



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 190 OF 2019

BETWEEN

MURINGA COMPANY LIMITED.....APPLICANT

AND

ARCHDIOCESE OF NAIROBI REGISTERED

TRUSTEES.....RESPONDENT

(An Application for extension of time within which to file and serve a Notice of Appeal from the Judgment of the Environment and Land Court at Nairobi (K. Bor, J) dated 20th May 2019

In

ELC Case No. 284 of 2015(O.S)

RULING

On 20th May, 2019 the Environment and Land Court allowed the respondent's originating summons with the result that it was declared to have acquired, by adverse possession, the title to land reference number 7785/1442, registered in the applicant's name. In the result, the court directed the Land Registrar to rectify the register by cancelling the registration of the applicant as the proprietor of the property and instead to enter the name of the respondent as its new proprietor. The respondent was awarded the costs of the suit.

The applicant was aggrieved but did not take the first necessary steps to challenge the decision within 14 days of its delivery. Procedurally the applicant was required by **Rule 75(2)** of the Court of Appeal Rules to have given to the respondent a notice of its intention to appeal the decision.

Where a party fails to give a notice of intention to appeal, **Rule 4** gives the Court the discretion to extend that time. It is a

discretion exercised on behalf of the Court by a single judge. The discretion is wide and unfettered. (See **Leo Sila Mutiso V. Rose Wangari Mwangi**, Civil Appeal No. Nai. 255 of 1997). Though wide and unfettered the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. (See. **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others**, CA. No. 14 of 2013).

Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In **Athuman Nusura Juma V. Afwa Mohamed Ramadhan**, CA No 227 of 2015, this Court stated thus, on that issue:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”

According to the applicant the delay was only for 22 days while the respondent puts it at 45 days. The Court's own computation brings the period of the delay to 86 days. A prolonged and inordinate delay is more likely than not to disentitle the applicant leave. Likewise the reason or reasons for the delay must be reasonable and plausible, while bearing in mind the other parameters, such as the prejudice to the parties should the Court allow or reject the application for enlargement of time.

The reasons proffered for the delay include the fact that the applicant's directors were not aware that the judgment of 20th May, 2019 had been delivered until 11th June, 2019, some 21 days later. Being a corporate entity the applicant convened an urgent meeting of directors at which it was decided that the decision of the court be appealed. In the result, they instructed their present advocates.

The respondent does not think the applicant deserves the exercise of the court's discretion because through its advocate it was aware of the delivery of the judgment and even sought and was granted a temporary order of stay of execution;

that if their advocate failed to update it, it cannot blame anybody but itself; and that it ought to have been diligent.

It is my view that, apart from the fact that the applicant has been candid on why there has been delay in lodging and serving the notice of appeal, the period of delay itself was not inordinate, in the strict meaning of the term. They took reasonable steps within the shortest time to convene a directors' meeting before bringing this application.

Without deciding the point, the appeal does not appear to me to be frivolous. The question being raised is whether adverse possession was proved to the threshold required in such cases.

For these reasons, I grant the prayer to extend time within which the notice appeal may be filed and served.

The applicant consequently, has 14 days from the date of this ruling to file and serve both the notice of appeal as well as the record of appeal, failing which these orders shall stand vacated without further orders.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR



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