



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 37 OF 2020

BETWEEN

NYAKUNDI ONCHIRI APPLICANT

AND

NYAMWANGE NYANG'AU.....1ST RESPONDENT

OBIERO NYANG'AU2ND RESPONDENT

OSEKO NYANG'AU.....3RD RESPONDENT

(An application for extension of time for filing of the Record of Appeal from the Judgment of Environment and Land Court at Kisii (Mutungi, J.) dated on 9th October, 2018 in ELC No. 638 of 2016)

RULING

In the Motion brought under rules 4, 42 and 43 of the rules of this Court I am asked to grant leave for extension of time for lodging a Record of Appeal from the Judgment of the Environment and Land Court (“ELC”) delivered on 9th October, 2018 and also extend time within which a Notice of Appeal should have been served. In grounds in support of the Motion and in a supporting affidavit of **Nyamage Nyangau** (the applicant) it is stated that the Notice of Appeal was lodged on 21st February, 2020; that advocates now on record obtained instructions to take over conduct of the matter from previous advocates; that Notice of Appeal lodged on 21st February, 2020 was not served on time upon the respondent; that failure to lodge Record of Appeal was not occasioned by any willful neglect or negligence on the applicant’s part “Save that the circumstances he was in at the material time could not enable him to give proper instructions on the conduct of the appeal.” The same reason is given for failure to serve Notice of Appeal to the respondent. Further, that after delivery of Judgment the applicant had instructed his lawyers to lodge an application to set aside the Judgment and also apply to file and serve a statement of defence out of time; that the application was dismissed; that the dispute at the ELC involved a parcel of land; that mistakes of counsel should not be visited on their clients.

The applicant filed written submissions which I have perused. He says that the respondent filed a suit at ELC praying for an order of eviction from the parcel of land known as **Central Kitutu/Mwogeto/1230**; that the ELC had directed the Land Registrar and Surveyor to visit that parcel of land and another (**Parcel No. 1239**) and establish and fix boundaries; that the two officers visited the lands and filed a report which was adopted by the Court as a Judgment; that an application to set aside that Judgment was dismissed.

Further, that various steps necessary for filing an appeal were not taken through oversight.

The respondents also filed written submissions where the history of the dispute in the ELC is repeated. They cite the oft-cited case **Leo Sila Mutiso v**

Rose Hellen Wangari Mwangi (Civil Application No. 255 of 1997) where the principles that govern extension of time are set out and submit that the applicant has not satisfied those principles.

The principles that govern applications for extension of time, were, indeed, set out in that case (**Leo Sila Mutiso – supra**) 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".

I note that Judgment of the ELC was delivered on 9th October, 2018 and a decree issued on 31st October, 2018. The Motion was filed on 5th March, 2020, about 16 months after Judgment was delivered. The applicant says that the Notice of Appeal was lodged on 21st February, 2020 (way out of time allowed by the Rules) but was not served on the respondents. He says that this was due to circumstances that could not allow him to give instructions to his lawyers. He does not explain what those circumstances were. As properly submitted by the respondent's delay in serving Notice of Appeal and in not filing Record of Appeal as required is not explained. I find the delay to be inordinate. I am also not persuaded that the intended appeal is arguable. I do not think that the issue of a mistake of counsel has any relevance here, the applicant not having explained why he was unable to instruct his lawyers. In those circumstances, I refuse to exercise my discretion and dismiss the Motion with costs to the respondents.

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

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR