



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 73 OF 2017

BETWEEN

FANUEL NYATENGAPPLICANT

VERSUS

THE TOWN COUNCIL OF MUHORONI.....RESPONDENT

(Being an application for extension of time limited for filing of the applicant's Notice of Appeal in the intended appeal from the judgment and decree of the High Court of Kenya, Environment and Land Court at Kisumu, (Kibunja, J.) dated 14th day of June, 2017

in

ENVIRONMENT & LAND COURT CAUSE NO. 136 OF 2012)

RULING

[1] This is an application under **Rule 4 Court of Appeal Rules** for orders that leave to file notice of appeal out of time be granted and that upon granting leave the notice of appeal lodged on 30th June, 2017 be deemed as properly filed.

[2] The application is supported by the affidavit of **Bruce Odeny**, the applicant's advocate. It is opposed on the grounds in the replying affidavit of **Benjamin Odhiambo**, the respondent's advocate. However, the respondent's advocate did not attend the hearing of the application although served with a hearing notice.

[3] The principles for granting extension of time are well known. The applicant has to show, inter alia, that, the intended appeal or appeal is not frivolous, that the delay is not inordinate and that if time is extended, the respondent would not suffer undue prejudice.

[4] The applicant filed a suit in the Environment and Land Court (*ELC*) seeking a permanent injunction in respect of plot **No. 092 Swahili Mjini** within **Town Council of Muhoroni**.

The applicant claimed that he was allocated the plot in 1978 by Kisumu County Council, that he had been paying rates; that he had built a semi-permanent building; that he presented building plans for proposed permanent building and paid the requisite fees; that he commenced construction but was later stopped by market master for the reason that his plot was not on the place he was building and that the applicant instructed surveyor who confirmed that his plot was on the place he was occupying.

[5] It appears from the judgment that there was no appearance for the respondent at the hearing of the suit. However, the judgment shows that respondent's defence was that the proposed development had not been approved and that the respondent was only showing the applicant the extent of his plot. The court however dismissed the suit mainly on the ground that the applicant had not produced a letter of allotment. The court said in part:

“... in the absence of a formal letter of allotment or lease in favour of the plaintiff, the court is unable to confirm whether Plot No. 092 occupied by the plaintiff was so occupied on temporary occupation license basis or any other arrangement.

Secondly, the court is not in a position to know whether the plaintiff's plot No. 092 changed to Plot No. 90 after the 207 physical planning departments exercise.”

The court was of the view that the applicant should engage the respondent so as to obtain a formal letter of allotment or lease for the plot and confirmation of whether his entitlement is Plot 90 or 092.

[6] The respondent's counsel averred in the replying affidavit that since the applicant failed to produce a letter of allotment, he does not have an arguable case.

The applicant has filed a draft memorandum of appeal containing nine proposed grounds of appeal. **Ms. Imbaya** for the applicant submitted that the applicant has been in possession of the plot for 30 years without interference from the respondent; that he has been paying rates; that respondent has not objected to the developments already made and that it is the applicant who moved the ELC for a relief and not the respondent.

[7] I have considered the applicant's case and the respondent's case as disclosed in the impugned judgment. It seems that the respondent's case is not that the applicant is not entitled to a plot. Rather, the respondent's case seems to be that the applicant is occupying a wrong plot.

All considered, I am satisfied that the intended appeal is not frivolous.

[8] The judgement of ELC was delivered on 14th June, 2017. The applicant lodged the Notice of Appeal dated 28/6/2017 on 30th June, 2017. The 14 days within which to lodge the Notice of appeal expired on or about 28th June, 2017.

The applicant's counsel explains in the supporting affidavit that the notice of appeal was presented to the Registry on the morning of 28th June, 2017 but the Deputy Registrar was not available to sign it; that the notice was left at the registry and was signed on 30th June, 2017.

It is apparent that the notice of appeal was presented at the registry within the stipulated 14 days but was signed by the Deputy Registrar 2 days later.

The applicant is not to blame for the systemic delay of 2 days. Moreover, the delay has not caused any prejudice to the respondent.

[9] In the premises, the application is allowed. Time is extended and the notice of appeal lodged on 30th June, 2017 is deemed as duly filed within time.

The costs of the application shall be costs in the appeal.

DATED and Delivered at Kisumu this 11th day of October, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR