IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OTIENO-ODEK, JA (IN CHAMBERS)

CIVIL APPLICATION No. 84 of 2019

BETWEEN

GEORGE KIPTABUT LELEI.....1st APPLICANT

JOHN ARAP SAINA.....2nd APPLICANT

AND

FANIKIWA LIMITED.....RESPONDENT

(Being an application for leave to extend time within which to file a record of appeal against the ruling of the Environment and Land Court at Eldoret, (Ombwayo, J.) delivered on 6th December 2018

in

ELC Case No. 392 of 2015)

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RULING

1. This is a single judge application under ***Rule 4*** of the Rules of this Court. By a Notice of Motion dated 17th July 2019, the applicants have moved this Court for leave to extend time to file the record of appeal out of time or within such reasonable period as the Court may direct. The grounds in support of the application as stated on the face thereof and in the supporting affidavits are that:

> ***(i) The applicants are aggrieved by the ruling of the learned judge delivered on 6th December 2018.***
>
> ***(ii) That a Notice of appeal was filed on 7th December 2018.***
>
> ***(iii) That by letter dated 19th December 2018, the applicants applied for certified copies of the proceedings which has not been provided to date.***
>
> ***(iv) That learned counsel for the applicants, Ms. Laureen Isiaho Sawe, was indisposed and bereaved with the consequence that the record of appeal was not filed and served within the stipulated time lines. In support thereof, the applicant's counsel has attached medical reports towards proof of her indisposition.***
>
> ***(v) That the applicants' failure to file and serve the record of appeal was due to factors beyond their control.***
>
> ***(vi) That the applicants have a meritorious appeal.***
>
> ***(vii) That no prejudice will be suffered by the respondents who are not currently utilizing the suit parcels of land forming the subject matter of the intended appeal.***

2. The instant application for extension of time is opposed vide a replying affidavit dated 29th July 2019 deposed by ***Ms. Sophia Chemengen***, a director of the respondent company. In opposing the application, it is deposed that the said the application is fatally defective, bad in law and an abuse of court process. The medical reports attached in support of the application predate the impugned ruling by between

four to seven months. The medical report was prepared on 15th September 2018 while the ruling was delivered on 6th December 2018.

3. The said medical reports were drawn before the ruling was delivered. That the applicants learned counsel, ***Ms. Laureen Isiaho Sawe***, was never admitted to hospital. There is no proof that the applicants counsel was indisposed subsequent to the delivery of the impugned ruling. That in any event, the Notice of Appeal filed in the matter has never been served upon the respondent.

4. At the hearing of the instant application, while learned counsel ***Ms. Isiaho Sawe*** appeared for the applicants; learned counsel ***Ms. J. K. Chesoo*** appeared for the respondent company.

APPLICANT'S SUBMISSION

5. Counsel for the applicants reiterated the grounds in support of the application for extension of time to file the record of appeal out of time. The central ground in support of the application is that counsel for the applicants was indisposed and was unable to file the record of appeal within time. It was submitted that the delay in lodging the present application is seven (7) months computed from the date of delivery of the impugned ruling. Counsel for the applicant in a supporting affidavit deposed by herself submitted that she was ailing prior to delivery of the impugned ruling. Counsel urged this Court to invoke ***Article 159 (2) (d)*** of the Constitution and focus on substantive rather than procedural and technical justice. The Article enjoins courts to administer justice without undue regard to procedural technicalities.

6. Learned counsel for the applicant deposed that subsequent to her filing of the Notice of Appeal in this matter, she was taken ill and could not follow up on the preparation of the record of appeal. That she lost her sister during the period of her indisposition and this further compounded her return to work to follow up on the preparation of the record of appeal. Counsel reiterated that no certificate of delay was attached to the present application because the typed proceedings have not been availed by the registry.

7. In support of the application, the applicants cited the decisions in **Richard Ncharpi Leiyagu -v- IEBC & 2 others [2013] eKLR** and **Kamlesh Mansukhlal Damji Pattni -v- DPP & 3 others [2015] eKLR.**

8. In concluding her submissions, counsel urged that a draft memorandum of appeal had been attached to the application to demonstrate that the intended appeal is meritorious.

9. Responding to the contents of the replying affidavit that she was not indisposed, the applicants counsel submitted that the medical reports in support of the instant application can only be controverted by a specialist not a lay person. That the deponent of the replying affidavit, ***Ms. Sophia Chemengen***, is a lay person and not a medical doctor and as such, she cannot challenge the contents of the medical reports. Counsel urged that it is in the interest of justice for the present application to be allowed to enable the parties get substantive justice in the land dispute that is the subject of the intended appeal.

RESPONDENT'S SUBMISSION

10. Counsel for the respondent in opposing the application for extension of time relied on the replying affidavit deposed by ***Ms. Sophia Chemengen*** dated 29th July 2019.

11. Upfront, it was submitted that neither the Notice of Appeal nor the letter requesting for typed proceedings have been served upon the respondent. That failure to serve the Notice of Appeal and the aforestated letter is a violation the rules of this Court rendering the instant application an abuse of court process.

12. On the merits of the application for extension, the respondent highlighted three issues submitting that the delay in filing the present application is about seven months. That the applicant filed the instant application on 18th July 2019 which is a delay of seven months' since delivery of the impugned ruling on 6th December 2018. That the seven months' delay is inordinate and has not been explained.

13. That the supporting medical documents attached to the affidavit of counsel for the applicant relate to illness of counsel prior to the date of delivery of the impugned ruling. For instance, that the letter by Eldoret Hospital was prepared on 15th September 2018 yet the impugned ruling was delivered on 6th December 2018. That the Eldoret Hospital test results were carried out on 6th August 2018 which is five months prior to the delivery of the impugned ruling. That the Mediheal Group of Hospitals Lab result was carried out on 7th June 2018 which is seven months prior to delivery of the impugned ruling. That the Eldoret Hospital MRI results was carried out on 1st September 2018 which is four months prior to the date of the impugned ruling. That the Mediheal Group of Hospitals MRI results was carried out on 21st December 2017 which is eleven months prior to the date of delivery of the impugned ruling on 6th December 2018. As a result of the medical documents predating the date of the impugned ruling, counsel submitted the said documents have no evidential value towards explaining the seven months' delay.

14. Counsel further submitted that subsequent to the delivery of the ruling on 6th December 2017, there is no proof on record that counsel for the applicant has been indisposed.

15. In addition, that no explanation has been given why the Notice of Appeal dated 7th December 2018 and the letter seeking typed proceedings dated 19th December 2018 have not been served upon the respondent. That the applicants have not annexed a certificate of delay pursuant to ***rule 82 (1)*** of the Rules of this Court. That perusal of the intended appeal confirms the same is frivolous since the applicant intends to change the cause of action after delivery of the impugned judgment/ruling.

16. Counsel further submitted that the judicial authorities cited by the applicant are irrelevant to the present application. That the case of

Richard Ncharpi Leiyagu -v- IEBC & 2 others [2013] eKLR cited by the applicant related to an appeal against an order for dismissal of suit for non-attendance; the case does not relate to an application for extension of time. That the case of **Kamlesh Mansukhlal Damji Pattni -v- DPP & 3 others [2015] eKLR** cited by the applicant is irrelevant as circumstances obtaining in that case and the present case are different. That in the ***Pattni case*** (supra), the Notice of Appeal had been served while in the present case, the Notice of Appeal has never been served.

17. Counsel for the applicants in reply to the submissions by the respondent urged this Court to find that the delay in making the instant application is not inordinate and the delay has been explained. That ailment of counsel was sporadic and required periodic treatment. That the applicant does not intend to change the cause of action in this matter but simply to move the Court for adduction of newly discovered evidence and material. That the instant application has been brought in the interest of justice. Counsel reiterated that the veracity of the medical reports cannot be challenged by a lay person.

ANALYSIS and DETERMINATION

18. Before me is an application for extension of time to file the record of appeal out of time. The intended appeal is against a ruling delivered on 6th December 2018. The instant application was filed on 18th July 2019 which is approximately seven months after delivery of the impugned ruling.

19. The applicant filed a Notice of Appeal against the impugned ruling on 7th December 2018. The applicant further applied for certified copies of the proceedings by letter dated 19th December 2018. In the submissions before me, it was stated that as at the date of the hearing of this application, the typed proceedings have not been availed.

20. The respondent in opposing the instant application for extension of time urged that the period of seven-month delay is an inordinate. That the delay has not been sufficiently explained. That the Notice of Appeal and letter requesting for typed proceedings have not been served upon the respondents. That the medical documents in support of the instant application do not offer sufficient explanation for the delay because the said medical documents were prepared prior to the date of delivery of the impugned ruling.

21. I note that the instant application has been brought under ***Rule 4*** of the Rules of this Court. ***Rule 4*** of the Rules provides: -

> **"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."**

22. In ***Abdul Aziz Ngoma -v- Mungai Mathayo*** **[1976] Kenya LR 61, 62,** it was stated:

> **"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.**

23. An application for extension of time must be made timeously without inordinate delay. In the instant matter, the application was made seven months after delivery of the impugned ruling. In **Charo -v- Mwashetani & 3 Others (2014) KLR-SCK**, the Supreme Court in considering an application for extension of time stated:

> **"In the emerging jurisprudence, the concept of 'timelines and timeliness' is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice."**

24. In ***Nicholas Kiptoo Arap Korir Salat -v -The Independent Electoral and Boundaries Commission & 7 Others*** **[2014] eKLR**, the Supreme Court aptly captured the circumstances to be considered in an application for extension of time. The Court stated:

> **"… it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.**
>
> **… we derive the following as the underlying principles that a Court should consider in exercising such discretion:**
>
> ***1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;***
>
> ***2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
>
> ***3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;***
>
> ***4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***

5. whether there will be any prejudice suffered by the respondents, if extension is granted;

***6. whether the application has been brought without undue delay*; and**

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time" [emphasis supplied].

8. In the instant application, the issue for my consideration and determination is whether the applicant has offered sufficient explanation for the delay between 6th December 2018 when the impugned ruling was delivered and 17th July 2019 when the instant application for extension of time was filed. The delay is for a period of about seven months.

9. In **Bernard Kibor Kitur -v- Alfred Kiptoo Keter & another [2018] eKLR**, the Supreme Court expressed that when considering an application for extension of time, the Court considers whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time.

10. The applicants counsel has proffered one ground in explanation for the delay. The ground is that counsel was indisposed. A notable feature in this application is that it is brought in the name of the applicants. The central ground in support of the application is that the applicants counsel was indisposed. An interesting observation is that the counsel urging the present application is the same self-counsel who is alleged to have been indisposed. The same self-counsel has deposed one of the affidavits in support of the application. The same self-counsel is the one who did not file the record of appeal on time. It behooves counsel not to depose to contentious issues where personal interest may stand in the way for effective prosecution of a matter.

11. Notwithstanding the foregoing observations, the critical documentation in support of the present application are the medical reports and medical letters attached to the application. The respondent in opposing the application submitted that the medical documents in support do not give sufficient explanation as they pre-date the impugned ruling. To this end, it was submitted the applicant has not given a sufficient explanation for the seven-month delay. Further, and more significant, that subsequent to the delivery of the impugned ruling on 6th December 2018, there is no medical proof that counsel for the applicants was indisposed. That in any event, counsel for the applicants was never admitted to hospital during the relevant period of seven months' delay.

12. In determining whether to extend time, the Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case **M/S Portreitz Maternity -v- James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court stated:

> **"That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."**

13. I have considered the explanation by the applicants and the respondent's submission. First, the issue is whether there is sufficient explanation for the delay and second, if the delay of seven months in bringing the instant application is inordinate.

14. I am cognizant that whether or not to grant an application for extension time depends on circumstances of each case. There is no limit to the number of factors that the Court should consider in an application for extension of time, so long as they are relevant. Some of the factors to bear in mind include the period of delay; the reason for the delay; the degree of prejudice the respondent stands to suffer; the effect of the delay on public administration; the constitutional imperatives, on the one hand that justice should be administered without undue regard to procedural technicalities and on the other, that justice should not be delayed; the overall importance of complying with prescribed timelines; the resources of the parties; whether the intended appeal raises issues of public importance; among others. (See **Abdulkadir Athman Salim Elkindy -v- Director of Public Prosecutions & another [2018] eKLR**).

15. I note that the subject matter in dispute between the parties relates to several parcels of land including LR No. 7739/1-14 and numerous titles derived therefrom. Land is an emotive issue in this country and the right to land and protection of private and public interest and rights over land are matters that require conclusive and substantive determination on merit.

16. The explanation given by the applicant's counsel for delay in filing the instant application has strenuously been challenged. In this matter, I separate and distinguish the explanation for delay given by the applicants who are the main parties to the case from the explanation given by counsel for the applicants, ***Ms. Lauren Isiaho Sawe***. There are two explanations for delay given in this matter. The first explanation is by the parties themselves. The second explanation is by counsel for the applicant ***Ms. Isiaho Sawe***.

17. In the supporting affidavit deponed jointly by the applicants as parties to the suit, they aver that they instructed their counsel, ***Ms. Isiaho Sawe*** to lodge an appeal against the impugned ruling delivered on 6th December 2018. That following their instructions, a Notice of Appeal was filed on 7th December 2018. That subsequently, counsel fell ill and was indisposed. It is manifest and clear and it is undisputed that applicants as parties to the suit aver that they gave instructions to their advocate to lodge an appeal against the impugned ruling.

18. The second explanation for delay is given by counsel for the applicants herself. In her supporting affidavit, she explains the delay by stating that she was taken ill and was indisposed. In support of her explanation, counsel attached several medical documents.

19. I have considered the medical documents attached by counsel in her affidavit. I have also taken into consideration the fact that the medical documents were prepared prior to the date of delivery of the impugned ruling i.e. before 6th December 2018. As correctly observed by counsel for the respondent, there is no proof that subsequent to the delivery of the impugned ruling counsel for the applicant was indisposed. I therefore find the explanation for delay given by counsel for the applicant is insufficient. In arriving at my decision, I reiterate that 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 exercised. (See **Monica Malel & Ano -v- R. Eldoret Civil Appln No. NAI 246**

of 2008).

20. In this matter, I also oblige to consider the explanation for delay given by the applicants as parties to the suit. In their explanation, it is stated that they instructed their advocate on record to pursue an appeal against the impugned ruling. This explanation raises the legal question whether a mistake or omission by counsel should be visited upon a client. In considering the issue, I am cognizant that the applicants' counsel submitted that the intended appeal is meritorious and extension of time should be granted. In ***Mugo -v- Wanjiru*** **[1970] EA 481, 483**, Spry V-P said:

> ***"... I do not think the fact that an appeal appears likely to succeed can of itself amount to 'sufficient reason'.***
>
> ***Normally, I think the sufficient reason must relate to the inability or failure to take the particular step in time, but I am not prepared to say that no other consideration may be invoked."***

21. In this matter, the applicants further argued that by virtue of ***Article 159*** of the Constitution, I ought to disregard procedural technicalities and extend time to lodge and file the record of appeal out of time. The Supreme Court in **Hon. Lemanken Aramat -v- Harun Meitambei Lempaka & 2 others – Petition No. 5 of 2014** observed:

> **"A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character."**

22. Can the delay in filing the appeal be considered as procedural technicality capable of being cured under ***Article 159*** of the Constitution? In **Hon. Lemanken Aramat -vs- Harun Meitambei Lempaka & 2 others** (supra*)* the Supreme Court while considering whether an Election Petition which was filed out of time could be sustained expressed itself as follows: -

> **"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice."**

23. In the instant matter, the applicants who are parties to the suit explain the delay and state that they instructed their counsel to pursue an appeal. In ***Kenya Industrial Estates Limited -v- Samuel Sand & Another*** ***(2008) eKLR*** Deverrell, JA stated that there were *"numerous decisions of this court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time." In the instant matter, there is omission on the part of counsel to file the record of appeal.* In ***Bains Construction Co. Ltd. -v- John Mzare Ogowe*** ***(2011) eKLR*** the court observed:

> ***"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences".***

24. In ***Habo Agencies Limited -v- Wilfred Odhiambo Musingo*** ***(2015) eKLR,*** *it* was thus stated:

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

25. It is a constitutional imperative that each person has a right to be heard and a right to access justice. Founded on this constitutional underpinning, I find the explanation by the applicants that they had instructed their advocate to pursue appeal against the impugned ruling is a sufficient explanation for me to arrive at a determination that in this matter, the omission by counsel to file a record of appeal should not be visited upon a client.

26. Noting that the subject matter in dispute herein relates to land, I find the delay in this matter is not inordinate. In arriving at my decision, I note that it was submitted that the record of typed proceedings has not been availed and hence the absence of a certificate of delay. It is trite that a certificate of delay *per se* has the legal effect of extending the period for computation of time. When availed, a certificate of delay in civil proceedings *ipso jure* should be taken into account in an application for extension.

27. As to the submission that the Notice of Appeal and letter seeking certified copies of proceedings have not been served upon the respondent, the procedure is to file an appropriate application before a three judge bench to consider and determine the matter.

28. In the final analysis, I find the explanation for delay as given by the applicants themselves in their capacities as parties to the suit is sufficient. I hereby exercise my discretion and allow the Notice of Motion dated 17th July 2019. Leave be and is hereby granted extending time for the applicants to file the record of appeal against the ruling delivered by the ELC court on 6th December 2018 in **ELC Case No. 392 of 2015**. The record of appeal is to be filed and served within twenty one (21) days of the date hereof. Noting that the applicants counsel, ***Ms. Laureen Isiaho Sawe***, did not offer sufficient explanation for delay on her part, I hereby order counsel for the applicants ***Ms. Laureen Isiaho Sawe*** to personally bear the costs of this application.

Dated and delivered at Eldoret this 17th day of October, 2019.

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR