IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK JA (IN CHAMBERS)

CIVIL APPLICATION No. 139 of 2018

BETWEEN

NJERI NJOROGE ....APPLICANT

AND

JOSEPH MAINA GICHUHI..1st RESPONDENT

MAINA RUKUNGU ....2nd RESPONDENT

(Being an application for leave to file an appeal out of time against the judgment and decree of Environment and Land Court at Thika (Gacheru ,J.) dated 2nd March 2018

in

ELC Case No. 122 of 2017 formerly NRB. HCCC No. 233 of 2015)

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RULING

1. By Notice of Motion dated 9th May 2018, the applicant has moved this Court for leave to file the Notice of Appeal out of time. The ground in support of the application as detailed on the face thereof is that the advocate presently on record was instructed to act for the applicant after the impugned judgment was delivered; the previous advocate did not file a Notice of Appeal.

2. At the hearing of this application, learned counsel ***Mr. Kanyi Kiruchi*** appeared for the applicant. There was no appearance for the respondents. Satisfied the firm of Njoroge Kugwa & Co. Advocates for the respondents was served with the hearing notice on 21st November 2018, this Court proceeded to hear the application for extension of time.

3. Counsel relied on the affidavit deposed by the applicant in support of the Motion. He submitted there was no inordinate delay in presenting the instant application; judgment was delivered on 2nd March 2018 and the application was filed on 11th May 2018; the application is approximately 45 days late from the date of impugned judgment.

4. In support of the application, it was urged the applicant was previously represented by the firm of Kiarie Joshua & Co. Advocates; without knowledge of the applicant, judgment was delivered on 2nd March 2018; the applicant deposes she was not present when judgment was delivered but her previous counsel was present in court; she was later informed the outcome of the case but this was after the 14-day period had lapsed; her previous advocate informed her she was to facilitate survey on LR No. Chania/Ngorongo/633 and that the respondent was entitled to ¼ acre out of the larger portion of LR No. Chania/Ngorongo/633. Upon being informed the details of the judgment, the applicant was aggrieved and decided to appoint a new firm of advocates namely Kanyi Kiruchi & Co. Advocates; that failure to file and lodge the Notice of Appeal was due to factors beyond her control; there has been no inordinate delay after the new advocate was instructed; and there is no prejudice to the respondents if leave to extend time is granted.

5. Counsel for the applicant cited the case of **Athumani Nusura Juma vs. Afwa Mohamed Ramadhan (2016) eKLR** to support the proposition that it is an excusable delay if all parties are confused or not aware of the date of judgment. The case of **Imperial Bank Limited (In Receivership) vs. Alnashir Popat & 18th Others (2018) eKLR** was also cited.

6. I have considered the Notice of Motion dated 9th May 2018 and the supporting affidavit thereof. I have also considered the authorities cited by the applicant. The case of **Athumani Nusura Juma vs. Afwa Mohamed Ramadhan (2016) eKLR** is distinguishable as all parties in the instant matter had knowledge of the date of judgment. It is conceded by the applicant that she was represented by counsel on the date of delivery of the impugned judgment.

7. An application for extension of time must be made timeously without inordinate delay. In **Charo vs. Mwashetani & 3 Others (2014) KLR- SCK**, the Supreme Court in considering an application for extension of time stated:

"In the emerging jurisprudence, the concept of 'timelines and timeliness' is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice."

8. In **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court aptly captured the circumstances to be considered in an application for extension of time. The Court stated:

"… 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*; and**

7. ***whether in certain cases, like election petitions, public interest should be a consideration for extending time"* [emphasis supplied].**

8. In the instant application, the issue for my consideration is whether the applicant has offered sufficient explanation for delay between 2nd March 2018 when the impugned judgment was delivered and 11th May 2018 when the application for extension of time was filed. In **Bernard Kibor Kitur vs. Alfred Kiptoo Keter & another [2018] eKLR**, the Supreme Court expressed that when considering an application for extension of time, the Court considers whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time.

9. The applicant in explaining the delay has urged that she was not present when the impugned judgment was delivered and when she learnt of the same, she opted to instruct another counsel to lodge an appeal against the judgment; that when the new advocate took instructions the 14-day period for filing the Notice of Appeal had lapsed.

10. In **Abdul Aziz Ngoma vs. Mungai Mathayo [1976] Kenya LR 61, 62,** this Court said:

"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."

11. I have considered the explanation by the applicant. The supporting affidavit does not indicate the date when the previous advocate on record informed the applicant the outcome of the impugned judgment; all that is deposed is that when the applicant was informed it was after the 14-day period had lapsed. There is an averment in the supporting affidavit that the new advocate on record was instructed on 14th April 2018; there is also an annexed consent recorded before the trial court between the applicant's former and present advocates dated 17th April 2018 allowing the current advocate to represent the applicant. Notwithstanding the consent, there is no explanation for the delay between 14th April 2018 and 11th May 2018 when the instant application was filed. There is no affidavit by the present counsel explaining the delay of about 27 days from the date of receipt of instructions.

12. The issue is whether the delay of 45 days is inordinate and if there is sufficient explanation for delay. Whether or not to grant extension of time depends on circumstances of each case. There is no limit to the number of factors that a court should consider in an application for extension of time, so long as they are relevant. Some of the factors to bear in mind include the period of delay; the reason for the delay; the degree of prejudice the respondent stands to suffer; justice should be administered without undue regard to procedural technicalities and that justice should not be delayed.

(See **Abdulkadir Athman Salim Elkindy vs. Director of Public Prosecutions & another [2018] eKLR**)

13. In the instant matter, the applicant explains the delay that she instructed a new advocate to act for her. In **Kenya Industrial Estates Limited vs. Samuel Sand & Another (2008) eKLR** Deverrell, JA stated that there were "numerous decisions of this court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time." In the instant matter, there is no mistake on the part of counsel, if any, the allegation is that the applicant was informed the outcome of the case by her previous advocate after the lapse of 14 days.

14. In **Rajesh Rughan vs. Fifty Investment Ltd. & Another (2005) eKLR** this 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."

15. In **Bains Construction Co. Ltd. vs. John Mzare Ogowe (2011) eKLR** the court observed:

"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences".

16. In **Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR,** it was thus stated*:*

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

17. This Court in **Donald O. Raballa vs. Judicial Service Commission & another [2018] eKLR** when considering delay and inaction by a new advocate on record expressed as follows*:*

"In our view, the new advocates of the applicant cannot be said to have faired any better than the previous advocates, and it is no wonder that the learned single Judge posed the pertinent hypothetical questions he did. According to the applicant, the advocates were instructed in October 2014 but did nothing on the matter until December 22nd when they made a draft of the application before us. They then waited until 15th January the following year to file it in court. Even assuming without deciding that time does not run for some functions of the court between mid-December and January, it is not argued that the court registries were closed and the filing of the application was impossible. This was not an ordinary matter. A judgment had been in existence unchallenged since 13th May, 2013. There was already a long delay caused by inaction by previous advocates. Surely in those circumstances, it behooved the new advocates to move with alacrity to save the situation before a court of equity. But no, they took their sweet time before drawing up the application and before filing it. We say they took their time because they have not sworn any affidavit to explain the inaction apparent in the matter. In court, counsel appeared to tell us, not in so many words, that he was entitled to go on vacation because the court was also on vacation between 21st December and 15th January! That is why he did nothing. A court of equity would frown on such conduct and we do not blame the single Judge for the findings he made". (Emphasis supplied)

18. It is a constitutional imperative and a rule of natural justice that each person has a right to legal representation and counsel of his/her choice. Founded on this constitutional underpinning, I find the explanation by the applicant that the delay of 45 days was due to her instructing another counsel a sufficient explanation. I am persuaded by dicta in **Richand Velji Shah & 3 Others vs. Victor Maina Ngunjiri ELC 359/200** where it was expressed delay caused by administrative lapses in the process of change of advocates is a sufficient explanation of delay. In this matter, I note there is no affidavit by the new advocate on record explaining the delay between 14th April 2018 and 11th May 2018 when the instant application was filed. However, given the sufficient explanation and taking into account the period of delay is about 45 days, I find the delay is not inordinate.

19. Accordingly, I exercise my discretion and allow the Notice of Motion dated 9th May 2018. Leave be and is hereby granted extending time for the applicant to file and serve the Notice of Appeal against the judgment delivered by the ELC court on 2nd March 2018 in ELC Case No. 122 of 2017 formerly Nairobi Civil Appeal No. 233 of 2015. The Notice of Appeal is to be filed and served within 14 days of the date hereof. The record of appeal is to be served within 21 days of service of the Notice of Appeal. There shall be no order as to costs.

Dated and delivered at Nairobi this 20th day of December, 2018

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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