



REPUBLIC OF KENYA



**Odiwuor & another v Mbogo & 3 others (Civil Appeal (Application)
E019 of 2023) [2023] KECA 1113 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1113 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E019 OF 2023
M NGUGI, JA
SEPTEMBER 22, 2023**

BETWEEN

PETER ALBERT ODIWUOR 1ST APPLICANT

SILAS ONYANGO ODHIAMBO 2ND APPLICANT

AND

JACKTON KOLO MUGA 1ST RESPONDENT

MICHAEL OGWENO MBOGO 2ND RESPONDENT

ALPHONSE ONYANGO MBOGO 3RD RESPONDENT

PETER OTIENO MBOGO 4TH RESPONDENT

(Being an Application for extension of time to file a Notice of Appeal and the Record of Appeal out of time against the Judgment and Decree of the Environment and Land Court at Homa Bay (G. M. A. Ong'ondo J.) dated 20th July 2022 in ELC No 39 of 2020)

RULING

1. In the application dated February 10, 2023 brought under Rule 4 of the Court of Appeal Rules, 2010 (also Rule 4 of the 2022 Rules), the applicants seek an order that the time allowed for the filing of the Notice of Appeal and Record of appeal be extended for such period as the Court deems sufficient and just. They also seek an order that the costs of the application be in the appeal.
2. The application is based on the grounds set out on the face of it. These are that 'the applicant' has been sick and admitted in hospital from July 2022 to date and was unable to instruct Counsel to prosecute his intended appeal. The 'applicant' was dissatisfied with the decision of the trial court and intends to appeal against it on the grounds set out in the draft memorandum of appeal annexed to the application. Unless the orders sought are granted, the respondents shall execute the decree and cancel the applicant's title, obtain certificate of costs and execute, as a result of which the 'applicant' will suffer substantial



- loss and the intended appeal will be rendered nugatory as the respondents will have changed the title, putting it beyond the jurisdiction of the court.
3. It is further contended that should the title change to third parties, the respondents will not be able to refund the costs should the appeal succeed.
 4. The application is ostensibly supported by two affidavits, both sworn on February 10, 2023. The first is sworn by the applicants' counsel, Mr. Vincent Mukoye. While it is indicated in the opening paragraph of the second affidavit that it is sworn by the 2nd applicant, Silas Onyango Odhiambo, it contains exactly the same averments as are set out in the affidavit of Mr. Mukoye. The deponent is also indicated as being Mr. Mukoye. Effectively, therefore, there is only one affidavit before the Court, sworn by Mr. Mukoye.
 5. Mr. Mukoye avers that he was instructed by the 'applicant' on January 13, 2023, long after the judgment had been delivered, and he therefore had to apply for leave to come on record for the applicants. He further reiterates the grounds set out on the face of the application.
 6. While the application before the Court appears to be filed on behalf of two applicants. It appears from the averments and the submissions dated July 4, 2023 that it is the 2nd applicant who seeks leave to file a notice and record of appeal out of time. He contends in these submissions that he purchased the suit land, Kabondo/Kakangutu East/853, on January 15, 2003, from Shem Koyo (deceased). The transfer of the land was effected in 2004, and he obtained title to the land on April 20, 2010.
 7. It is his contention further that the respondents had, on their part, sought to recover the suit land under the *Limitation of Actions Act* by adverse possession for having been in occupation for a period exceeding 12 years. He submits that in the impugned judgment, the court had directed that the 2nd applicant's title, L.R. No. Kabondo/Kakangutu East/853 be extinguished and the respondents be registered as the proprietors of the whole parcel.
 8. He prays that his application be allowed as the intended appeal is arguable as it raises the issues whether 'the learned judge established a claim for adverse possession' and whether the respondents proved open, continuous, uninterrupted occupation of the land.
 9. The respondents opposed the application and filed a replying affidavit sworn on July 18, 2023 by Jacton Kolo Muga on July 18, 2023. They also filed submissions of the same date through their counsel on record, Messrs. Oguttu Mboya Ochwal & Partners.
 10. Mr. Muga terms the application and the supporting affidavit as totally inaccurate, misleading, and false. He avers that the suit was determined on July 20, 2022, in the presence of all the parties. The applicants had been previously represented by the firm of Nyambati & Co Advocates which had later applied to be discharged from representing the applicants. The applicants had thereafter represented themselves and were present when the judgment was delivered. Mr. Muga avers that the present application had been lodged 7 months after the delivery of the judgment.
 11. With regard to the reasons advanced for the delay, the respondents aver that the documents relied on by the applicants, annexure S00 2, alludes to tests being conducted on March 1, 2022 and July 9 and 12, 2022. Further, that no medical evidence had been placed before the Court to show that the 2nd applicant has been bedridden from July 2022 to February 2023. It is his averment that the applicants knew, as demonstrated by the letter dated October 4, 2022 annexed to the affidavit in support of the application, that judgment had been delivered and that the respondents' bill of costs was being taxed.
 12. In their submissions, the respondents note that there is no evidence before the Court that the 2nd applicant was indisposed as he avers. The applicants were physically present in court when the judgment was delivered. The notice of appeal should have been lodged on 3rd August 2022 and the



record of appeal lodged by 3rd October 2022. It is the respondents' submission that the applicants have not satisfactorily explained the delay in filing the notice and record of appeal, and their application should fail.

13. Under Rule 4 of the Rules of this Court, the Court has the discretion to extend time for the doing of any act required to be done under the Rules. In exercising this discretion, the Court is required to consider certain factors as set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997. The Court is required to consider the length of the delay, the reasons for the delay, the prejudice to be suffered by the respondent and, (possibly) the chances of success of the appeal.
14. The judgment that the applicants seek to appeal against was delivered on July 20, 2022. The present application was filed in February 2023. There was thus a delay of seven months, a period that is rather long, given that the applicant was required, under rule 77 (2) of the Court of Appeal Rules, to file the notice of appeal within 14 days of the date of the judgment. The record of appeal should have been filed within sixty days of the date of lodging the notice of appeal.
15. The reason advanced by the 2nd applicant for the failure to lodge the notice of appeal in time is that he was ill and admitted in hospital from July 2022 to the time of filing the application. The 'evidence' placed before the Court in support of this averment are some documents marked 'SOO2'. These documents appear to be the results of tests carried out on Silas Onyango Odhiambo at the Mediheal Hospital on July 9, 2022; a pathology request form for 'investigation of PSA' and 'testosterone,' and a tests results report dated July 12, 2022. There is also a request for tests to be done on the 2nd applicant at the St. Joseph Mission Hospital in Kilgoris dated March 1, 2022. None of these documents indicate that the 2nd applicant was ill and admitted in hospital. More importantly, they pre-date the judgment which was delivered on July 20, 2022. They do not adequately explain the failure to file the notice of appeal in compliance with the Rules of this Court.
16. As the applicants admit in their submissions, they were galvanised into action when they were served with the respondents' bill of costs. They were not, however, sufficiently moved to take action relating to their appeal. In his letter dated October 4, 2022, the 2nd applicant writes to the Deputy Registrar of the Environment and Land Court explaining that he was not able to attend court on October 6, 2022, it would appear the date for the taxation of the bill of costs, due to injuries he had sustained in February 2022, and asking to be allowed two months to either recover or engage an advocate to act for him.
17. I find that the delay of seven months before seeking leave to file the notice of appeal out of time was inordinate, and that no satisfactory reasons have been placed before the Court. The alleged illness and admission of the 2nd applicant is not borne out by the 'evidence' he places before the Court, the test results from Mediheal Hospital and the request for tests at St. Joseph's Hospital. His letter of October 4, 2022 suggests that he was in a position to communicate and could have given instructions for the filing of the application for extension of time, but he waited a further four months before filing the present application.
18. It is my finding, therefore, that the present application is devoid of merit, and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

MUMBI NGUGI

.....

JUDGE OF APPEAL



*I certify that this is
a true copy of the original*

Signed

DEPUTY REGISTRAR

