



IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPLICATION NO. 127 OF 2020

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

BETWEEN

PAMELA IMBUKA NJARO.....1ST APPLICANT
FRANCIS MBOGE NJARO.....2ND APPLICANT
AND
JOSEPH VUTITA NJARO.....1ST RESPONDENT
MOLYN CREDIT LIMITED.....2ND RESPONDENT
KENNEDY K. SHIKUKU T/A
ESHIKHONI AUCTIONEERS3RD RESPONDENT
KENNETH NANDI VITISIA.....4TH RESPONDENT

(An application for extension of time to file a Notice of Appeal, a Memorandum of Appeal, and Record of Appeal

from the Judgment of the High Court at Kakamega (Musyoka, J.) delivered on 8th May 2020

in

Civil Case No. 17 of 2018)

RULING

Background

1. This application is brought under **Rules 4 and 41** of the **Court of Appeal Rules**. **Pamela Imbuka Njaro & Francis Mboge Njaro** (the applicants) seek an extension of time to file and serve a Notice of Appeal, Memorandum of Appeal and Record of Appeal from the judgment of the High Court at Kakamega (**Musyoka, J.**) delivered on 8th May, 2020, along with costs of and incidental to this application. **Joseph Vutita Njaro, Modyn Credit Limited, Kennedy K. Shikuku T/A Eshikhoni Auctioneers & Kenneth Nandi Vitisia** are the 1st, 2nd, 3rd, and 4th respondents herein.

2. The application is premised on the grounds set out on the face of the application and supported by an affidavit sworn by the 1st and 2nd applicants. The grounds put forward are summarised as follows: Judgment was delivered electronically on 8th May, 2020, due to the Corona virus pandemic, in the absence of the applicants or their advocates. Though aggrieved, the applicants could not give instructions to their advocates since their advocates' offices were also closed following the Corona-virus pandemic. It was the applicants' contention that the courts have now up-scaled their operations and the applicants applied and paid for a certified copy of the proceedings and judgment and are keen on filing their appeal; and that the time within which to file the Notice of Appeal, Memorandum of Appeal and Record of Appeal have since expired.

3. The applicants contend that the delay is not inordinate or deliberate but excusable since the courts were only recently re-opened and the applicants ought not to be blamed or punished for a pandemic which was unexpected and beyond the applicants' control. They also contend that the respondents will not be prejudiced should the orders sought be granted; and that it is in the interest of justice and fairness that the applicants be given an opportunity to access justice.

4. The applicants further contend that they have an arguable appeal with overwhelming chances of success. They aver that the learned trial judge dismissed their case and in effect validated the 4th respondent's purported acquisition of and title to **L.R. No. S.Maragoli/Kagiye/1316** (the suit property) when the entire process of charging the suit property by the 1st and 2nd respondents was illegal, unlawful and a nullity; and when both the 2nd and 3rd respondents breached all mandatory legal steps and failed to issue all mandatory legal notices contemplated by **Sections 90 (2), 96 and 97 (2)** of the Land Act. The applicants further averred that the 3rd respondent purported to

sell the suit property in violation of orders of injunction which had not been vacated or reviewed.

Submissions

5. In written submissions filed by the applicants' advocate, it is submitted that this Court is granted the unfettered discretion to extend time, which discretion is exercisable in accordance with the principles set out in Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997.

The respondents have not filed a reply to this application or submissions thereof.

Determination

6. I have considered the application, the grounds in support thereof, the affidavits, the authorities cited and the law. The applicants are urging this Court to exercise its discretion and extend the time for filing and serving a Notice of Appeal, Memorandum of Appeal and Record of Appeal. **Rule 4** of the **Court of Appeal Rules** provides:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.

7. The principles guiding this Court in the exercise of that discretion are set out in Leo Sila Mutiso v Rose Wangari Mwangi Civil Appeal No. Nai. 255 of 1997:

“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; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”.

8. In Muchugi Kiragu v James Muchugi Kiragu & Another [1998] eKLR this Court stated:

“...the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it”.

9. When considering the possible chances of the intended appeal's success, this Court in Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR stated that caution ought to be exercised as the issue of whether the intended appeal has merits or not is not an issue determined with finality by a single judge. At this stage, the Court does not delve into the merits of the intended appeal but considers whether the intended appeal is arguable. As this Court stated in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, an arguable appeal does not necessarily mean one which will succeed.

10. A perusal of the draft Memorandum of Appeal annexed by the applicants reveals that the intended appeal raises arguable issues touching on the nature of ownership of the suit property; the legality of the process through which the suit property was charged; and the legality of the auctioning of the suit property.

11. The respondents have not filed any reply or written submissions to the instant application and have thereby failed to demonstrate any prejudice that would be suffered by them should this application be allowed.

12. The upshot is that I find merit in this application and I allow it. I direct the applicants to file and serve the notice of appeal within seven (7) days from the date hereof and the memorandum of appeal and record of appeal within thirty (30) days from the date of filing and serving the notice of appeal. Costs of the application will abide by the outcome of the intended appeal.

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