



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 36 OF 2016

BETWEEN

BARNABAS MUNGO LONGIT.....APPLICANT

VERSUS

STANLEY TANUI.....RESPONDENT

*(Being an application for leave to file an appeal out of time from the judgment*

*and decree at Kitale, (E. Obaga, J.) delivered on 17/9/2015*

in

KITALE ELC NO. 16 OF 2012 (OS)

\*\*\*\*\*

**RULING**

1. On 17<sup>th</sup> September, 2015, judgment in Kitale ELC Case No. 16 of 2012 was delivered. The dispute in the said case was over a parcel of land known as **LR. No. Cherangany/Kapkanyor/55** (*the suit land*). The suit was determined in favour of the respondent. The court ordered that the applicant be evicted from two acres of the suit land that he was occupying.
2. Being aggrieved by that decision, the applicant in person wrote to the trial court's deputy registrar a letter that he personally signed, seeking to be supplied with certified copies of the said judgment.
3. A notice of appeal was filed on 7<sup>th</sup> October, 2015. The respondent's advocate filed an application to strike out the notice of appeal for having been filed and served out of time. The application was allowed on 16<sup>th</sup> February, 2016.
4. On 16<sup>th</sup> May, 2016 the applicant filed an application **under rule 4** of this **Court's Rules** seeking extension of time to file an appeal out of time.
5. The affidavit in support of the said application was allegedly sworn by the applicant. I say so because the affidavit was executed by way of a thumb print and not a signature. The respondent argued that the applicant is an intelligent retired civil servant who had initially signed the letter dated 21<sup>st</sup> September,

2015 requesting for proceedings. It was therefore curious that he had to thumb print the said affidavit. Furthermore, the affidavit is not dated.

6. The disputed affidavit contained only an explanation for the delay in filing the notice of appeal that was struck out. The applicant explained that shortly after delivery of the impugned judgment the court file got misplaced at the registry and the notice of appeal could not be filed in the absence of the file.

7. In his brief submissions, **Mr Wanyama**, learned counsel for the applicant, stated that the objection raised regarding the affidavit sworn in support of the application could only be dealt with under **section 48** of the **Evidence Act**; no prejudice would be occasioned to the respondent if the orders sought are granted since the decree issued by the trial court had already been executed; and that he believed that the intended appeal is arguable.

8. The respondent filed a replying affidavit and stated, **inter alia**, that there was an inordinate delay that had not been explained; that there was no draft memorandum of appeal and so there was no proof that the intended appeal is arguable; that the trial court's judgment had been fully executed and the applicant evicted from the two acres he had been occupying; and that the applicant was underserving of the orders sought.

9. **Mr Kiarie**, learned counsel for the respondent, made brief submissions in amplification of the aforesaid arguments advanced by the respondent.

10. Counsel submitted that the 90 days' delay had not been explained at all; that the affidavit sworn in support of the application was incurably defective; that the intended appeal was not arguable, and in any event, the applicant had not made any effort to so demonstrate, having failed to file a draft memorandum of appeal and that the respondent will be prejudiced by continued litigation, which started way back in 1996.

11. I have given due consideration to the affidavits on record as well as submissions by counsel. The principles that this Court takes into account in an application of this nature are well settled. In **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI**, Civil Application No. Nai. 255 of 1997, the Court held;-

***"It is now settled that the decision whether to extend the time for appeal 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 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."***

12. It is not in dispute that on 16<sup>th</sup> February, 2016 this Court struck out the first notice of appeal that had been filed. The applicant took no action until 16<sup>th</sup> May, 2016. The disputed applicant's affidavit did not contain any explanation for that inordinate delay.

13. In **Grindlays Bank International (K) Ltd v. George Barbour**, Civil Application NAI. 257/95, following the House of Lords in **Ratman V Camarasany [1964]3 ALL ER 933**, this Court stated;-

***"The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."***

14. I find and hold that the delay of 90 days was inordinate and there was no explanation for it.

15. The applicant did not also demonstrate that the intended appeal is arguable. It is important, though not

mandatory, that in an application for extension of time to file an appeal that an applicant attaches to the application a draft memorandum of appeal. In the absence of such a draft, the applicant should set out clearly in the affidavit sworn in support of the application the grounds that are intended to be raised.

16. The affidavit sworn in support of the application is defective. The affidavit is not dated. Section 5 of Oaths and Statutory Declarations Act states that:

***“5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”***

17. There was also some dispute as to whether the said affidavit was actually thumb printed by the applicant, as the applicant is admittedly a literate person who ordinarily signs all his formal documents that require his signature. However, Mr Wanyama explained that at the time of drawing and filing of the affidavit the applicant had sprained his right hand and was therefore unable to append his signature onto the affidavit.

18. Notwithstanding the aforesaid defects about the applicant’s affidavit, pursuant to the provisions of **order 19 rule 7** of the **Civil Procedure Rules**, I am inclined to overlook the irregularities and determine the application on its merits.

19. Having done so, I find and hold that the applicant has failed to establish the first three principles that are set out in the **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (supra)**.

20. All in all, I find this application lacking in merit and dismiss it with costs to the respondent.

**Dated and delivered at Eldoret this 24<sup>th</sup> day of November, 2016.**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**