



**Ogola & another v Legion Maria of Africa Church Mission (Civil Application E058 of 2022) [2022] KECA 879 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 879 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E058 OF 2022**

**M NGUGI, JA**

**JULY 22, 2022**

**BETWEEN**

**MELKIO ODUOR OGOLA ..... 1<sup>ST</sup> APPLICANT**

**ANGELINE APONDI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LEGION MARIA OF AFRICA CHURCH MISSION ..... RESPONDENT**

*(Being an application for extension of time to file a notice of appeal out of time and leave to file appeal out of time from the judgment of the Environment and Land Court (A. Ombwayo J) dated 5th May, 2020 in Kisumu ELC No. 30 of 2018)*

**RULING**

1. In the application brought by way of Notice of Motion dated 12<sup>th</sup> April, 2022 and supported by an affidavit sworn by the 1<sup>st</sup> applicant, the applicants seek extension of time to file a notice of appeal and intended appeal out of time. They further seek orders that the memorandum of appeal dated 12<sup>th</sup> April, 2022 and annexed to the application be deemed to be properly on record and be admitted for hearing.
2. A third order sought in the application is that there be a stay of execution of the judgment and/or decree emanating from the judgment of the Environment and Land Court at Kisumu delivered on 5<sup>th</sup> May 2020 in Kisumu ELC Appeal No. 30 of 2018; Legion Maria of Africa Church Mission vs Melkio Oduor Ogola & 2 Others pending the hearing and determination of the application. The applicants also seek stay of execution of the judgment in the said suit pending the hearing and determination of the intended appeal, and ask that the costs of the application be in the cause.
3. The application is brought under Rules 4 and 5(2)(b) of the *Court of Appeal Rules* 2010. The grounds on which the application is based are that on 12<sup>th</sup> May, 2020, the applicants, who had lost contact with their previous advocates on record, the law firm of Geoffrey Okoth and Company Advocates,



- discovered that a judgment in the suit had been delivered on 5<sup>th</sup> May, 2020. That they live in Norway and were unable to do anything to get information regarding the judgment except through relatives who reside in the interior of Siaya County.
4. The applicants contend that the trial court found their claim against the respondent's to be time barred and that fraud against the respondent's as regards all the suit property known as LR No. Siaya/Ojwando 'A' 3409 had not been proved. Due to lack of communication from their previous advocate on record, they were never aware of the date of the delivery of the judgment. They had instructed their current advocates on record, the firm of P. Ochieng and Ochieng Advocates to take up the matter on their behalf and he had promptly filed an application to come on record pursuant to Order 9 Rule 9 of the Civil Procedure Rules which application was allowed on the 29<sup>th</sup> September 2021. A draft notice of appeal has since been drafted and is attached to this application and the applicants were seeking leave to file it out of time.
  5. The applicants aver that they are apprehensive that the respondent shall evict their family from the suit property and they therefore stand to suffer substantial loss and damage should they be evicted from the land in which they have lived for over fifty years. They have an arguable appeal and should this Court not grant the orders that they seek, their appeal will be rendered nugatory and a mere academic exercise. They set out in the draft memorandum of appeal three grounds in which they allege that the learned Judge erred in fact and in law in dismissing their case in the lower court by finding that it was time barred and thus dismissing it on a technicality contrary to the provisions of Article 159 of *the Constitution*; by finding that the appellants had not demonstrated that the land was transferred to the respondent through fraud; and by finding that their late father had listed the suit property as part of his estate in his will before his demise.
  6. In written submissions dated 4<sup>th</sup> April, 2022, the appellants contend that they have explained the reason for the delay in filing the appeal which was that their previous advocate on record failed to update them on the status of their case. That as they both live and work in Norway, they relied on information from their previous advocate on record to be able to know the status of their case which was never done. Further, that the year 2020 and 2021, being the height of the Covid 19 pandemic, they were unable to travel to the country to personally follow up on their case. It is their submission further that they were the successful litigants in the Magistrates Court in Siaya PM ELC No. 1 of 2016 where the court agreed that the issue of fraud was demonstrated. They pray that the orders sought in the application dated 12<sup>th</sup> April, 2022 be granted.
  7. The application is opposed. The respondent filed written submissions dated 29<sup>th</sup> June, 2022 in which it contends that Rule 4 of this Court gives the Court unfettered discretion whether to extend time or not, such discretion to be exercised in accordance with the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA. It is its case that the present application does not meet the threshold set out in the said decision as there is no plausible explanation given for the delay of two (2) years; there is no good reasons advanced for the delay, and the intended appeal lacks merit as the suit was dismissed on a point of law, namely that the suit was statute time barred, which position cannot be changed or altered on appeal. The respondent further submits that the delay in filing the appeal and grant of an order extending time shall greatly prejudice the respondent as it is the bona fide registered proprietor of the parcel of land that is the subject of the litigation.
  8. According to the respondent, the applicants have only sought an order for the extension of time and until such leave is granted, the other prayers in the Notice of Motion dated 12<sup>th</sup> April 2022 are premature. It is the respondent's submission that a notice of appeal should be filed in line with and or pursuant to the provisions of Rule 75 of the Court of Appeal Rules. Unless a valid and competent



notice of appeal is filed in accordance, with the Rules, this Court lacks jurisdiction to entertain, hear and determine any proceedings. The respondent relies on *Ernest Kabiro Kimani vs Malindi Musketeers Limited & 5 others* (2021) eKLR.

9. I have considered the application and the grounds in support thereof. I observe, first, that the application seeks orders under Rule 4 of the Court of Appeal Rules, 2010, and Rule 5(2)(b) of the said Rules, which have now been replaced by the 2022 Rules. I must observe that the present application is incompetent: the applicants ought to have filed an application for extension of time under Rule 4. Only upon grant of orders under this Rule would they have been able to file an application for stay of execution under Rule 5(2)(b)- it is now settled that the jurisdiction of this Court under this latter rule only arises when there is a valid notice of appeal.
10. Even were this not the case, have the applicants placed any material before this Court on the basis of which it could exercise discretion in their favour under Rule 4 to extend time for the filing of a notice of appeal and memorandum of appeal? The principles on the basis of which this Court will exercise discretion in favour of an applicant for extension of time were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (supra). These are the length of the delay, the reason for the delay, the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted.
11. The judgment against which the applicants seek to appeal was delivered on 5<sup>th</sup> May 2020. The present application was filed on 12<sup>th</sup> April 2022, close to two years after the decision. There was therefore a delay of almost two years in seeking leave to file the notice of appeal out of time. A delay of two years is, in the circumstances, inordinate.
12. The applicants explain the delay on the basis that they are based in Norway; their previous advocates did not inform them about the delivery of the judgment, and the years 2020 and 2021 were the height of the Covid pandemic. They also aver that they learnt of the delivery of the judgment on 12<sup>th</sup> May, 2020. Their present advocates on record applied for and were granted leave to come on record on 29<sup>th</sup> September 2021.
13. Taking the above matters into consideration, I am not satisfied that the applicants have placed before me plausible reasons for extension of time. The applicants learnt of the delivery of judgment on 12<sup>th</sup> May 2020, about seven days after its delivery. No action was taken in the matter, however, until sometime in September 2021 when an application to come on record was filed by the present advocates on record for the applicants. Leave was granted on 29<sup>th</sup> September 2021, but again the applicants did not seek extension of time with regard to the notice of appeal until seven months later when the present application was filed. It is my finding and I so hold that there are no plausible reasons for the exercise of the Court's discretion in favour of the applicants.
14. A final consideration is whether, in any event, the orders of stay sought by the applicants in this matter could be granted. The applicants seek stay of orders dismissing their suit before the trial court. In other words, they seek stay of a negative order. In its decision in *County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another* [2021] eKLR this Court observed as follows:

“It is now settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under Rule 5(2) (b) of this Court's rules such as the one before us. (See: *George Ole Sangui v. Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015) where this Court citing the famous case of *Western College of Arts And Applied Sciences v. Oranga & Others* [1976] KLR 63, pronounced itself as follows:-



“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.” (Emphasis added)

15. In view of my conclusions above, I find that the application dated 12<sup>th</sup> April 2022 is without merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

