



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC JR. NO. 05 OF 2019**

**JOSEPH MUNGAI GICHURU..... 1<sup>ST</sup> APPLICANT**

**LUCY WAIRIMU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**MUTHAIGA NORTH ASSOCIATION..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> April, 2021, the *Exparte* Applicants (the Applicants) have prayed for the following orders;

*a) That leave be granted to the firm of Njenga Maina & Advocates to come on record in place of Njuguna, Kahari & Kiai Advocates representing the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.*

*b) That this Honourable Court be pleased to grant the Applicants leave to file their Notice of Appeal out of time against the judgment delivered at Nairobi by Hon. E. O. Obaga J. on 8<sup>th</sup> October, 2020 and serve the same out of time.*

*c) That the draft Notice of Appeal filed herein be deemed as duly and properly filed.*

*d) That this honourable Court be pleased to grant stay of execution pending the hearing and determination of the Application and the intended appeal.*

*e) That the costs of this application be in the cause.*

2. The Application is supported by the Affidavit of the Applicants' Advocate who has deponed that the Applicants filed a Judicial Review application against the Respondents seeking to quash the decision of the 1<sup>st</sup> Respondent made on 9<sup>th</sup> November 2018 revoking the Applicant's title L. R. No. 15868/1 and 15868/2 and that although the court delivered its Judgment on 8<sup>th</sup> October, 2020, the Applicants were not aware of the Judgment date and were therefore unable to lodge the Notice of Appeal within the stipulated timeline.

3. According to the Applicants' Counsel, the Applicants got to know of the Judgment sometime in February, 2021 when they visited the premises and found a copy of the judgment that had been dropped on the suit Land and that the said Judgment was never served on them or their advocate.

4. The Applicants' advocate finally deponed that the Applicants are dissatisfied with the whole Judgment of the Court; that the Applicants should be allowed to file their Appeal challenging the said decision out of time and that the Applicants have been in quiet possession of the suit property for over ten (10) years and have developed the same.

5. In response to the Application, the Interested Party's advocate deponed that the Applicants were fully represented in this matter by the firm of T. M. Kuria who took a Judgment date by consent; that the Judgment of this court was delivered on 8<sup>th</sup> October, 2020 and that the delay in bringing this instant application is grossly inordinate.

6. The Interested Party's counsel deponed that the firm of T. M. Kuria advocates have not filed an affidavit to explain the delay in filing the Notice of Appeal and that counsel has deponed on matters that are not within his knowledge.

7. In his submissions, the Applicants counsel submitted that the decision whether or not to extend time for appealing is essentially discretionary; that the Applicants found a copy of the Judgment dropped on the subject suit property being L. R. No. 15868/1 and 2 and that the said Judgment has never been served upon the Applicants.

8. It was submitted that the court should exercise its jurisdiction in favour of the Applicants because the Respondents will not suffer any prejudice and that the delay in filing the Appeal is not unreasonable.

9. On his part, the Interested Party's advocate submitted that the firm of T. M. Kuria and Company Advocates have not filed an Affidavit to explain why they did not file an Appeal despite being aware of the date of the Ruling; that a delay of six (6) months is not only inordinate but has not been explained and that a similar application challenging the decision of the National Land Commission was dismissed by Mativo J. in Petition Number 530 of 2016.

10. The Applicants are seeking for an order to file an appeal against the Judgment of this court delivered on 8<sup>th</sup> October, 2020. **Section 7 of the Appellate Jurisdiction Act, Cap 9**, provides as follows:

***“Power of High Court to extend time-***

***The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”***

11. The power granted by this court to extend time for giving of a notice of intention to appeal is discretionary. As was held in the case of ***Leo Sila Mutiso vs Rose Wangari Mwangi, Civil Appeal No. Nairobi 255 of 1997***, the decision whether or not to extend time for appealing has to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondents if the application is granted.

12. The record shows that this Court reserved the date of Judgment in this matter, in the presence of the Applicants' advocate, Mr. Kuria. Indeed, the said Mr. Kuria was in court on 25<sup>th</sup> June, 2020, when the Court pronounced the date of the delivery of Judgment to be on 8<sup>th</sup> October, 2020.

13. The Applicants' advocate having known the date of the delivery of the Judgment to be on 8<sup>th</sup> October, 2020, he has not informed this court by way of an affidavit why he did not relay to the Applicants the decision of the court.

14. Indeed, the Applicants in this matter have not informed the court the circumstances under which they were not informed about the Judgment of the court by their advocate immediately the same were delivered.

15. What is even more curious in this matter is that it is the Applicants' counsel, and not the Applicants, who has deponed to matters of fact which should be in the knowledge of the Applicants or the advocate who was on record as at the time the judgment was delivered.

16. Indeed, it is erroneous for counsel to depone that “the Applicants got to know of the Judgment sometime in February, 2021 when they visited the premises and found a copy of the judgment that had been dropped there and the same was never served upon their former advocate or upon them physically.” These are facts only the Applicants can depone to and not their advocate.

17. The issue of how the judgment was served on the Applicants is only in the knowledge of the Applicants and not the advocate who was neither a party in the suit, nor represented them as at the time the Judgment was delivered.

18. To the extent that the Applicants have not sworn an affidavit to explain why they did not file a Notice of Appeal within the requisite period, despite their advocate having been aware of the date of the Judgment, it is my finding that the application is unmeritorious.

19. For these reasons, save for prayer (a), I dismiss the application dated 19<sup>th</sup> April, 2021 with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF DECEMBER, 2021.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms Maria for the Applicants

Mr. Kabaru for Interested Party

