



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 131 OF 2020

BETWEEN

ACTON MUSII KHALAMBUKHA.....1ST APPLICANT

SABETI KHALAMBUKHA.....2ND APPLICANT

AND

PATRICK MALONGO LIDOVOLO.....RESPONDENT

(An Application for extension of time to serve a notice of appeal out of time from the

Judgment of the Environment and Land Court of Kenya at Kakamega (N.A. Matheka, J.)

dated and delivered on 24th June, 2020

in

ELC Cause No. 78 of 2017)

RULING

On 24th June, 2020, N.A Matheka, J. allowed the respondent's case against the applicants where the controversy was around the ownership of parcel of land known as **No. Tiriki/Shamakhokho/1442**, measuring approximately 0.12 Ha, which the respondents claimed to have purchased from one Enisi Khavere Kilaini, who was registered as its proprietor and who held the title to it, having been registered on 28th April, 2015.

The applicants denied the allegation that the respondent bought the parcel in question and insisted that they have all along been in lawful occupation of the parcel.

They counter-claimed for, among others, an order that the register be rectified by deleting all the subdivisions to the original title, **Kakamega/Shamakhokho/369**, including the suit property.

In entering judgment for the respondent, the Judge directed the applicants, their relatives, servants, or agents to vacate the suit land within 90 days from the date of the judgement and in default, they would be evicted, since they were in unlawful occupation the land. They were also ordered to exhume bodies of two of their relatives from the suit land.

The judgment in question, having been entered on 24th June, 2020, by **Rule 4** read with **Rule 75(2)** the applicants, who are desirous of appealing it, ought to have first lodged a notice of appeal within fourteen days of the date of that decision, and, by **Rule 82**, brought the record of appeal within sixty days of the date when the notice of appeal was lodged. This they did not do.

In the instant application, therefore, they have asked the Court (single Judge), in exercise of the power donated by **Rule 4**, to extend time to enable them take the first step by lodging and serving the notice of appeal, and thereafter bring the appeal.

In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (Civil Application No. Nai 255 of 1997), the Court laid the conditions that must be satisfied before time can be extended. For instance, the Court will take into account;

“the length of the delay; 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.”

Seven days from 24th June, 2020 was 3rd of July, 2020. This motion was taken out on 4th November, 2020, 4 months late. No delay is long or short, so long as there is plausible, reasonable and credible explanation for it. What reason have the applicants proffered for the delay of 4 months?

First, they have sworn that they were not aware of the hearing and the case proceeded *ex parte*; that they also learnt of its existence when they were served with a copy of the decree on 10th August, 2020, by which time to lodge the notice of appeal had lapsed; that the judgment was sent by an email; that upon getting funds, on 30th August, 2020, they instructed their present advocate; and that in view of the imminent danger of eviction, they seek indulgence to file and serve both the notice and record of appeal, out of time.

In reply, the respondent contends that the delay is inordinate and not adequately explained; that the grounds upon which the application is brought are not plausible; that the applicants ought to have been vigilant; that the applicants did not attend court and therefore failed to challenge the respondent's case; that they have not applied to set aside the judgment; and that the respondent will be highly prejudiced if the application is allowed.

Upon considering the rival arguments by the parties, it is common factor that the suit was heard in the absence of the applicants. It has also not been rebutted that they only learnt of the judgment on 10th August, 2020.

This application, having been brought on 4th November, 2020, with a plausible explanation that the applicants had to look for finances before engaging their current advocate, I find that the delay was not inordinate. The explanation for the delay is therefore compelling and credible.

As regards the chances of the appeal succeeding if the application is granted, the answer was provided in **Athuman Nusura Juma vs. Afwa Mohamed Ramadhan**, CA No. 227 of 2015, thus:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

Without being definitive, the decision intended to be challenged has profound consequences, including exhumation of the dead. I do not see any prejudice that the respondent will suffer by the application being allowed.

In the circumstances, I allow this application and grant the applicants 30 days from the date of this ruling to file and serve both the notice and the record of appeal, failing which, this leave shall stand vacated without any further orders.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR