



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 163 OF 2019

BETWEEN

ELIZABETH WANGUI NJENGA.....1ST APPLICANT

JANE WANGUI CHEGE.....2ND APPLICANT

BENSON GICHUKI CHEGE.....3RD APPLICANT

FRANCIS NJUGUNA CHEGE.....4TH APPLICANT

AND

PETER CHELULE.....1ST RESPONDENT

MOTO FARMERS CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

(Application for extension of time to file and serve notice of appeal out of time against the

Judgment and Decree of the Environment and Land Court at Nakuru (Ngetich, J)

delivered on 11th July, 2019 in ELC No. 95 of 2015)

RULING

[1] The applicants have moved this Court under Rule 4 of the Court of Appeal Rules for extension of time to enable them file a notice of appeal and a record of appeal from the judgment and order of the High Court (ELC) (**Ngetich, J**) delivered on 11th July, 2019.

[2] The judgment of the learned Judge arose from an appeal against the judgment of the Chief Magistrate's court in which the Chief Magistrate dismissed a suit filed by the 2nd respondent herein, **Moto Farmers Cooperative Society Limited (Moto Farmers)**, in which it sought, *inter alia*, orders that **Peter Chelule (Chelule)** who is now the 1st respondent, had no *locus standi* to exercise power of a liquidator of that society, and an order to restrain Chelule from acting as liquidator, pending determination of the appeal to the Minister for Cooperatives, and a declaration that the advertisement and sale of the company's premises on grant No. LR. No. 9716 Molo (**suit property**), was wrongful, illegal and a nullity.

[3] In the judgment delivered on 11th July, 2019, the learned Judge declared that Chelule had acted without authority from the Commissioner of Cooperative Society in disposing of the **suit property**; that the Court lacked jurisdiction to deal with the issues arising from the liquidation order; and that any acts done by Chelule after filing of the appeal to the Minister of Cooperative were a nullity.

[4] The applicants, who were the 2nd – 5th defendants in the suit before the magistrate's court, had filed a joint defence in the suit as administrators of the estate of deceased persons who purchased the **suit property**, which they claimed had since been distributed. Upon the suit being dismissed by the magistrate's court, they filed an appeal to the High Court, and now wish to appeal to this Court against the judgment of the High Court delivered on 11th July, 2019.

[5] The applicants' motion lodged on 15th October 2019, is supported by grounds stated on the face of the motion and an affidavit sworn by **Naftali Rubua Ngure**, Counsel for the applicants. In short, the applicants contend that upon hearing the appeal, the learned Judge reserved

the judgment for 15th April, 2019 but the judgment could not be delivered as the court was on vacation. Thereafter, the applicants did not receive any notice of the date for delivery of judgment and their advocate only came to learn on 27th September 2019 that judgment had in fact been delivered on 11th July, 2019. The applicants therefore explain that the delay in filing the notice of appeal was not deliberate, but was due to the fact that they were unaware of the judgment.

[6] It is trite that this Court has unfettered discretion under Rule 4 of the Court Rules, to extend time for the doing of any act under the Court Rules. However, that discretion must be exercised judicially. In this regard, it has also been stated time and again that the reason for the delay, the length of the delay, the degree of prejudice to be suffered by the respondent, and the possible chances of the intended appeal succeeding, are all relevant factors in the exercise of such discretion. (See Thuita Mwangi v Kenya Airways Limited [2003] eKLR; Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. NAI 255 of 1997).

[7] The Supreme Court has further crystalized the principles that guide the Court in exercising this discretion in Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C. & 7 others (2014) eKLR, thus:

“1. 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;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

[8] The applicants plead that the judgment was supposed to be delivered on 15th April, 2019 but this did not happen as the High Court was on vacation. Their advocate was surprised to learn on 27th September, 2019 that the judgment had been delivered against them on 11th July, 2019, without a notice of delivery of judgment having been served upon them. By this time, time for filing a notice of appeal had already expired. The applicants maintain that they have an arguable appeal that has good chances of success.

[9] Although duly served with the application and hearing notices through email on 29th April, 2021 and 17th May, 2021, that the hearing of the motion would proceed by way of written submissions, the respondents did not file any reply to the application, nor did they file any written submissions. I have therefore to determine the motion on the basis of the unchallenged information provided by the applicants.

[10] I have considered this motion, and the affidavit in support. The applicants have explained that the delay arose because they were unaware of the delivery of the judgment date as no notice had been served upon them. It is the duty of the court to notify parties of the judgment date, particularly if the initial date given changes. The explanation given by the applicant is therefore plausible. Judgment having been delivered on 11th July, 2019, the applicants had up to 25th July, 2019 to file the notice of appeal. However, without knowing of the delivery of the judgment, the applicants could not fulfil this obligation. Upon learning of the judgment on 27th September, 2019, the applicants brought their motion on 15th October, 2019, which was about 17 days after learning of the judgment. Although this delay has not been explained, the same is not inordinately long. In my view, where a judgement is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of the time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time.

[11] In the circumstances, I find that this is an appropriate case in which I should exercise my discretion in the applicants' favour. Accordingly, I allow the applicants' notice of motion lodged on 15th October, 2019 and deem the same as properly filed. The applicants shall file a record of appeal within 60 days from the date hereof. Costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 9th day of June, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR