



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. E056 OF 2021

BETWEEN

ROSE ANYANGO OWALA.....1ST APPLICANT

GEORGE OMONDI OWALA.....2ND APPLICANT

(Suing on behalf of the estate of Charles Indiri -deceased)

AND

GEORGE A. ODHIAMBO.....RESPONDENT

(Being an application for extension of time to file appeal out of time from the orders of the High Court

at Kisumu (E.A Ochieng',J.) dated 10th September, 2020)

in

HCCC NO. 197 OF 1992

RULING OF THE COURT

The dispute before the High Court was commenced by a suit filed by the respondent in which he sought the following prayer against the applicants; an order for permanent injunction restraining the 1st applicant’s husband **Charles Indiri** (deceased) or servants or agents from trespassing onto all that piece or parcel of land known as number **LR. No. East Gem/Nyamninia/736** (herein after the suit property). It was the respondent’s case that he had purchased plot number **East Gem/Nyamninia/734**, which was bigger than suit property. He opted to give to his siblings parcel No. 734 aforesaid so that he could retain the suit property which was smaller. Pursuant to the agreement, he was registered as the legal and beneficial owner of the suit property. These transactions occurred whilst he was working in Nairobi. Thereafter he allowed his siblings to till and make use of the suit property. After retirement he came back home but his siblings declined to give him vacant possession of the suit property, thus necessitating the suit.

Judgment in the suit was delivered on the 18th October, 2006 by **Justice Mwera**, in which he ordered that **Charles Indiri** (deceased) be evicted from the suit property within 90 days from the date of judgment. The applicants did not prefer any appeal instead filed an application seeking an order to the effect that the suit be marked as wholly compromised by directing the District Land Registrar, Siaya to proceed with sub-division of the suit property and the respondent do hand over the original title deed, failure to which the title deed be deemed as cancelled. This application was dismissed on the 26th October, 2011 by **Justice Chemitei** who made reiterated that the judgment delivered on 18th October, 2006 was still valid. Thereafter the applicants moved the court by another application to stay the execution of the decree and on 13th June, 2012 in it’s ruling the Court held that there was nothing on record to prevent the execution of the judgment.

It seems the applicants were adamant not to vacate the suit property. Accordingly, the respondent was compelled to move the Court by an application dated 21st April 2020 seeking an injunction to restrain the family of **Charles Indiri** (deceased) the applicants, from entering or interfering with his right of proprietorship in respect of the suit property. The application was opposed by the applicants on the grounds that being a land matter the court lacked jurisdiction; judgment had been delivered 20 years ago and it had become *functus officio* to entertain any other application and that the title in respect of the suit property issued to the respondent if any had been extinguished by dint of section 7 and 17 of the Limitation of Actions Act; that the family to the deceased had been residing on the suit property for years; that the judgment

could not be enforced being statute barred as 12 years had expired since its delivery. The court was thus urged to dismiss the application on those grounds.

The trial court delivered its ruling upon interpartes hearing of the application and dismissed it the effect of which was to have the applicants evicted from the suit property. Aggrieved by the outcome the applicants intimated their desire to lodge an appeal to this Court against the ruling and order of the Court aforesaid by filing a notice of appeal albeit out of time, and thereafter the instant motion under rule 4 of this Court's rules.

I have been asked in the motion to grant leave to the applicants to file notice of appeal out of time against the entire ruling and an order that upon grant of the prayer, the filed notice of appeal be deemed as duly filed and served upon the respondent. The grounds in support of the motion are that: the court delivered ruling on 10th September, 2020 wherein it ordered that the applicants and their entire families do immediately vacate the suit property or be evicted forcefully; that they were not parties to the suit thus they were not aware of any proceedings filed in 2020, they came to learn of the same upon service through the area assistant chief; that they have an arguable appeal with high chance of success; that the appeal may be rendered nugatory if the respondent proceeds with execution; however time within which to launch notice of appeal had lapsed and it is only fair and just that leave be granted.

In support of the motion is an affidavit sworn by the 1st applicant who largely reiterated and expounded on the grounds in support of the motion aforesaid. In addition, she deposed that she was a widow to the deceased and the 2nd applicant was the son; her late husband was the defendant in the civil suit; he had been born, lived and was buried on the suit property; they are living on the said suit property; that the deceased died on 28th June, 2019 and he was unrepresented in the suit, and finally, that the respondent was desirous of executing the judgment and decree against them which will cause them untold suffering and loss. The respondent neither filed his response to the motion nor written submission despite a hearing notice and reminder having been served on him 17th May, 2021.

In their written submissions the applicants maintain that they were not party to the proceedings and filed the notice of appeal immediately they were informed about their pending eviction. The failure to file the notice of appeal in time was a mistake which and was curable. Further that if the prayers are not granted then they shall have been condemned unheard, thus depriving them of their constitutional right to fair hearing and the right to be heard. Lastly it was urged that they intend to raise weighty issues in the intended appeal.

I have considered the application, the grounds, affidavit in support, submissions by the applicant and the authorities cited.

The motion is premised on rule 4 of this court's rules. Rule 4 provides as follows,

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.” (emphasis provided)

It is trite that extension of time is not automatic. Whether or not to grant extension of time, the court takes into account various factors. This court in ***Paul Wanjohi Mathenge v. Duncan Gichane Mathenge [2013] eKLR*** while referring to other authorities, observed as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

The Supreme Court in ***Nicolas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission [2014] eKLR***, summarized the principle as follows:

- 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.”***

One of the grounds in support of the motion was that they were not privy to the proceedings and that deceased was unrepresented. The court record shows that the applicants filed their grounds of opposition to the application dated 21st April, 2020 through the firm of **N. E. Mogusu** and that on 29th April, 2020, both parties were present in court though on 3rd June, 2020 when the application came up for hearing, the applicants were absent. The applicants cannot therefore say that they were not aware of the application and that the deceased was unrepresented. In addition, the Court in its ruling upheld the judgment that was delivered on the 18th October, 2006 in which the deceased

had been ordered to vacate the suit property. The 1st applicant cannot therefore claim not to have been unaware of the suit. From the proceedings it is apparent that she had been allowed by the respondent to perform burial rites for her husband and thereafter vacate the suit property. It is therefore clear that the suit was well within her knowledge and that she was aware that the suit property was rightfully and legally owned by the respondent.

In addition to the above, the applicants filed the notice of appeal on the 17th November, 2020, and it took them about five months to file the instant motion. The applicants have not explained to my satisfaction the delay in filing and prosecuting the instant application. It is pretty obvious therefore that the applicants were not desirous of swiftly moving the Court.

The reasons advanced by the applicants in support of the application are clearly an afterthought. The applicants are in my view not being truthful. They have filed this application upon realizing that they had come to the end of the rode and were yet to vacate the suit property. The remedy of extension of time is discretionary and the applicant needs to explain the reasons for the delay truthfully and candidly. The applicants have fallen far too short of this expectation. A party who seeks exercise of this court's discretion in his or her favour must put all the cards on the table. The applicants having deliberately embarked on a journey of deceit and falsehoods are undeserving of my exercise of discretion in their favour. It is for this reason that the application must fail. It is accordingly dismissed with no order as to costs.

DATED AND DELIVERED AT THIS 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