



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO.27 OF 2017**

**RUFUS MURITHI NYAGA.....APPELLANT**

**VERSUS**

**JULIET WANJA IRERI.....RESPONDENT**

**RULING**

**A. Introduction**

1. The appellant filed an application dated 14<sup>th</sup> September 2018 seeking the following orders: -

*1. That this Honourable Court does extend time for filing the record of appeal.*

*2. That there be a stay of execution of the judgement entered on 13<sup>th</sup> April 2017 in Runyenjes Succession cause no. 205 of 2017 pending hearing and determination of this application interparty and or pending hearing of the appeal.*

2. The parties herein agreed to dispose of the appeal by way of written submissions.

**B. Applicant's Case**

3. In his supporting affidavit dated 14<sup>th</sup> September 2018, the appellant deposed that the appeal was admitted for hearing on the 21/9/2017 and he was granted 21 days to file the record of appeal which he had not filed.

4. The appellant further deposed that the failure was due to his former advocates on record to prosecute the appeal and that it was only after his current advocates came on record that he was made aware that he had not put in his record of appeal.

5. The appellant further deposed that this mistake was not deliberate as he was never made aware of the court directions to file his record of appeal within 21 days as he was under the mistaken belief that memorandum of appeal was sufficient to commence hearing of the appeal.

6. The appellant further deposed that he had an arguable appeal with chances of success and as such urged court not to visit his advocates mistake on him.

7. He further deposed that unless stay of execution was granted, the appeal would be rendered nugatory and further that he stood to suffer substantial loss as he had invested heavily in the suit property.

8. He further deposed that the respondent would suffer no prejudice if his application would be allowed.

### **C. Respondents Case**

9. The respondent deposed that the reasons given by the appellant for the delay in filing his record of appeal were misconceived and not satisfactory and consequently urged the court to dismiss the appellant's case.

### **D. Issues for Determination**

1. Whether the appellant had satisfied court to warrant extension of time for filing the record of appeal.
2. Whether the appellant had met conditions for grant of stay of execution.

### **E. Analysis & Determination**

10. On the issue of merit of application to extend time, it was held in **Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**: -

*"..... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.*

*"We derive the following as the underlying principles that a court should consider in exercising such discretion: -*

*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 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; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if 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."*

11. Under **Section 79G of the Civil Procedure Act**, which section provides that: -

*"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"*

12. The court is persuaded to rely on the above case of **Nicholas Kiptoo** (Supra) and cited provisions of the law on the issue of delay in filing appeal out of time. There is also a duty now imposed on courts 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. The Supreme Court, in the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR** laid out some general principles in matters extension of time thus: -

*"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*

*"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*

*"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

1. *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;*

2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*

3. *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*

4. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*

5. *whether there will be any prejudice suffered by the respondents, if extension is granted;*

6. *whether the application has been brought without undue delay; [emphasis supplied].*

13. On the 24<sup>th</sup> August 2017, M/s Wangoko & Gitonga the advocates for the appellant wrote to the trial court seeking certified copies of the proceedings. It is not clear when the proceedings were collected. The appellant deponed that the appeal was admitted for hearing on the 21/9/2017 and he was given 21 days to put in his record of appeal. The current application was filed on the 18<sup>th</sup> September 2018.

14. In his explanation for the delay, the applicant heaps the blame on his previous advocates, who, according to him, failed to file the record of appeal on time as directed by court.

15. **Order 42 Rule 12** requires that the appellant after being notified of the admission of the appeal, ought to file the record of appeal within 21 days. The appeal in this case was admitted on 21/09/2017 while this application for extension of time was filed on 18/09/2018.

16. The delay of one (1) year has not been explained satisfactorily. The applicant says his advocate failed to act after being notified of the admission of the appeal by the registrar. I have good reason to believe that a case or an appeal belongs to the litigant and not the advocate.

17. A party has a duty to follow up his case with his advocate and also with the court registry. The applicant has not demonstrated that he made any effort to follow-up his case for a whole year.

18. In the case of *Rajesh Rughani vs Fifty Investment Ltd. & Another [2005] eKLR* the Court held:

*“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.*

19. When a court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days but he took a whole one (1) year in slumber. It is not too harsh to refer to the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain but to serve the purpose of expeditious disposal of cases. Litigation must come to an end.

20. The respondent relied on the case of **Imperial Bank Ltd (In receivership) & Another Vs Alnashir Popat & 18 Others [2018] eKLR** where the Court of Appeal observed: -

*Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.*

21. The discretion of the court in extension of time must be exercised judiciously. I find one (1) year delay inexcusable and contrary

to the overriding objective in regard to expeditious disposal of cases and in regard to economic use of judicial resource.

22. The applicant is said to be in occupation of the land of the respondent since judgment was delivered to the effect that he vacates from therein. This may explain why the applicant is not in a hurry to meet his obligations.

23. However, I find that without a record of appeal in place, the applicant has no existent appeal.

24. It therefore follows that this appeal cannot be sustained in its current status. For the foregoing reasons, and by the court on its own motion, the memorandum of appeal is hereby struck out with costs.

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Okwaro for Maina for Applicant**

**Mr. Kamunyori for Respondent**



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