



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 157 OF 2019

BETWEEN

THOMAS SHIKAMAYA SHIKHOBAAPPLICANT

AND

SETH ODERA1ST RESPONDENT

PETER IMBISI 2ND RESPONDENT

JOSEPH WANGA SHIKOBA3RD RESPONDENT

GOLDMIRE CO. LTD..... 4TH RESPONDENT

(Being an application for leave to file an appeal out of time from the judgment and decree of the Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 19th March, 2019 in E.L.C No. 129 of 2014)

RULING

The motion before me seeks leave of the Court to extend time under **Rule 4** of this Court's Rules within which to file an appeal against a judgment dated 19th March, 2019 arising from the Environment and Land Court (ELC) in E.L.C No. 129 of 2014.

The dispute that has given rise to this motion relates to **Parcel No. Butsotso/Indangalasia/1208**, to which the applicant has laid a claim, on the basis that the same had been bequeathed to him by his late father.

Consequently, he has challenged in the court below the title held by the 4th respondent. Matheka, J. in the impugned judgment was not convinced that the applicant had established his entitlement to the suit property and dismissed his suit.

In upholding the 4th respondent's title, the learned Judge found that suit property was transferred to one Joram Ingulu Imbisi through a court order in SRMCC No.59 of 1981; that upon the demise of Joram Ingulu Imbisi and his wife, the property was inherited by their sons, the 1st and 2nd respondents; and that the 1st and 2nd respondents passed a good title to the 4th respondent upon its purchase of the same.

According to the applicant, he was not aware of the delivery of the judgment since his then advocates, M/S Anziya & Company Advocates, had failed to keep him up to speed with the position of the matter; that when he finally learnt that the judgment had been delivered, he instructed M/S Amasakha & Company Advocates who filed two applications dated 2nd May, 2019 and 11th July, 2019 both seeking leave to appeal out of time.

The applications were subsequently withdrawn on 26th June, 2019 and 16th September, 2019 respectively; that he then took over the conduct of the matter and filed the current motion; that the delay in filing the intended appeal was not intentional but was occasioned by the conduct of his former advocate; that further, there was also delay occasioned by the ELC in supplying the court proceedings; that it was not until 24th October, 2019 that the proceedings were supplied; and that upon receipt, he filed the current motion without delay.

Apart from stating that the delay was not inordinate, and that he has given a plausible explanation, the applicant urged me too to find that the

intended appeal raises arguable issues, and moreover, that the respondents did not stand to suffer any prejudice if time was extended.

There was no response to these averments by the respondents.

Under **Rule 4**, some of the considerations I have to bear in mind 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 appeal, should the application be granted. **See Fakir Mohammed vs. Joseph Mugambi & 2 Others** [2005] eKLR.

The applicant ought to have filed a notice of appeal under **Rule 75(2)** of this Court's Rules on or before 2nd April, 2019, that is, 14 days after the delivery of the judgment. Considering that the current motion was filed on 9th December, 2019, the delay was for over 7 months excluding the Easter holiday which fell between 19th April and 22nd April, 2019 both days inclusive. Whether this delay was inordinate is dependent on whether the reasons advanced for the delay were reasonable.

Ordinarily, as appreciated in **Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others** [2015] eKLR, whether or not the mistake of an advocate should be visited on a party is dependent on the circumstances of each case. Assuming that indeed the applicant's former advocate kept him in the dark, that explanation only caters for the period from the date of delivery of the judgment up to when the applicant appointed M/S Amasakha & Company Advocates who filed the two applications for leave to appeal out of time, which were subsequently withdrawn.

The period between the date of the withdrawal, on 16th September, 2019 until the date when the current motion was filed on 9th December, 2019, remains unexplained. The applicant seems to suggest that the ELC contributed too to the delay by not availing the proceedings in time. That explanation has no substance since certified proceedings are not necessary before a notice of appeal can be filed under **Rule 75**.

Besides, there is no explanation why the applicant filed the current motion on 9th December, 2019 yet the proceedings were availed on 24th October, 2019. I come to the conclusion that the explanation given for the delay is not reasonable rendering the delay inordinate.

Being cognizant that it is not in my place to determine the merits of the intended appeal, I have my doubts on its arguability.

For those reasons, I decline to exercise my discretion in the applicant's favour.

Consequently, the motion is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI 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