



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: J. MOHAMMED, J.A (IN CHAMBERS))

CIVIL APPLICATION NO.106 OF 2020

BETWEEN

JULIUS JOAB BURUDI.....1ST APPLICANT

ISAAC JOAB BURUDI.....2ND APPLICANT

JACKSON WAMBUNYA.....3RD APPLICANT

MACHANI WAMBUNYA.....4TH APPLICANT

JAMES WAMBUNYA.....5TH APPLICANT

AND

JIM HABIL MKIMBO.....RESPONDENT

(An application for leave to extend time to file and serve notice of appeal out of time of the ruling/orders of (Matheka, J.) made on 29th May 2018 in Kakamega Environment & Land Case No.252 of 2017) in ELC NO.252 OF 2017

RULING

Background

1. Julius Joab Burudi, Isaac Joab Burudi, Jackson Wambunya, Machani Wambunya & James Wambunya (the applicants) moved this Court vide an application dated 8th September, 2020 seeking for leave to file and serve a notice of appeal out of time against the ruling of the Environment & Land Court at Kakamega, (ELC) (**Matheka, J.**) delivered on 29th May, 2018. **Jim Habil Mkimbo** is the respondent herein.

2. The applicant has also to satisfy the criteria for granting the order under **Rule 4** of the Court of Appeal Rules (this Court's Rules).

3. The application is brought under **Rule 4, 47 and 43** of the **Court of Appeal Rules** as well as section **47, 50 and 159** of the **Constitution**. A brief background of the application before the Court is that by way of Originating Summons. The applicants instituted and filed ELC NO.252 of 2017 against the respondent seeking to be declared owners of Land Registration **No. Kabras/Shamberere/367** (the suit property) under the principle of adverse possession; that by a notice of motion dated 20th November, 2015, the respondent applied to strike out the applicants' suit on the ground that the same was *res judicata* and that on 29th May, 2018, the High Court ruled that the suit was *res judicata* and struck out the applicants' Originating Summons with costs. The ELC also ordered eviction of the applicants from the suit property.

4. The applicants aver that they were unable to seek advice from their advocates after delivery of the Ruling of 29th May, 2018 due to ignorance and lack of money to facilitate the appeal hence the instant application to seek extension of time to file the appeal out of time. The application is supported by the grounds on the face of the application as well as by the supporting affidavit of the 1st applicant deponed on 8th September, 2020 in which he reiterated the aforesaid grounds.

5. In response to the application, the respondent in his replying affidavit sworn on 24th February, 2021 stated that: the applicants are guilty of inordinate delay; he stands to be greatly prejudiced should the application be allowed; that ignorance of the Law is no defence and that the applicants have not demonstrated their lack of money. The Respondent further avers that the intended appeal does not have the slightest

remote chance of success as the applicants are re-litigating issues already determined by courts of competent jurisdiction.

Submissions

6. The application was dispensed with by way of written submissions. The applicants' submissions are not in the Court record. The respondent submitted that in view of the fact that the impugned ruling was delivered on 29th May, 2018 and the instant application filed on 8th September, 2020 the delay is inordinate. The respondent further submitted that the reasons submitted by the applicants for delay are not satisfactory.

7. The Respondent further submitted that great prejudice will be occasioned to him should the application be allowed as his constitutional right to property and protection shall be infringed. In sum, he urged this Court to dismiss the application with costs.

Determination

8. I have considered the application, the grounds in support thereof, the affidavits, the authorities cited and the law.

9. In **Leo Sila Mutiso** (supra) which is the *locus classicus*, laid down the parameters under **Rule 4** of the Court of Appeal Rules as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” [Emphasis supplied.]

10. As regards the length of delay, In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR**, this Court stated as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. The impugned ruling was delivered on 29th May, 2018 whereas the instant application was filed on 9th September, 2020. The delay in filing the present application was therefore approximately two years and three months. In a bid to explain the delay, the applicants contend that they were unable to seek advice from their advocates after the ruling of 29th May, 2018 due to ignorance and lack of money to meet their advocate’s legal fees to facilitate the filing of the appeal. In the circumstances of this case I find that the reasons advanced by the applicants for the delay are not plausible or satisfactory.

12. The applicant further attributed the delay to financial constraints. In **Joseph Maina Njoroge & 2 Others v Paul Chege Mutahi [2007] eKLR** this Court held that impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. It was held that:-

“Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why Omolo JA stated categorically in the case of Francis Mwai Karani vs. Robert Mwai Karani (Civil Application No. NAI. 246 of 2006) that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”

13. Regarding the chances of success of the intended appeal the applicant contends that the intended appeal has high chances of success and raises serious questions of law. In **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

14. On the degree of prejudice to the respondent, this Court has to balance the competing interests of the parties, that is, the injustice to the applicants, in denying them an extension, against the prejudice to the respondent in granting an extension. The respondent avers that he will be greatly prejudiced in the event that this application is allowed as his constitutional right to property and protection as envisaged by **Article 40** of the **Constitution** will be infringed. I find that in the circumstances of this case, any further delay is prejudicial to the respondent, as it would deny him access to the suit property.

15. From the circumstances of the application before me, the applicants have failed to demonstrate the existence of the parameters set out in

Leo Sila Mutiso (supra). The upshot is that I decline to grant the prayer to extend time. The application dated 8th September, 2020 lacks merit and is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR