



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. 154 OF 2020

BETWEEN

MARY OMOLLO ODONGO.....1ST APPLICANT
APOLLO ODHIAMBO GUZA.....2ND APPLICANT
AND
HELLEN AUMA OJUOK.....RESPONDENT

Being an application seeking leave to Appeal out of time from the judgement and decree of the Hon. Justice A.O. Ombwayo given at Kisumu on the 13th day of March 2020.

in

KISUMU ELC NO. 13 OF 2019

RULING

This is an application dated 17th December, 2020 by the applicant seeking leave to appeal out of time against the judgment and decree of the Environment and Land Court “ELC” (A.O. Ombwayo J.) delivered on the 13th March, 2020 at Kisumu. The applicant further prays that upon the grant of the said prayer the filed notice of appeal dated 2nd July, 2020 be deemed as duly filed and served on the Respondent.

The application is brought under Rule 4 of the Court of appeal Rules, Section 3B & 7 of the Appellate jurisdiction Act, and is premised on the grounds that following delivery of judgment by the trial court on 13th March, 2020, there was an outbreak of Corona Virus pandemic which resulted in the closure of the Court Registries hence the applicant could not file the notice of appeal on time. That the applicant was only able to access the Courts on 3rd July, 2020 and that is when he filed a notice of appeal although it was already out of time. That the applicants appeal is meritorious with high chances of success. The application is further supported by the 1st applicant’s affidavit of the same date in which she merely reiterates and expounds on the grounds on the face of the application aforesaid.

The application was not opposed as the respondent neither file a replying affidavit nor written submissions. In her written submissions the applicant stated that at the time the judgment was delivered, there was an outbreak of corona virus pandemic and all registries were closed countrywide. That the registries only started partial operations around the month of July and the applicant whilst acting in person immediately filed a notice of appeal on 3rd July, 2020 and served the same upon the Respondent. That the delay in filing the notice of appeal in time was caused by force majeure.

On prejudice, the applicants submit that the respondent will not suffer any prejudice but rather the applicants will suffer prejudice, irreparable loss and harm as the judgment was entered against them in favor of the respondent the net effect being that the applicants were disposed of the suit property Kisumu/Kakarent/1653 by adverse possession thus rendering them homeless and denying them the right to own their property. The applicants relied on the case of *Fahim Tridha v Timamy Issa Abdalla & 2 others [2015] eKLR* in buttressing their plea for the extension of time.

I have considered the application, grounds in support thereof and the submissions. The issue for determination is whether the applicant has met the set threshold for enlargement of time. The threshold was set in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi [1995] 2 EA 231* as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary it is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are; first

the length of the delay, secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice if the application is granted.

The issue I am tasked to consider is both discretionary and non-exhausting as stated in the case of ***Fakir Mohammed Vs. Joseph Mugambi & 2 others [2005] eKLR***. Further I am well aware that there is no maximum or minimum period of delay set out under the law. However, logically a prolonged and in-ordinate delay is more likely than not to disentitle the applicant leave; and equally the reason for the delay must be a plausible one- see ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR***.

The delay in filing the present application and the intended appeal was approximately nine (9) Month and 3 Months respectively. The applicant cited the delay to have been occasioned by the effects of Covid -19 pandemic.

I take cognizance of the directive by the **Chief Justice Hon. David Maraga, Chief Justice** (as he was) to courts to ***“consider granting extension of time for filing any time bound pleading that may not have been filed during this period.”***

Under Rule 4 of this Court’s Rules, the court has powers to extend time.

“For doing of any act authorized or required by these rules whether before or after the doing of the act.”

This implies that time can be extended even after filing of the record of appeal and the fact that the applicants filed the notice of appeal before extension of time is therefore inconsequential as the same can be regularized by the court subsequently granting extension of time.

As regards the chances of success of the intended appeal, it is not in my province currently to determine definitively the merits of the intended appeal; that will be determined by the court hearing the appeal. See ***Athuman Nusura Juma V Afora Mohamed Ramadhan EA 2016 eKLR***. Given the challenge that the applicants intend to mount in the intended appeal based on the application of the concept of adverse possession, I am satisfied that the intended appeal may possibly succeed.

On the degree of prejudice, to the respondent in granting the extension, the applicants being aggrieved by the judgment and decree of the ELC are desirous of appealing against the said judgment and decree save that time for them to exercise that right of appeal has since lapsed hence the current application. As already stated the Respondent did not file any replying affidavit or any response to the application to demonstrate any prejudice she may suffer. Without any such prejudice being demonstrated by the respondent, the weight, tilts in favour of the applicants.

The applicant has thus satisfied the parameters set in the ***Leo Sila Mutiso*** (Supra) and various other decisions of this Court and I therefore allow the application and deem the notice of appeal filed on 3rd of July, 2020 as having been filed in time. I further direct that the applicant do file and serve the memorandum and record of appeal within the next thirty days from the date of this Ruling. Costs shall abide the outcome of the intended appeal.

DATED & DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

Signed

DEPUTY REGISTRAR