



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E411 OF 2020

BETWEEN

SAMUEL MUKUHA NJUKI.....1ST APPLICANT

JOHN KIMANI NJUKI.....2ND APPLICANT

AND

MARGARET NYOKABI KAHIHU....1ST RESPONDENT

JOHN KAHIHU KAMUYU.....2ND RESPONDENT

(Being an application for leave to appeal out of time against the ruling of the High Court of Kenya at Nairobi (Mbogholi, J.) delivered on 22nd September 2010 in High Court Civil Case No. 1476 of 2005 (OS))

RULING

1. In their application dated 26th October 2020 made under Rule 4 of the Court of Appeal Rules the applicants Samuel Mukuha Njuki and John Kimani Njuki have sought “leave to appeal out of time against the whole ruling of the Hon. Justice Mbogholi, J...delivered on 22nd September 2010.” In the same application, the applicants have prayed for an order of stay of execution in HCCC No. 1476 of 2005 (OS) Margaret Nyokabi Kahihu and anor vs. Samuel Mukuha, which I cannot, as a single judge, entertain as it is a matter for the full Court under Rule 53 of the Court of Appeal Rules.

2. As the 1st applicant has correctly stated in his detailed affidavit sworn on 26th October 2020 in support of the application, this matter, “has been a long winded road” characterized by a “plethora of actions”. The short of it is that approximately 16 years ago, the respondents, Margaret Nyokabi Kahihu and John Kahihu Kamuyu instituted suit by Originating Summons dated 9th December 2005 in the High Court claiming a portion of the property known as Title Number Dagorreti/ Riruta/1868 registered in the name of the applicant’s late father, Samuel Mukuha Njenga on the basis that the interest of the deceased had been extinguished through adverse possession. The respondents sought to be declared the owners of the entire property. The suit was compromised by consent and judgment entered about 13 years ago, on 15th April 2008, before **Angawa, J.**

3. The applicants have maintained that the advocate who compromised the suit and recorded the consent on behalf of the deceased did so unilaterally, and had no authority to do so, for among other reasons that the applicant’s father, the deceased, was mentally incapacitated.

4. After entry of judgment, an application dated 13th October 2008 was made seeking an order for the appointment of applicants’ brother, one George Njuki Mukuha, a guardian of the suit. That application was dismissed by **Osiemo, J.** in a ruling dated 23rd June 2009.

5. Thereafter, an application was made through different advocates seeking a review of the judgment entered before **Angawa, J.** on 15th April 2008. That application was dismissed in a ruling delivered by **Mbogholi, J.** on 22nd September 2010. Another application was then made seeking review of the orders made on 23rd June 2009 by **Osiemo, J.** That application was heard by **Mbogholi, J.** who dismissed it in a ruling delivered on 12th July 2011. Numerous other applications followed, and it would seem, based on the affidavit in support of the application now before me, that the matter is still being pursued in the High Court.

6. Learned counsel for the applicants, Njogu & Associates Advocates, have relied on past decisions, among them Paula Waheti Muchina vs. Henry Wanjohi Muchina [2003] eKLR;

Harrison Mbaria Mbogo & another vs. Mbutu Ngugi Civil Application No. Nai 340 of 1996; Major Joseph Mweteri Igweta vs. Mukira M’Ethare & Attorney General, Civil Application No. Nai 8 of 2000 with regard to the principles applicable when the Court is invited to exercise its discretion in matters of extension of time and for the proposition that mistakes of counsel should not be visited on a party.

7. Learned counsel for the respondents, Ojienda & Company Advocates on the other hand submitted that the delay involved is inordinate and that no good and sufficient cause for not filing the appeal in time has been shown. For the principles that should guide the Court in applications of this nature, reference was made to decisions of this Court in First American Bank of Kenya Ltd vs. Gulab P Shah & 2 others [200] 1 EA 65;

Aviation Cargo Support Limited vs. St. Mark Freight Services Limited, CA; Gloria Paolo vs Pietro Scavo [2019] eKLR.

8. I have considered the application, the supporting and further affidavits of Samuel Njenga Mukuha and the rival submissions and authorities. The legal principles applicable as captured in the authorities to which I was referred are consolidated in the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR where the Supreme Court of Kenya expressed that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; a party seeking extension of time has the burden to lay a basis to the satisfaction of the court; extension of time is a consideration on a case to case basis; delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted;

whether the application is brought without undue delay; and whether public interest should be a consideration.

9. In this matter, the applicants have exhibited to the affidavit in support of the application a memorandum of appeal. Although the memorandum of appeal avowedly relates to “*appeal from the ruling...of the High Court by his Lordship Hon. Mbogholi Msagha J...given on 22nd September 2010*” the applicants grievances as particularized in that memorandum of appeal relate to “the entire judgment above-mentioned as relates to orders by the trial judge on the finding of adverse possession by way of a consent judgment...”.

10. Furthermore, the notice of appeal dated 26th October 2020 exhibited to the affidavit in support of the application relates to, and is in respect of the judgment of Angawa, J. given on 15th April 2008. In effect, whereas the application before me seeks

“leave to appeal out of time against the whole ruling of the Hon. Justice Mbogholi J...delivered on 22nd September 2010”, the intention, clearly, is to challenge the judgment of Angawa, J. given 16 years ago.

11. Given the background of the matter as set out above, and although the applicants blame their predicament on the numerous advocates who have acted for them from time to time, I am not satisfied that an explanation has been given, least of all a satisfactory explanation, why an appeal against the judgment given on 15th April 2008 was not lodged in time or extension of time sought within a reasonable time. 16 years is a long time to wait.

12. Even assuming that the intention is to challenge the decision of 22nd September 2010 given by Mbogholi, J., there is no satisfactory explanation why it has taken another 10 years or so to make the present application. I am therefore in agreement with counsel for the respondents that the delay involved is inordinate and no good and sufficient cause has been given on the basis of which I can exercise the Court’s discretion in the applicants’ favour.

13. The application dated 26th October 2020 fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of February, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR