



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 60 OF 2020

BETWEEN

KENYA POWER & LIGHTINING CO. LIMITED APPLICANT

AND

NOORLANDS LIMITED RESPONDENT

(An application for extension of time to lodge a Memorandum and Record of Appeal against the judgment of the Environment and Land Court at Mombasa (Omollo, J.) delivered on 4th November, 2016 in E.L.C No. 287 of 2013)

RULING

1. Before me is a motion under **Rule 4** of this Court's Rules. The applicant seeks leave to file a memorandum and record of appeal out of time against a judgment dated 4th November, 2016 of the **Environment and Land Court (ELC)** in **E.L.C No. 287 of 2013**.

2. The respondent had lodged the suit which was anchored on the tort of trespass against the applicant. According to the respondent, the applicant had encroached on its **Plot No. 121/V/MN** by placing its equipment and power lines thereon without its consent. More specifically, the applicant was supplying electricity to squatters who had similarly trespassed onto the suit land. The respondent was adamant that the applicant's actions encouraged the influx of more squatters on to the suit land. Towards that end, the respondent sought a number of reliefs including a mandatory injunction to compel the applicant to remove all the equipment and electricity supply lines on the suit land as well as damages for trespass.

3. **Omollo, J.** in the afore stated judgment partly allowed the respondent's suit by awarding it Kshs. 2,500,000 as general damages for trespass. Intent on challenging the decision, the applicant lodged a notice of appeal to that effect on 8th November, 2016. Nonetheless, the applicant failed to file the appeal within the requisite time frame specified under **Rule 82** of this Court's rules, that is, within 60 days of lodging the notice of appeal.

4. The applicant attributed the delay to two factors; firstly, the long period it took the ELC to prepare and furnish the certified proceedings. Secondly, on the mistake of its advocates on record. As per the applicant, the said advocates collected the proceedings on 15th October, 2018 and prepared the record of appeal which was later sent to its representatives in Malindi on 3rd December, 2018 for filing. Unfortunately, the advocates inadvertently failed to follow up on the same due to the fact that they had closed their offices

during the Christmas vacation from 14th December, 2018 to 14th January, 2019.

5. As far as the applicant was concerned, the explanation rendered was excusable and its intended appeal was arguable. Moreover, the applicant urged that the motion was brought without unreasonable delay; and the respondent would not suffer any prejudice since it had deposited part of the decretal sum in a joint interest earning account as security pending the determination of the intended appeal.

6. Opposing the motion, the respondent submitted that the delay of 678 days from the time the proceedings were ready for collection up until the current motion was lodged was not only inordinate but that the explanation given was unreasonable. Besides, the respondent urged that the applicant did not state what steps, if any, it took to follow up on the filing of its intended appeal and as such, it cannot hide behind the alleged mistake of its advocates. In the respondent's opinion, to allow the motion in light of the inordinate delay would be an affront to the maxim that justice delayed is justice denied. In any event, the intended appeal, in the respondent's view, was frivolous.

7. What was more, as per the respondent, the current motion was intended to pre-empt an earlier motion it had filed on 22nd July, 2020 to strike out the notice of appeal on account of the applicant's failure to lodge the appeal within the prescribed timeline. All in all, the respondent urged that there was no reason to warrant the exercise this Court's discretion in favour of the applicant.

8. In exercising my unfettered discretion, with regard to the motion before me, I have to take into account, among other factors, the length of the delay; the reasons for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal should the application be granted. See **Karny Zahrya & Another vs. Shalom Levi [2018] eKLR**.

9. By virtue of the proviso to **Rule 82** of this Court's Rules, the period taken by the ELC to prepare proceedings is excluded in computing the time within which the intended appeal should have been lodged. The period in question was between 8th November, 2016 and 5th October, 2018 as evinced by the certificate of delay dated 11th October, 2018 annexed to the motion. Consequently, time commenced running on 6th October, 2018 thus the appeal ought to have been lodged on or before 6th December, 2018.

10. Therefore, taking into account that the current motion was filed on 20th August, 2020, the delay was for over 1 ½ years excluding the public holidays and the Court's Christmas vacation which fell within the said period. Whether this delay was inordinate depends on whether the explanation given was reasonable.

11. Having stated that the time taken to prepare the proceedings by the ELC was excluded this leaves the mistake attributed to the applicant's advocate. Even if I was prepared to give the applicant the benefit of doubt that its advocates failed to follow up on the filing of the intended appeal while their offices were close, there was still the period after the said advocates opened their offices on 14th January, 2019. There was no explanation as to when the said advocates or the applicant learnt of the failure to lodge the appeal or at the very least the steps taken to verify the institution of the appeal.

12. Whilst ordinarily the mistake of an advocate should not be visited on a party, I find that the explanation given as unsatisfactory in the circumstances of this case. See **Tana & Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**. It follows therefore that the delay was inordinate.

13. Equally, being cognizant that it is not in my place to determine the merits of the intended appeal, I have my doubts on its arguability.

14. Accordingly, I decline to exercise my discretion in the applicant's favour and hereby dismiss the motion dated 12th August, 2020 with costs.

Dated and delivered at Nairobi this 23rd day of July., 2021.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR



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