favour and enlarge time as prayed.

On her part, the respondent has opposed the application vide her replying affidavit sworn on 29th November, 2013. She concedes that the judgment was not delivered on 13th September, 2013 as

scheduled. She nonetheless deposes that there was a notice at the door of the courtroom indicating that the judgment would be delivered on 20th September 2013 and so she went to court on that date and the judgment was duly delivered. It is her contention that the applicant stands to suffer no prejudice if the application is not allowed as he has conceded that he had no claim in the portion of land decreed to the respondent in the said judgment. She implores the court to dismiss this application with costs.

Both learned counsel appearing for the parties – Mr. Wandaka for applicant and Mr. Kimani for the respondent reiterated the averments in the affidavits I have referred to above, in their oral submissions before me.

I have considered the application, the contents of the rival affidavits and the submissions of both learned counsel. I have also noted the cited legal authorities availed by Mr. Wandaka. The principles to be considered before a court grants leave to a party to file an appeal out of time are well established and I need not repeat them in detail for purposes of this ruling. The court needs to consider the period of the delay; the reasons proffered for the delay; the prejudice if any that is likely to be suffered by the party if leave is denied; and possibly the chances of the appeal succeeding.

In this case, it is conceded that judgment was not delivered on the due date. It was delivered on 20th September, 2013. According to the applicant, he only came to learn about it on 13th October, 2013 and the very following day, he wrote the letter bespeaking the proceedings to the court. Even assuming that he learnt of the delivery of the judgment sooner, still the delay involved here would be a maximum of three weeks. That cannot be said to be excessive under any circumstances.

I am also satisfied that the same has been sufficiently explained. There was no indolence whatsoever on the part of the applicant in filing this application. The first two requirements have therefore been satisfied.

On the issue of prejudice, both parties conceded that the respondent is not claiming the portion decreed to the applicant. The respondent therefore stands to suffer no loss or undue prejudice if this application is allowed. She can be adequately compensated by way of costs.

In the circumstances, I am satisfied that the applicant deserves the favourable exercise of my discretion pursuant to **Rule 4** of this **Courts Rules**. I therefore, allow the application and order that the notice of appeal be filed within seven (7) days from the date hereof, and the memorandum and record of appeal be filed and served within 30 days thereafter.

The costs of this application are awarded to the respondent.

Dated and delivered at Nairobi this 7th day of November, 2014.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR