



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 62 OF 2011

BETWEEN

WILLIAM KAMUNGE GAKUI..... APPLICANT

AND

EUSTACE GITONGA GAKUI.....RESPONDENT

(An application for extension of time to file a Notice of Appeal against the Judgment and Decree of the High Court of Kenya at Nyeri (Sergon, J) dated 18th February, 2011

in

H.C.C.C No. 5 of 2007)

RULING

The applicant William Kamunge Gakui (the applicant) has moved to the seat of justice by way of a notice of motion brought under Rule 4 & 41 of the Court of Appeal rules, dated 15th March, 2011 and filed on the same 15th day of March, 2011. Two reliefs are sought namely that ***“the applicant be granted leave to file a notice to appeal out of time and that costs be provided.”***

The application is premised on the grounds in the body of the application and the supporting affidavit. The total sum of the grounds in support of the application is that the applicant and the respondent are brothers; the applicant moved to the seat of justice in the High Court and presented Nyeri HCCC No. 5/2007 against the respondent, Eustace Gitonga Gakui, seeking orders for eviction, evicting the respondent, his family and properties from L.R. No. Kirimukuyu/Mutathini/937 and damages for trespass, costs of the suit and interest. The respondent filed a defence denying the claim. Despite the defendant's and his advocates failure to attend the hearing after the notice had been served on them, and despite the applicant tendering both oral and documentary evidence, the learned trial Judge J. K. Sergon in a judgment delivered on the 18th day of February, 2011 declined to find for the applicant.

The applicant became aggrieved with that decision and desired to appeal but was not able to file a notice of appeal in the time stipulated in the Court of Appeal Rules. The reason the applicant has given for the delay is that, judgment was delivered in the absence of both him and his advocate on record; that the advocate indicated to have held brief for the applicants counsel on the date of the delivery of the judgment is not known; that the applicant came to learn of the delivery of the judgment on the 9th day of March, 2011 when time for lodging of the notice of appeal had lapsed on 2nd March, 2011.

It is the applicants argument that he has a genuine complaint to take up on appeal as he has issues with the manner the trial Judge recorded the applicants evidence; that the mistake is excusable as he had no notice of the delivery of the judgment.

There is reliance on the case of ***Gakuu & others vs Hee (2003)*** eKLR, a Court of Appeal decision by S. E. Okubasu JA wherein the learned Judge drew guidance from the landmark decision of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997*** (unreported) where on the following observation had been made:

“It is now settled that the decision whether or not to extend the 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 reason 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.”

There was further inspiration from the decision in the case of ***Muchugi Kiragu versus James Muchugi Kiragu and another, Civil Application No. Nai. 356 of 1996*** where an observation was made to the effect that:-

“Lastly, we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his decision was in the circumstances inexcusable and that his opponent was prejudiced by it”

The applicant has also made reliance to the case of ***Gachihi Wang'ombe versus Hellen Thongori substituted by James Muriuki Maina & Eratus Wang'ombe, Nyeri Civil Application No. Nai. 361 of 2004*** wherein Waki JA granted the relief of an extension of time within which to lodge the notice of appeal for the reason given that the learned Judge did not consider a delay of two weeks to be inordinate. Neither did he have reason to doubt the reasons for the delay and for that reason the learned Judge could not deny the applicant the right to exercise his undoubted right of appeal.

The respondent was allegedly served with the application but filed no opposition against the same. They were also served with the hearing notice by the registry on 24th May, 2013 but did not appear for the hearing.

The applicant has invoked the exercise of my discretion under Rule 4 and 41 of the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules deals with extension of time. It provides:-

“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.” whereas Rule 41 on the other hand deals with mode of procedure for seeking the extension of time. It provides:-

“The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.”

A reading of both Rules indicate clearly that what is called for in deciding whether to grant or withhold the relief of extension of time is simply a matter of the exercise of the courts discretion. The parameters within which I am required to exercise this discretion have been crystallized by case law cited which I have duly considered and applied them to the sole argument herein. The main reason the applicant has given is that he was not aware of the delivery of the judgment till after the time for lodging of the notice of appeal had lapsed.

This application has not been opposed as indicated above.

The other criteria that I am required to take into consideration when deciding whether to grant or withhold a request to extend time is a determination that the intended appeal is arguable. Herein, the applicant was the sole witness. His evidence was not believed by the learned trial Judge. He is desirous of getting a second opinion on the appraisal of the evidence. He has an undoubted right of appeal which can only be curtailed if there is demonstration that the applicant is un deserving of the same.

It is now trite that by 'arguable', it does not mean that which must succeed. On the facts the applicant may very well have an arguable point to raise an appeal as to whether the learned trial Judge properly evaluated the sole evidence adduced before him in order to withhold the relief the applicant had sought from the court.

For the reasons given in the assessment, I am inclined to grant the relief sought in prayer 1 of the application filed on 15th March, 2011. The applicant has fourteen (14) days of todays date to lodge a notice of appeal and thereafter lodge the record of appeal within twenty one (21) days from the date of the lodging of the notice of appeal.

There will be no orders as to costs.

Dated and delivered at Nyeri this 6th day of June, 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR