



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 16 OF 2020

BETWEEN

ANDREW WAFULA MASINDE.....1ST APPLICANT

ELIZABETH NABUKWANGA WABWILE.....2ND APPLICANT

SUSAN NABALAYO WABWILE.....3RD APPLICANT

RAEL NEKESA WABWILE.....4TH APPLICANT

AND

STEVE MANGU NGURE.....1ST RESPONDENT

HANNINGTON MUIGAI KARIUKI.....2ND RESPONDENT

(Being an application for extension of time to file and serve the notice of appeal out of time from the Judgment of the Environment and Land Court at Kitale (Mwangi Njoroge, J) dated 9th October, 2019

in

ELC Case No. 29 of 2011

RULING OF THE COURT

1. The applicants were the plaintiffs in **Kitale ELC Case No. 29 of 2011**, where they filed a suit against the two respondents seeking among other things, an injunction restraining the two respondents, their servants, agents or assigns from occupying, developing, leasing, selling, charging, transferring, subdividing or in any way dealing with land known as Kiminini/Kinyoro Block 3 Matisi/1165 and Kiminini/Kinyoro Block 3 Matisi/1166. Their suit was heard and dismissed by the learned Judge on the 9th October, 2019.

2. The applicants filed a notice of appeal on the 6th November 2019. The applicants are now before this Court with a notice of motion under Rule 4 of the Court Rules seeking leave to have the notice of appeal filed on 6th November 2019 deemed to have been filed on time.

3. The 4th applicant who filed an affidavit in support of the motion blames their advocate, as he did not give them any notice about the delivery date for the judgment, and that they only learnt of the judgment when time for filing the notice had already expired. The 4th applicant who claims to be 86 years old further explains that the delay in filing the motion was caused by illness on her part, and heavy rains in Kitale town which made it impossible for her maize to dry so that she could raise legal fees for preparation and filing of the application and the intended appeal.

4. The application is opposed through a replying affidavit sworn by the 2nd respondent **Hannington Muigai Kariuki**, who deposes that the applicants' motion is an afterthought, brought in bad faith and meant to defeat the course of justice. He contends that the applicants were well aware of the judgment date as it was announced in court in presence of the parties' advocates. The 2nd respondent contends that he is in actual physical and legal possession of the suit property, and that the intended appeal is irredeemably incompetent for failure to comply with the mandatory requirements of **Rule 71** of the Court of Appeal Rules.

5. The applicants and the respondents, each filed written submissions urging the Court to find in their favour.

6. The applicants urge that their intended appeal has very high chances of success as the defence counsel was conflicted in the matter, and secondly, the delay in filing the notice of appeal was not deliberate on their part, but was occasioned by their former advocate who failed to communicate the judgment of the court to them timeously.

7. In his submissions, the 2nd respondent urges that the 4th applicant is not deserving of the exercise of the court's discretion under Rule 4 of the Court of Appeal Rules, as her explanation that she was not informed of the date for the judgment is not true, since the date was given in open court in the presence of the applicants.

8. Further, the Court is urged to find that her explanation for the delay of 44 days in filing her motion is not plausible as there is no proof of the alleged sickness. The 2nd respondent maintains that it will suffer prejudice if the application is granted as the parties have been litigating for almost 10 years, and the 2nd respondent who is an innocent purchaser without notice has incurred considerable costs and the legal proceedings should now come to an end.

9. I have carefully considered this motion. Under Rule 4 of the court Rules, I have unfettered discretion but that discretion must be exercised judiciously as was stated by this Court in **Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2EA 231**, there are some matters that this Court must take into account in exercising its discretion and this includes, the length of the delay, the reason for the delay and the degree of prejudice if any that the respondent is likely to suffer if the application is granted. Moreover, the Court must further consider whether the delay is inordinate, and or prejudicial to the respondent. (**Ivita vs Kyumbu [1984] KLR 441**).

10. In this case the delay in filing the notice of appeal was only 14 days which by any standards is not inordinate. However, the applicants took another 44 days to file the current application. The 4th applicant has given an explanation which sounds plausible. She is a farmer and depended on sale of her maize to raise money for the required fees, and this was frustrated by the weather. Even though no document has been produced in regard to her illness, I think the explanation regarding the maize is sufficient. It is evident that she did her best within the limitations that she had and the period of 44 days is not inordinate given the circumstances.

11. The 2nd respondent has deponed that he is in actual and physical possession of the suit property. The prejudice, if any, that he will suffer from the delay is not one that cannot be compensated by an order of costs. For these reasons, I allow the applicants' motion and order that the notice of appeal filed on 6th November 2019 shall be deemed to have been properly file and grant leave to the applicant to file and serve the record of appeal within 45 days from the date hereof. Costs of the application shall be in the appeal.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR