



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**MISC. CIVIL APPLICATION NO. 5 OF 2020**

ANNA KNIGHT OJIAMBO.....1<sup>ST</sup> APPLICANT

GOEFREY ODUORY OJIAMBO.....2<sup>ND</sup> APPLICANT

ESTHER SUNDAY.....3<sup>RD</sup> APPLICANT

**VERSUS**

DAVID BULIMO MUSA.....RESPONDENT

**RULING**

1. The Applicant brought an application dated 20<sup>th</sup> August 2019 under Order 51 of the Civil Procedure Rules, Section 79G of the Civil Procedure Act and all enabling provisions of the law seeking for the following orders;

*a. That this Honourable Court be pleased to grant leave to the Applicants to file their appeal out of time.*

*b. That costs of this application be provided for.*

2. The application is supported by the grounds on the face of it inter alia;

*i. That the ruling which is intended to be appealed was delivered on 10/7/2019.*

*ii. That on 15/7/2019 an application for typed and certified copies of the proceedings was forwarded through a letter dated 11/7/2019.*

*iii. That the certified copies of proceedings were not availed until 14/8/2019 by which time the period for filing the appeal has lapsed.*

*iv. That the intended appeal was overwhelming chances of success.*

*v. That the applicants will suffer irreparable consequences if orders sought are not granted.*

3. The Respondent opposed the application by filing a Replying Affidavit sworn on 23<sup>rd</sup> July 2020 by Wycliffe Onsongo advocate. He deposed that the application is vexatious and otherwise a blatant abuse of court process as the same is sub-judice, the application filed as BUSIA HC Misc Civil Appl No. 129 of 2019. That both parties had agreed by consent to canvass the former application by way of written submissions and that matter came up in court on 10/3/2020 for the purpose of confirming if the submissions were filed, applicant sought leave to file a supplementary affidavit so it is not true that the earlier application had been withdrawn. Counsel further deposed that the applicant's intended appeal does not have overwhelming chances of success and the applicants are guilty of laches as certified typed proceedings was delivered to them on 14/8/2019 and this application filed 10 months later was an afterthought.

4. The applicants filed a supplementary affidavit deposed by their counsel, Mr Manwari in which he stated that the earlier application was withdrawn as per the withdrawal notice dated 3/6/2020 and captured by the court record of 5/8/2020. He deposed that the nature of their application ought to be decided that the nature of their application ought to be decided on merit/substance and not on imagined technicalities.

5. The applicants filed their submissions on 8<sup>th</sup> March 2021 submitting that the filing of this application was clearly done within reasonable

time and they cannot be accused of being slow to move the court. That the subject matter of the suit is family land which the applicants still reside on and as such they should not be shut out on the basis of perceived technicalities. They submitted that they have an arguable appeal which has very high chances of succeeding on merits.

6. The Respondent filed his submissions on 23<sup>rd</sup> March 2021 stating that the applicants do not deny that they had filed a similar application vide Busia HC Misc Appl. No. 129 of 2019 and that they had filed submissions and was awaiting directions on ruling before withdrawing the application. He further submits that the notice for withdrawal was not exhibited and they were not served with it. He further submitted that the Applicants have not satisfied the provisions of Section 79G of the Civil Procedure Act of giving a good and sufficient cause for not filing the appeal in time. He stated that the appeal does not have overwhelming chances of success and the applicants are relying on imagined technicalities at the expense of the substance. Lastly, the Respondent submits that the applicants are aware that the land was transferred to him through the execution of a court decree and not fraud as alleged. He supported his submissions with the case of **SEREPHEN NYASANI MENGE V. RISPAH ONSANSE (2018) eKLR**.

7. I have considered the application and the prayer sought and the submissions filed by the parties. The main issue for determination is whether the application is merited. The provisions to Section 79G of the Civil Procedure Act states that;

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

8. The reasons for exercise of discretion to extend time to appeal as provided in Section 79G of the Civil Procedure Act requires an applicant to demonstrate good and sufficient cause. The principles to be considered were laid down by the Supreme Court in **Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others [2014] eKLR** namely:

**“The underlying principles a court should consider in exercise of such discretion include:**

- 1. Extension of time is not a right of any 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;***
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;***
- 6. Whether the application has been brought without undue delay.***

9. From the supporting affidavit, the applicants have stated the delay in bringing this application was occasioned by an inadvertent mistake of filing a similar application in Busia High Court and they withdrew the same once they realized that the court did not have jurisdiction over environment and land matters. This fact was not controverted as the Respondent’s counsel confirms the existence of that application. That application was dated 20<sup>th</sup> August 2019 was filed approximately one week after the time to file an appeal had lapsed From the typed proceeding annexed to supplementary affidavit marked as ‘JOM-06’, on 5<sup>th</sup> August 2020 the High Court recorded an order withdrawing the application. The sequence of events put forth explains the delay in filing this application was not intentional on the part of the Applicants.

10. The ruling which the applicants are appealing against is the dismissal order of their application seeking to set aside the interlocutory judgment entered on 23<sup>rd</sup> May 2012. I have perused the draft grounds of appeal annexed by the applicants’ as JOM-3 and find that the appeal raises arguable issues. For instance; in ground 6 of the draft memo of appeal, the Applicants pleaded that the reasons given by the trial magistrate for dismissing the application on account of the title changing hands was misleading and not based on materials presented before her as. That it is settled in law that a party should not be condemned unheard even if his appeal raises only one triable issue.

11. In conclusion, I find that the applicant’s application is merited and allow it by extending time to file their appeal by a period of Seven days from the date of delivery of this ruling. The costs of this application awarded to the Respondent in any event.

**DATED, SIGNED AND DELIVERED AT BUSIA THE 22ND DAY OF JULY, 2021.**

**A. OMOLLO**

**JUDGE**