



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR J.A.)

CIVIL APPLICATION NO. E459 OF 2020

BETWEEN

BENSON NZAMBU.....1<sup>ST</sup> APPLICANT

GEORGE OGONDO.....2<sup>ND</sup> APPLICANT

BENSON OCHOKA.....3<sup>RD</sup> APPLICANT

AGNETTA MUENI MUNGEL.....4<sup>TH</sup> APPLICANT

AND

JEDIDA ONDUSO AKANDA.....RESPONDENT

*(Being an Application for extension of time to file and serve a letter  
requesting for proceedings and a record of appeal against the Judgment  
of the Environment and Land Court at Milimani (Gitumbi, J) dated on 6<sup>th</sup>*

*November 2018 delivered on 13<sup>th</sup> November 2018 in ELC Case No. 466 of 2014))*

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**RULING OF THE COURT**

*The applicants*, have brought this Notice of Motion dated 18<sup>th</sup> November 2020 under various provisions including *rules 4* and *82* of the rules of this Court seeking for time to be extended within which to file and serve the letter requesting for proceedings and a record of appeal out of time.

The background to the application as can be discerned from the motion is that the applicants had trespassed on the respondent's property and constructed a house prompting the respondent to seek injunctive orders against them. In its judgment, the Environment and Land Court (*Gitumbi, J*), granted the orders as sought.

The applicants were aggrieved by the trial court's decision and have brought this motion on grounds that they filed and served the Notice of appeal dated 26<sup>th</sup> November 2018 against the judgment through its advocates, Kalwa and Company Advocates; that the advocates failed to simultaneously file a request for the typed proceedings and serve it on the respondent; that they later came to realize the omission on the part of their counsel which error they contend should not be visited upon them.

In an affidavit in support of the motion sworn by the 1<sup>st</sup> applicant and in written submissions, the applicants reiterated the contents of the motion, and also attached copies of receipts showing payment of instruction fees for the filing of an appeal that was paid to the firm of Kalwa and Company Advocates.

In a replying affidavit sworn by the respondent it was deponed that the judgment was delivered on 13<sup>th</sup> November 2018 and this application is dated 18<sup>th</sup> November 2020; that the applicants who have been indolent in pursuing their appeal have not advanced any credible reason for

the delay in filing the appeal, and therefore have no justification for seeking to blame their advocate for the delay. The respondent further asserted that in compliance with the orders of the court, she has since taken over possession of the suit property, and therefore the appeal is overtaken; that in the event this Court were to extend time for filing of appeal, she would be subjected to extreme prejudice in view of the inordinate delay in filing the appeal.

Under **rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997.**

As concerns the period and reasons for delay, the judgment was delivered on 13<sup>th</sup> November 2018 and this application was filed on 27<sup>th</sup> November 2020. It becomes clear that a period of 2 years had lapsed since the judgment was rendered. The applicants contend that the delay in filing the appeal was occasioned by the failure of their advocate Kalwa and Company Advocates to request for the proceedings and serve the respondents with a copy of that request. To support the contention that they had instructed Kalwa & Company to file an appeal, they have produced receipts evidencing payment of instruction fees dated 21<sup>st</sup> November 2018, 22<sup>nd</sup> November 2018 and 5<sup>th</sup> March 2020.

Though it is not in dispute that the applicant instructed counsel to file the appeal, there is nothing that shows that counsel should be faulted for the lapses. No advocate has owned up to the failing that he or she is accused of, and the applicants in making such allegation have not pointed out the particular individual responsible for that omission.

In addition, the applicants have not explained their role in the 2 years' delay. They have not demonstrated what steps they took to mitigate against the inordinate delay. Though they claim to have listed their advocate, the receipts clearly show that after they instructed Kalwa and Co Advocates, they went to sleep for two years, and it was not until 5<sup>th</sup> March 2020 that they awakened to check on the status of their appeal. Their inaction displays indolence on their part and a lack of interest in their appeal, with the result that in my view, the delay has not been explained to my satisfaction.

As to whether the appeal has any chance of success, since they did not attach the judgment or a draft memorandum of appeal, I am unable to discern the likelihood of success of the appeal.

As to whether the respondent will be prejudiced. This application was brought after an inordinate delay of 2 years. According to the respondent, the court orders have already been executed, and she is in occupation of the disputed premises. Considering that so much has transpired since the judgment was rendered, it cannot be doubted that the respondent will suffer prejudice.

In sum, I have come to the conclusion that the application for extension of time is not merited. I decline to exercise my discretion to allow it. I order that the Notice of Motion dated 18<sup>th</sup> November 2020 be and is hereby dismissed with costs.

***It is so ordered.***

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2021.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**