



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 22 OF 2016

BETWEEN

**RICHARD WEFWAFWA SONGOI.....APPLICANT**

AND

**BEN MUNYIFWA SONGOI.....RESPONDENT**

*(Application for extension of time to file and serve an Appeal out of time from the Judgment Environment and Land Court at Bungoma, Omollo, J. dated 19<sup>th</sup> March 2015*

*in*

*ELC Suit No 68 of 1997)*

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**R U L I N G**

By a Notice of Motion dated 3<sup>rd</sup> March 2016, the applicant, **Richard Wefwafwa Songoi** has applied for time to be extended to file and serve a Notice and a Record of Appeal under **Rule 4** of the **Court of Appeal Rules 2010**.

The Notice of Motion was filed on grounds that though the time to file and serve the intended appeal had expired, the delay could not be attributed to the applicant; that the delay was not inordinate or inexcusable; that the intended appeal had overwhelming chances of success; and that the applicant ought to be provided with an opportunity to ventilate his claim.

In his affidavit in support of the application sworn on the same date, the applicant deponed that following his dissatisfaction with the decision of the court below, he filed a Notice of Appeal on 26<sup>th</sup> March 2015, applied for copies of the proceedings and judgment on 27<sup>th</sup> March 2015, and paid for them on 30<sup>th</sup> March 2015.

Thereafter it was deponed, the applicant instructed an advocate to pursue the proceedings and the judgment but, when they received proceedings from the registry on 27<sup>th</sup> January 2016, they were incomplete and the judgment was not included. They immediately requested the registrar to supply the missing documents, following which they forwarded a draft Certificate of Delay for the registrar's signature. A signed certificate was subsequently issued to them on 22<sup>nd</sup> February 2016. The applicant

averred that he has continued to pursue his appeal with diligence, but that the delay in filing the record was not of his making, but that of the registry.

In a replying affidavit sworn on 12<sup>th</sup> April 2016, the respondent deponed that the delay in filing the appeal was intentional and calculated to keep him out of his land. It was further deponed that the intended appeal had no chance of success as the suit from which the intended appeal arose was found to be res judicata by the court below and as such the application is without merit.

In his submissions, learned counsel for the applicant **Mr. Athung'a** largely outlined the averments in the applicant's affidavit, but added that the application was filed on the 4<sup>th</sup> March 2016 about 7 days after collecting the proceedings and the judgment, and that the delay in filing the intended appeal was due to no fault of the applicant but was occasioned by the registry.

Learned counsel for the respondent **Mr. Khakula**, submitted that the application does not show when the proceedings and judgment were supplied by the registry, and what efforts were made to obtain them prior to their being supplied. Counsel stated that the delay was inordinate as it extended from 27<sup>th</sup> March 2015, when the applicant requested for the proceedings. Counsel argued that the intended appeal is without merit as the lower court had found the suit to be res judicata, the land dispute having already been ventilated twice.

The application is brought under **rule 4** of this Courts rules, where it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and in accordance with the established principles, having regard to the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court granted the extension sought. The principles were as outlined in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

The judgment was delivered on 19<sup>th</sup> March 2015. Thereafter the applicant filed a Notice of Appeal on 26<sup>th</sup> March 2015, and on 27<sup>th</sup> March 2015 applied for copies of the proceedings and judgment, which request was not received by the registry until 30<sup>th</sup> March 2015. According to the applicant, when the proceedings were supplied, it was established that the certified judgment was missing, and that the proceedings were incomplete as part of the plaintiff's testimony was omitted.

On 2<sup>nd</sup> October 2015, the applicant's counsel wrote to the registry requesting for the missing documents. It would appear that by 1<sup>st</sup> December 2015, the documents were yet to be supplied, prompting the applicant's counsel to send a further reminder to the registry. From the annexures, there is no indication of when the missing documents were supplied, but on 4<sup>th</sup> February 2015(6), the applicant's counsel requested to be provided with a certificate of delay. A further reminder was to follow on 11<sup>th</sup> February 2016.

A certificate of delay was finally issued on 22<sup>nd</sup> February 2016 specifying that the applicant had requested for the certified copies of the proceedings on 30<sup>th</sup> March 2016 and that it was not until the 27<sup>th</sup> January 2016 that the proceedings were typed, proof read and certified.

**Rule 82** requires that once an appellant has requested for proceedings and served the relevant notification on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant, which period is excluded when computing delay.

Given that **rule 82** excludes the period of preparation of the proceedings, it would mean that the period between 30<sup>th</sup> March 2015 and 27<sup>th</sup> January 2016 was excluded from the computation of delay. This would leave the period between 27<sup>th</sup> January 2016 and the date that this application was lodged in this court, that being on 4<sup>th</sup> March 2016 as the period in which to determine whether there was a delay, and if so whether it was satisfactorily explained. I find the computation of that period to be 36 days, which was well within the 60 days specified for filing of the Record of Appeal. As such, this application for extension of time is unwarranted.

Nevertheless, the application is allowed, and I order that the Record of Appeal be filed within the next fourteen (14) days from the date hereof. Each party to bear their own costs.

***It is so ordered.***

***Dated and Delivered at Eldoret this 25<sup>th</sup> day of November, 2016.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original

**DEPUTY REGISTRAR**