



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MURGOR, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 31 OF 2019

BETWEEN

JOSEPH MUTIGA.....1ST APPLICANT

JANE NYAMBURA MWANGI.....2ND APPLICANT

AND

GRACE NJERI WARUKENYA.....1ST RESPONDENT

MARGARET NYAKERU WAWERU.....2ND RESPONDENT

MARY WANGECHI MWANGI.....3RD RESPONDENT

(An application for leave to appeal out of time against the Ruling and order of the Environment and land Court of

Kenya at Murang'a by (J.G. Kemei, J.) made on 8th March, 2018

in

Murang'a Environment and land Case No. 130 of 2017 (OS)

RULING

By a Notice of Motion dated 14th March, 2019, the **applicants, John Mutiga and Jane Nyambura Mwangi** seek to be granted leave to file and serve the Record of appeal out of time. The application which is premised on grounds on its face and the affidavit in support of the 1st applicant, **John Mutiga** sworn on the same day to the effect that the applicants being aggrieved by the ruling delivered on 8th March, 2018 dismissing their application for re-opening their case in the trial court, intend to prefer an appeal against that decision; that they filed a Notice of appeal dated 13th March, 2018 and thereafter by a letter dated 29th March, 2018, their advocate applied for certified copies of proceedings and the ruling so as to enable them prepare the Record; that thereafter, their advocate requested them for legal fees but, being peasant farmers they were unable to raise Kshs. 20,000 within time; that the dispute concerned family land where the respondents were claiming the existence of a trust in respect of land which the 2nd applicant's husband and the 1st applicant were granted through succession; that the appeal has a likely chance of success, and they stand to be grievously prejudiced should they be denied the opportunity to file the Record of Appeal but conversely, no prejudice will be occasioned to the respondents.

Having considered the application and submissions, 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**. Beginning with the length of delay, the ruling was delivered on 8th

March 2018. A Notice of appeal was lodged on 13th March 2018. This motion was not filed until 14th March 2019, thus occasioning a delay of one year.

The applicants have explained that the delay was occasioned by a request for legal fees made by their advocate on 8th June 2018, which the claim they were not in a position to pay; that being peasant farmers they could not afford the fees at the time. I am not however satisfied that this provides an adequate explanation for the delay since, there is nothing that shows that after the demand for fees was made that they communicated this to their advocate or that they requested for terms in which to settle the fees at a later date. Indeed, there is nothing that shows that they were eventually able to pay the fees one year on, which begs the question whether their inability to pay the legal fees was the real cause of the delay or it was mere indolence.

Additionally on the question of fees, this Court has said time without number that lack of fees is not a valid reason for extending time to lodge an appeal. In the case of **Francis Mwai Karani vs Robert Mwai Karani**, Civil Application No. NAI. 246 of 2006, Omolo, J.A. in his ruling delivered on 11th May, 2007 in a similar matter addressed himself at the very beginning of his ruling thus:-

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well-known one that lack of financial resources is generally not a basis for extending time.”

And in addition, **rule 117** of this Court’s rules provides relief where an applicant can show that they are facing financial challenges. From the record, there was no attempt made by the applicants to invoke this recourse.

In view of the above, I do not find that the reasons for delay proffered by the applicants to be satisfactory.

On the likelihood of success of the appeal, as the applicants did not attach a memorandum of appeal, it was not possible to discern the nature of the complaints against the trial judge’s ruling, or where the learned judge fell into error.

It is also my view that, since the suit in the trial court is still pending, any further delay in its finalization will not only be prejudicial to the respondent, but it can be envisaged that the ramifications will also be visited on the applicants.

All in all, the Notice of Motion dated 14th March 2019 is not merited and is dismissed. I decline to exercise my discretion to extend time to file and serve the record of appeal out of time. The suit concerning members of the same family, I make no orders as to costs.

It is so ordered.

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

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR