



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: J. MOHAMMED (IN CHAMBERS))**

**CIVIL APPLICATION NO. 80 OF 2020**

**BETWEEN**

**SAMWEL MWANGI KANYARI.....APPLICANT**

**AND**

**MATHEW WACHA NYONGESA.....RESPONDENT**

*(An application for extension of time to file Notice of Appeal against the Judgment of the*

*Environment and Land Court at Busia (A. Omollo, J.) delivered on 15th April 2020*

*in*

*Busia ELC Case No. 89 of 2014)*

**RULING**

**Background**

1. This application dated 16th July, 2020 is brought pursuant to Section 3, 3A and 3B of the Appellate Jurisdiction Act; Rules 4 and 42 of the Court of Appeal Rules; Articles 50 and 159 (2) of the Constitution; and all enabling provisions of law. **Samwel Mwangi Kanyari** (the applicant) seeks orders extending the time for filing a Notice of Appeal against the Judgment of the Environment Court (ELC) at Busia (**A. Omollo, J.**) dated 15th April, 2020. **Mathew Wacha Nyongesa** is the respondent herein.

2. A brief background of the application herein is that the respondent (the plaintiff in the ELC) sued the applicant (the 1st defendant in the ELC) and the Attorney General (the 2nd defendant in the ELC) claiming an interest over **Land Parcel No. Bukhayo/Bugengi/4550** (the suit property). The learned Judge entered judgment in favour of the respondent and *inter alia* made orders issuing a permanent injunction against the applicant restraining him from trespassing into or interfering with the respondent's peaceful use and occupation of the suit property.

3. Dissatisfied with this decision, the applicant filed the instant application which is premised *inter alia* on the grounds on the face of the application that the impugned judgment was delivered on 15th April, 2020 with neither the applicant nor his advocate being aware of the delivery date of the judgment; that consequently, the time within which to file a notice of appeal lapsed before the applicant could file the notice of appeal; that it was not until the applicant's counsel was served with a notice of taxation on 10th June, 2020 that he learnt that the impugned judgment had been delivered; that although the date of delivery of the judgment had been communicated by a notice by the Court's Deputy Registrar dated 6th April, 2020, the notice had not been brought to the attention of the applicant or his counsel; that the notice by the Deputy Registrar had a requirement that advocates willing to have rulings or judgment delivered online were to formally consent to such delivery; and that no such consent was communicated to the Deputy Registrar by the applicant's advocate.

4. It is the applicant's further contention that the instant application has overwhelming chances of success as can be discerned from the Memorandum of Appeal; that the respondent will not suffer prejudice as he will have an opportunity to ventilate his case on merit; that the delay in filing the notice of appeal has been reasonably explained and it is in the interest of justice that the application is allowed.

5. The applicant's advocate filed a supporting affidavit reiterating the grounds on the face of the application. The advocate averred that following the announcement of the scaling down of court activities on 16th March, 2020, he closed his office and released his staff from 30th March, 2020 and resumed on 8th June 2020; that this was the reason for his failure to respond to the Deputy Registrar's notice of 6th April, 2020 requiring advocates with pending rulings and judgments to formally consent to have their rulings and judgments delivered online as he was not aware of the notice.

6. In written submissions filed by the applicant's advocates it was submitted that the fact that the applicant's advocates did not respond to the Deputy Registrar's notice for formal consent for online delivery of the judgment supports the applicant's position that the message was never received at their offices. Counsel further contended that the intended appeal raises arguable issues which the Court ought to allow to enable the applicant to ventilate in the intended appeal.

7. The respondent opposed the appeal and filed a replying affidavit sworn by his advocate. Counsel averred that soon after the delivery of the impugned judgment, the ELC forwarded a copy of the impugned judgment to the respective advocates for the parties by email; that it is therefore not true that the applicant's advocate only got to know about the judgment on 8th June, 2020; that the applicant has therefore not satisfied the pre-requisites for granting of the orders sought; and that the grant of the orders sought will greatly prejudice the respondent as the decree issued by the ELC has been executed in full.

8. The respondent's advocate also filed written submissions and submitted that the effects of the COVID-19 pandemic do not support the applicant's position that he was not aware that the impugned judgment was delivered as it was forwarded to the applicant's advocate's email address; that it was inconceivable that counsel for the applicant did not access his emails from the date of the impugned judgment to the date of filing the instant application; that there was no explanation for the 93 day delay between 15th April, 2020 and 16th July, 2020 when the instant application was filed; that the chances of the intended appeal's success is not a factor as the pleadings and proceedings have not been placed before this Court to enable it make a *prima facie* impression of the intended appeal's success; that the decree of the ELC has already been fully executed; and that the applicant did not move to stay its execution and the respondent will therefore suffer prejudice if the orders sought are granted.

### **Determination**

9. I have considered the application, the affidavits on record, submissions by counsel and the law. This discretion is provided for

under **Rule 4** of the **Court of Appeal Rules**:

*“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.”*

10. The principles guiding this Court in the exercise of that discretion are set out in *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Appeal No. Nai. 255 of 1997:

*“It is now well 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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”*

11. With regard to the possible chances of the success of the intended appeal, this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR stated:

*“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”.*

12. When considering the possible chances of the appeal succeeding, caution should be exercised by the Court not to delve into the merits of the intended appeal, as aptly stated in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR:

*“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”.*

13. The question whether the delay in filing the notice of appeal has been satisfactorily explained is a consideration that this Court must examine before determining whether to exercise its discretion to extend the time allowed for filing the notice of appeal.

14. This Court in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR stated:

*“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”*

15. In *Raphael Musila Mutiso & 3 others v Joseph Ndava Nthuka & another* [2019] eKLR, this Court also observed that:

*“In an application for the extension of time, the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation. There are, on the other hand, many decisions where delays of many months and even years have been excused because the applicant in those applications provided plausible explanation.”*

16. In the instant application, the impugned judgment was delivered on 15th April, 2020. The applicant's advocate averred that he learnt of the delivery of the said judgment on 10th June, 2020 and subsequently filed the instant application on 16th July, 2020. On the other hand, the respondent demonstrated that a copy of the impugned judgment was sent by the Court to the parties' respective advocates via email on the same day that the impugned judgment was delivered.

17. The applicant's advocate has not satisfactorily explained the delay in filing the notice of appeal. In *Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR* the Court held *inter alia* that:

*“The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and principles...”*

[Emphasis supplied].

18. The respondent submitted and demonstrated vide a Court order dated 7th December, 2020 (marked FO-2) that the decree issued by the ELC has already been executed. This was not controverted. In the circumstances, the respondent will suffer prejudice if the orders sought are granted.

19. From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso* (supra). The upshot is that I decline to grant the prayer to extend time. The Notice of Motion dated 16th July, 2020 is accordingly dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2021.**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*Signed*

**DEPUTY REGISTRAR**



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