REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC. APP. NO.28 OF 2014

1. MICHAEL M. KALAMA

2. AGNES MANYESO MWERI.....APPLICANTS

=VERSUS=

PASTOR MANGI.....RESPONDENT

R U L I N G

Introduction

1. What is before me is the Application by the Applicants dated 7th November 2014. In the Application, the Applicant is seeking for the following orders:

   (a) That the Applicants/Intended Appellants be granted leave to file an Appeal out of time.

   (b) That this Honourable Court be pleased to grant any other and/or further order(s) as it may deem fit and necessary.

   (c) That cost be provided for.

The Applicants' case:

2. The 1st Applicant has deponed that in the year 1998, he entered into a sale agreement with David Mwaringa for the purchase of plot number 160 located at Muyeye, Malindi (the suit property); that in the year 2009, he was shocked to find a person unknown to him having already constructed a house on the suit property and that as a result they filed CMCC No. 286 of 2009 which was dismissed.
3. It is the Applicants' deposition that they did not lodge an appeal within time because the lower court delayed in typing and certifying the court proceedings; that the intended appeal is not frivolous and that it is necessary and in the interest of justice that the Applicants be allowed to file the appeal out of time.

The Respondent's case:

4. In the Replying Affidavit, the Respondent deponed that the delay to file the intended appeal has

been inordinate; that the Applicants have not given sufficient reasons for the delay in filing the appeal and that the Applicants have not disclosed when they applied for the proceedings.

5. According to the Respondent, the filing of the Appeal out of time will be prejudicial because he has since sold the suit property to a third party.

Submissions:

6. In their submissions, the Applicants and the Respondent advocates reiterated the depositions in their clients' Affidavits.

Analysis and findings:

7. The Judgment which the Applicants intend to appeal against was delivered by the Principal Magistrate in Malindi SPMCC No. 286 of 2009 on 30th September 2011.
8. Although the Applicants have deponed that their advocate applied for certified copies of proceedings for the purpose of lodging an appeal, they have not exhibited the letter requesting for the typed proceedings.
9. Nonetheless, the certified copies of the proceedings have been annexed on the Supporting Affidavit. According to the record, the proceedings in the lower court were certified on 3rd February 2012.
10. The Applicant have not explained why they never filed an Application to file an appeal out of time upon receipt of the certified proceedings which were ready on 30th February 2012.
11. It is trite law that an Applicant does not have to wait for the certified proceedings before he can file a Memorandum of Appeal.
12. Even where the intended Appellant waits for the certified proceedings before filing an Appeal, he should promptly move the court for leave to file the Appeal out of time after the said proceedings have been typed and certified.
13. The delay of two years since the proceedings were certified is in my view inordinate. That delay has not been adequately and satisfactorily explained by the Applicants.
14. The said delay has indeed led to the sale of the suit property by the Respondent to a third party. The Respondent cannot be blamed for having sold the suit property after the lapse of 30 days from the date the Judgment was delivered. Litigating over the subject matter will therefore be a waste of judicial time and prejudicial to the Respondent.
15. For those reasons, I dismiss the Applicants' Application dated 7th November 2014 with costs.

Dated and delivered in Malindi this **24th** day of **July** 2015.

O. A. Angote

Judge