



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL APPEAL NO. 15 OF 2014

1. SAMSON CHIRUME

2. CHRISTOPHER M. MBELE

3. ALICE J. CHOME

4. ERASTUS S. KOROGA.....PROPOSED APPELLANT/APPLICANTS

=VERSUS=

JOSEPH SULUBU.....PROPOSED RESPONDENT

RULING

Introduction:

1. The Application before me is the one dated 1st September, 2014 by the Appellant. In the Application, the Appellant is seeking for the following orders:

(a) THAT the proposed Appellants/Applicants be granted leave to appeal out of time against the whole judgment of Honourable A. M. Obura delivered on the 2nd day of July 2013 and the order issued on the 26th June 2014 in Kilifi SRMCC No. 188/2008.

(b) THAT the draft Memorandum of Appeal annexed to the affidavit of the Applicants herein be deemed as duly filed and served upon payment of the requisite court fees.

2. The proposed 4th Appellant has deponed that the firm of Kanyi J and Company never told them of the outcome of Kilifi SRMCC No. 188 of 2008 in which Judgment was delivered on 2nd July, 2013; that they were only aware of the Judgment on 31st July 2014 when they were served with an order and that that is when they instructed the current advocate to file this application.

3. The 4th Intended Appellant has further deponed that the decision of the Magistrate conferred ownership of the suit property on the Respondent despite the court not having jurisdiction and the Plaintiff not having the locus standi to file the suit.

4. In his Replying Affidavit, the Respondent deponed that there is an inordinate and unjustified delay of over one year in filing the appeal; that he is the lawful owner of the suit properties by virtue of inheriting the same from his father and that when the adjudication process started, he ascertained his rights and interests in the suit properties.

5. It is the Respondent's deposition that the Intended Applicants herein appealed to the Minister contesting the decision of the land adjudication officer and that on 12th May, 2005, the appeal was decided by the Minister in which the appellants were ordered to pay him Kshs.20,000 per acre to redeem the suit properties failure to which they were to surrender the land to him.

6. It is the Respondent's case that vide a letter dated 10th July, 2013, he informed the Applicants to vacate the land pursuant to the Judgment of the lower court and that on November 2013, he approached the Applicants and asked them to vacate the land.

7. The Respondent finally deponed that no affidavit has been sworn by the former advocate to confirm that he is the one who delayed in informing the Applicants about the Judgment and that in any event the appeal does not have chances of success.

8. The Applicants' counsel submitted that the Respondent contributed to the Applicants' delay in seeking redress in this court and that in the interest of justice, the Applicants have met the requirements for the grant of orders for leave to file an appeal out of time. Counsel relied on the case of **Nicholas Kiptoo Arap Korir Salet Vs IEBC & 7 Others, Supreme Court Application NO. 16 of 2004** which I have considered.

9. The Respondent's counsel submitted that the Applicants herein were satisfied with the decision of the Minister for Lands and they never filed an appeal against the said decision.

10. Counsel submitted that this court is prohibited from re-opening matters of fact that were dealt with by the Minister and that the Applicants declined to pay the Kshs.20,000 per acre as ordered by the Minister.

Analysis and findings:

11. The Applicants are seeking for leave to file the intended appeal out of time and for a stay of execution pending the hearing and determination of the intended appeal.

12. As was held by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 others Supreme Court Application Number 16 of 2014, extension of time to file an appeal 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.**

13. It is not in dispute that the learned Magistrate allowed the Plaintiff's/Respondent's claim in Kilifi PMCC No. 188 of 2008 whose effect was to evict the Applicants from the suit property.

14. It is also not in dispute that the suit in the lower court was premised on the decision of the Minister for Lands that was delivered on 18th May 2005 pursuant to Section 29(1) of the Land Adjudication Act.

15. In the said decision, the Minister ordered the Intended Appellants herein to pay to the Respondent Kshs.20,000 per acre within eight months and in default the Intended Appellants were to surrender the plots in question to the Respondents.

16. The Appellants did not file an appeal against the decision of the Minister.

17. There is no law that requires that the decision of the Minister should be presented to court for adoption as alleged by the Applicants. It is for that reason that the Respondents had to file a suit

in the lower court to have the Appellants evicted from the suit property having not complied with the orders of the Minister.

18. Just the way the proposed Appellants did not file an appeal against the decision of the Minister, they did not also file an appeal against the decision of the Magistrate in Kilifi PMCC No. 188 of 2008.

19. Although the proposed Appellants' reason for not filing the appeal against the decision of the Magistrate within 30 days is that their former advocate did not inform them about the delivery of the Judgment, I find and hold that the reason is not plausible.

20. A party who instructs an advocate to conduct a matter on his behalf has to be vigilant. Such a party cannot hide behind an advocate, who is just an agent, to claim that he did not know that the lower court had delivered its Judgment one year down the line.

21. In view of the fact that the proposed Appellants have never appealed against the decision of the Minister that was delivered on 18th May 2015, and considering that the lower court was just enforcing a decision of the said Minister by ordering for the eviction of the proposed Appellants, I find and hold that the proposed Appellants have not given any good reason to be allowed to file the appeal out of time.

22. The proposed Appellants' attitude from the time when the matter was heard and finalised by the Minister in the year 2005 is that of people who are not interested in pursuing what they think or perceive to be their rights over the suit.

23. Consequently, I decline to exercise my discretion of allowing the intended Appellants leave to file the appeal out of time.

24. For those reasons, I dismiss the Application dated 1st September 2014 with costs.

Dated and delivered in Malindi this 20th day of **March**, 2015.

O. A. Angote

Judge