



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC MISC. CIVIL APPLICATION NO. 14 OF 2018

ROSE ODHIAMBO ORACHO.....1ST APPLICANT

GEORGE OMOLO ORACHO.....2ND APPLICANT

MAURICE OTIENO ORACHO.....3RD APPLICANT

VERSUS

JAMES ORACHO WIRE.....1ST RESPONDENT

ANJELIN MAFFAT APONDI.....2ND RESPONDENT

YAN LODWAR JAYASNESS.....3RD RESPONDENT

THE LAND REGISTRAR BONDO SUB-COUNTY....4TH RESPONDENT

SUB-COUNTY LAND ADJUDICATION & SETTLEMENT

OFFICER BONDO SUB-COUNTY.....5TH RESPONDENT

RULING

1. Rose Odhiambo Oracho, George Omolo Oracho and Maurice Otieno Oracho, the Applicants, seek through the notice of motion dated 1st September 2018, brought under **Section 79G of the Civil Procedure Act and Order 50 Rule 5, Order 42 Rule 6 of Civil Procedure Rules**, for stay of the proceedings, in ELC No. 87 of 2018 pending the hearing and determination of the intended appeal on the ruling made therein on the 18th July 2018. They also pray for leave to file the appeal out of time. The application is based on the five (5) grounds on its face, and supported by the affidavit of the 3rd Applicant sworn on the 1st September 2018. The Applicants' case is that after the ruling was made on the 18th July 2018, their advocate immediately applied for the proceedings but were not provided until the 29th August 2018. That the ruling was on their application dated 12th June 2018, seeking for Hon. T. M. Olando, the learned trial Magistrate to recuse himself. That the application was dismissed and the Applicants intend to file an appeal on the ruling. The Applicants have attached a copy of their intended memorandum of appeal to the supporting affidavit.

2. The application is opposed by James Oracho Wire, the 1st Respondent, through his replying affidavit sworn on the 25th September 2018 deponing to the following, among others;

- That he is the husband to the 1st Applicant and father to the 2nd and 3rd Applicants.
- That he sold Bondo/Usenge/3596 to Angelin Maffat Apondi, the 2nd Respondent, over which the Applicant filed Siaya Land Case No. 87 of 2018, seeking to nullify the transaction.
- That the Applicants' case has been closed. That the 2nd Respondent has also testified before travelling to Norway where she resides and works, and only two defence witnesses are remaining.
- That the Applicants have since the case reached defence hearing, been presenting excuses aimed at stopping the deponent from testifying. That the Applicants filed the application dated 12th June 2018 seeking to have the trial magistrate recuse himself on the day the suit was coming for hearing.
- That the ruling of the 18th July 2018 was delivered in the presence of the Applicants and their counsel and that they should have filed their appeal in 30 days.
- That the ruling of 18th July 2018 was already typed when it was delivered and there is no explanation why the Applicants did

not obtain a copy on the same day, and file their appeal in time.

3. The Applicants filed a further affidavit sworn by the 3rd Applicant on the 25th September 2018 summarized as follows;

- **That 2nd Respondent who has a counsel in the lower court case, personally filed a certificate of urgency on the Respondents' application dated 17th May 2018 that was fixed for hearing on the 30th May 2018. That the trial Magistrate, Hon. T. M. Olando acted on the said certificate and issued orders on the 18th May 2018 fixing the interpartes hearing of the application for the 23rd May 2018, without the Applicants' participation.**
- **That the application dated the 17th May 2018 was heard without the Applicants, and their counsel's presence on the 23rd May 2018 and orders to visit the suit land on the 28th May 2018 issued. That the visit to the suit land was done without their representation.**

4. That this application came up for hearing on the 12th November 2018 when Counsel for the 1st Respondent reported that they had filed and served their written submissions dated the 9th November 2018. The Counsel for the Applicants requested for time to file theirs, which was eventually filed and is dated 30th December 2018.

5. The following are the issues for the Court's determination;

- a) Whether the Applicants filed their application without inordinate delay.**
- b) Whether the Applicants have made a case for leave to file their appeal out of time to be allowed.**
- c) Whether the Applicants have made a case for stay of proceedings in the lower court case to be issued.**
- d) Who pays the costs.**

6. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, the written submissions and come to the following conclusions;

a) That though the Applicants' main reason or basis for the delay in filing the intended appeal is said to be the time it took them to receive the typed proceedings, which they state they received on the 29th August 2018, they have failed to disclose when they applied for it, through possibly exhibiting a copy of the letter or a certificate of delay. That whereas this application was filed about 16 (sixteen) days after the lapse of 30 days within which to file an appeal, from the date of the ruling that is, 18th July 2018, no reasonable explanation has been tendered to explain that delay.

b) That the Applicants have to date not filed the appeal despite the provision of **Section 79G of the Civil Procedure Act** that requires appeals to be filed within 30 days, excluding the period the lower court may certify as required to prepare and deliver to the Appellant a copy of the decree or order. That as already pointed out in (a) above, there is no certificate of delay availed by the Applicants herein to confirm the date their request for decree or order, or for that matter proceedings, was received by the lower court and when it was provided. That to file an appeal, one does not require proceedings as a prerequisite. That as the Respondent's contention that the ruling of 18th July 2018 was already typed when it was delivered, has not been challenged, then there is no reasonable explanation tendered by the Applicants why the appeal was not filed within the 30 days as required by the law.

c) That the Supreme Court in the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR** set the following as the underlying principles for a court to consider in exercising the discretion on whether or not to extend time;

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 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 respondents if the extension is granted.

7. Whether the application has been brought without undue delay, and

8. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

That applying the above principles and the findings above to the Applicants' case, the court finds the Applicants have failed to establish reasonable grounds for the court to exercise its discretion of extending time in their favour.

d) That as there is no memorandum of appeal filed, as the copy attached to the application can only be taken as a draft memorandum of appeal, the court has no basis of making a finding on whether or not the Applicants have an arguable appeal. That from the affidavit evidence and submissions tendered, the Applicants, as the Plaintiffs in the lower court case, have already closed their case. That the defence hearing has also commenced. That in the absence of substantiated evidence of bias and or impartiality attributable to the Honourable trial Magistrate, it is prudent, just and expeditious to have the lower court case hearing continue to conclusion, for a determination on merit to be made, without unnecessary or inordinate delay. That way, any party who may be dissatisfied with the decision thereof may exercise their right of appeal to the highest level permitted by our laws.

7. That in view of the foregoing, the court finds no merit in the Applicants' notice of motion dated the 1st September 2018, and filed on the 3rd September 2018. The said application is therefore dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF MARCH 2019

In the presence of:

Applicants Absent

Respondents Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE