



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), (IN CHAMBERS))

CIVIL APPLICATION NO. 24 OF 2020

BETWEEN

MUNICIPAL COUNCIL OF KISUMU.....APPLICANT

AND

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES.....1ST RESPONDENT

COMMISSIONER LANDS.....2ND RESPONDENT

DISTRICT LAND REGISTRAR KISUMU..... 3RD RESPONDENT

THE ATTORNEY GENERAL..... 4TH RESPONDENT

MABEL OKWISA OMONDI.....5TH RESPONDENT

JULIUS NYABUDI..... 6TH RESPONDENT

MAUREEN OLEL.....7TH RESPONDENT

JARED GILO OPUL..... 8TH RESPONDENT

BERNARD ODHIAMBO.....9TH RESPONDENT

ERICK OUMA OTUOMA10TH RESPONDENT

JOHN ANDREW OGELE NYAKUNA..... 11TH RESPONDENT

MONICA ANYANGO ORWA12TH RESPONDENT

JACKTON OKITA OCHORE.....13TH RESPONDENT

ASTERI ANGOLO.....14TH RESPONDENT

CORNEL OPIYO OSANO..... 15TH RESPONDENT

PAUL MOSES OMONDI..... 16TH RESPONDENT

SEVENTH DAY ADVENTIST

CHURCH EAST AFRICA UNION

LIMITED (VICTORIA SDA CHURCH).....	17 TH RESPONDENT
JOSEPH SHADRACK ONGONGNO.....	18 TH RESPONDENT
MINISTER OF FINANCE.....	19 TH RESPONDENT
KREP BANK LIMITED.....	20 TH RESPONDENT

(Being an application for extension of time to file an application for an order that service of the notice of appeal arising from the judgment and decree of the Environment and Land Court of Kenya at Kisumu (Kibunja, J.) delivered on 13th December, 2019 need not be effected on parties who did not take part

in

E.L.C No. 782 of 2015)

RULING OF THE COURT

The applicant filed a suit in the Environment and Land Court (ELC) claiming proprietorship interest in parcels of land held by some of the respondents which it believes emanated from I.R No. 12663, over which the applicant claimed to have been granted a leasehold interest by the Government of Kenya; that thereafter, in 1958 it surrendered its title to the 2nd respondent for purposes of effecting the Government's request for a portion of 0.996 of an acre thereof to be utilized in the extension of a road; that instead, the 2nd respondent unlawfully converted the title which was registered under the Registration of Titles Act (repealed) to the Registered Land Act (repealed); that further the 2nd respondent fraudulently caused the 3rd respondent to register the same as L.R No. Kisumu Municipality/Block 9/1 and Kisumu Municipality /Block 9/329 both of which were illegally granted as leaseholds to the 1st respondent; and that the 1st respondent subsequently subdivided Kisumu Municipality /Block 9/329 into 103 portions and sold the same to some of the respondents.

Kibunja, J. in a judgment delivered on 13th December, 2019 found that the applicant had not established its case and dismissed the suit. Dissatisfied with that decision, the applicant lodged a notice of appeal evincing its intention to challenge that outcome.

However, the applicant whilst intent on filing an application under the proviso to **Rule 77(1)** of the Court of Appeal Rules, for exemption of service of the notice of appeal on some of the respondents who did not take part in the proceedings at the ELC, failed to do so within the stipulated time frame. Therefore, it took out a motion pursuant to **Rules 4 and 77(1)** of the Court of Appeal Rules, seeking extension of time to file the aforementioned application.

An application for extension of time under **Rule 4** calls for exercise of this Court's unfettered discretionary power within the parameters of the law. Some of the factors to be considered include, 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 success of the intended application under the proviso to **Rule 77(1)** should the current application be granted. See **Habo Agencies Limited vs. Wilfred Odhiambo Musingo** [2015] eKLR.

Emphasising that the current application was made without unreasonable delay, the applicant contended that the notice of appeal was filed on 20th December, 2019; that the Christmas period and Court recess commenced on 21st December,

2019 up to 13th January, 2019, both days inclusive; that in line with the proviso to **Rule 77(1)** an application thereunder should have been filed on or before 20th January, 2020; that the current application was filed on 18th February, 2020, some 29 days late, which delay was not inordinate. Moreover, the applicant attributed the delay to an oversight on the part of its advocate owing to the Christmas period during which many law firms take a break from work; and that the same should not be visited upon the applicant.

The applicant urged this Court to exercise its unfettered discretion and accede to its request in order to give effect to the overriding objective of the Court as in the case of **Stephen Boro Gittha vs. Family Finance Building Society & 3 others** [2009] eKLR. In addition, the applicant submitted that none of the parties would be prejudiced with the extension of time as evidenced by the absence of any opposition to the application.

Indeed, there was no response by any of the respondents to the application. Nonetheless, the 1st respondent through its advocates on record, M/s Kale Maina & Bundotich Advocates, by an email dated 23rd February, 2021 addressed to the Deputy Registrar of this Court, indicated that it would not take any position with respect to the current application, which did not affect it.

Under the proviso to **Rule 77(1)** the intended application should have been filed within 7 days of lodging the notice of appeal. As such, whether or not the delay of 29 days was inordinate depends on the explanation given for the same. While the common saying that mistakes of counsel should not be visited on a client is a qualified statement, which

should be determined on a case-by-case basis as appreciated in Monica Muthikwa Masyuko vs. James Nganda Mwanza & Another [2020] eKLR, I am inclined to give the applicant the benefit of doubt.

Though it is not my place in this current application to determine the merit of the intended application under the proviso to **Rule 77(1)**, I think it deserves to be canvassed before the Court. I also do not find any prejudice that would be occasioned to the respondents should the current application succeed.

In the result, this application is allowed with no orders as to costs and I direct the applicant to file the intended application under the proviso to **Rule 77(1)** within 7 days of this ruling.

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

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR