



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: NAMBUYE, J.A. - IN CHAMBERS)**

**CIVIL APPLICATION NO. 140 OF 2020**

**BETWEEN**

**SIMEA JAMIN ALFRED..... 1ST APPLICANT**

**ANUNDA DAVID.....2ND APPLICANT**

**ALEMBE KHATERE ..... 3RD APPLICANT**

**JAMES WAFULA .....4TH APPLICANT**

**ANTHONY MANASSEH.....5TH APPLICANT**

**ALFRED WAFULA MUSOMBI .....6TH APPLICANT**

**PETER BARAZA.....7TH APPLICANT**

**MARY OREDI.....8TH APPLICANT**

**AND**

**ESTHER NELIMA MANYASA.....RESPONDENT**

(Being an application for extension of time to file an appeal out of time against the decision of the High Court of Kenya (Hon. N. Matheka, J.) dated 23rd June, 2020 in *Kakamega ELC Case No. 21 of 2017*)

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**RULING OF THE COURT**

Before me, is a Notice of Motion dated 2nd November, 2020 purportedly under **Rules 31 & 41** of the **Court of Appeal Rules** and **Article 159** of the Constitution of Kenya, 2010 and all enabling provisions of the law of Kenya substantively seeking leave of Court to lodge an appeal out of time against the decision of the trial court delivered on 23rd June, 2020 by the Environment and Land Court ELC Kakamega in ELC Case No. 21 of 2017'; and second, that upon granting the above order, the draft memorandum of appeal and record of appeal be deemed to be properly filed.

It is supported by grounds on its body and a supporting affidavit sworn by **David Anunda** together with annexures thereto. It is not opposed. It was canvassed through the sole pleadings of the applicants following service of the hearing notice electronically on the respective parties on 8th March at 2.03p.m to which the respondent did not respond.

It is applicants' averments in support of the application albeit, in a summary form that, judgment was entered in favour of the respondent in the above cause on 23rd June, 2020. Applicants were aggrieved and filed a notice of appeal. They were however unable to file their intended appeal within the timeline stipulated for in the Rules due to delays in typing and supplying them with certified copies of proceedings which have subsequently been obtained together with an attendant certificate of delay. As a precautionary measure, they have filed an application for stay of proceedings in the trial court. There is however threat of eviction by the respondent. They are genuinely aggrieved as the respondent obtained and confirmed a grant of representation to the deceased's estate in collusion with other beneficiaries without their involvement. They have a legitimate claim in the substratum of the intended appeal. It is only fair and just that they be accorded an opportunity to be heard on the intended appeal which in their opinion has overwhelming chances of success. Second, they have also sufficiently and plausibly explained the reason for the delay in initiating their intended appellate process.

My invitation to intervene on behalf of Applicants has been purportedly invoked under the provisions of law cited in the heading of the application. I have deliberately used the word “purportedly” because, **Rules 31&41** of the Court of Appeal Rules are merely procedural and do not therefore fall for consideration in an application of this nature.

While **Article 159** of the Constitution enshrines the non-technicality principle in the dispensation of justice. The proper **Rule** and which applicants’ advocate ought to have cited is **Rule 4** of the **Court of Appeal Rules**. Failure to cite the said provision as the provision of law that falls for interrogation in the determination of the application under consideration notwithstanding the non-technicality principle in **Article 159** of the Constitution enjoins me to consider the application on merit which I hereby proceed to do.

**Rule 4** of the Court’s **Rules** provide as follows:

**“(4) 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.”**

The principles that guide the Court in the exercise of its mandate under the said Rule have now been crystalized by case law. I take it from the Supreme Court decision in the case of **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *extension of time is not a right* of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.

The factors I am enjoined to take into consideration in the exercise of the said mandate is the length of the delay, reasons for the delay, possibly, arguability of the appeal and lastly, prejudice to be suffered by the opposite party if the relief sought were granted.

Starting with delay it is uncontested that the intended impugned Judgment was delivered on 23rd June, 2020. Applicants as parties who were aggrieved with the said decision and desired to appeal against it were obligated to file and serve a notice of appeal within fourteen (14) days of the date of the delivery of the judgment pursuant to the prerequisite in **Rule 75(1)** and **(2)** of the Court’s **Rules** which fell on 6th July, 2020. The applicants have averred that they duly filed a notice of appeal but have not disclosed the date on which the notice of appeal was filed. The copy exhibited on the record is dated 10th July, 2020 outside the fourteen days stipulated for in the Rules. It does not therefore aid the course of applicants intended appellate process. It therefore requires regularization especially when there is no mention that applicants complied with **Rule 77(1)** of the Court’s rules with regard to service of the said notice on the opposite party within seven (7) days of lodging of the same. I, however, agree with the applicants’ contention that they were handicapped in the progression of their appellate process, for lack of capacitation with certified copies of proceedings which were availed to them on 15th October, 2020, but by which time as correctly averred by them, time for initiating an appeal as of right had long lapsed hence the need to regularize that process.

The certificate of delay is dated 15th October, 2020 while the application under consideration is dated 2nd November, a period of about seventeen-eighteen (17-18) days from the date of capacitation which in my view cannot be said to be in ordinate. I also find that it has been sufficiently and plausibly explained and is therefore excusable.

On the arguability of the intended appeal, applicants have annexed a draft memorandum of appeal. In summary, they intend to complain on appeal that the learned trial Judge grossly erred in the evaluation of the evidence before her, exhibited bias against them, failed to find that Applicants who were in actual occupation of the suit property had overriding interests over the parcel of land, failing to find that the registration of the respondent as proprietor of the suit property was tainted with fraud, failing to consider the doctrine of adverse possession as relates to the occupation of the suit property by Applicants and, lastly, that the final orders of eviction were drastic and draconian all of which I find arguable. Their ultimate success or otherwise notwithstanding.

As for prejudice to be suffered by the opposite party, none has been brought to my attention for lack of response by the respondent to both applicants’ averments in the supporting documents and the hearing notice served electronically onto the respective parties herein inviting them to file written submissions.

In the result, I find merit in the application under consideration and I proceed to make orders thereon as follows:

- 1. The applicants have fourteen (14) days of the date of the reading of this ruling to file and serve the notice of appeal.**
- 2. The applicants have sixty (60) days from the date of the lodging of the notice of appeal to lodge the memorandum and record of appeal.**
- 3. The application being undefended there will be no order as to costs.**

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

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**