



IN THE COURT OF APPEAL

AT NYERI

[CORAM: KANTAI, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. 28 OF 2016

BETWEEN

CHARLES MAINA MWANGI.....1ST APPLICANT

FRANCIS GATEMI MWANGI.....2ND APPLICANT

PETER WACHIRA MWANGI.....3RD APPLICANT

AGNES NYAMBURA.....4TH APPLICANT

GRACE WAMKOLI ,WAMGO.....5TH APPLICANT

CATHERINE GATHIGIA.....6TH APPLICANT

VERONIC WAIRIMU.....7TH APPLICANT

ALICE NYAKERU.....8TH APPLICANT

JANE WAITHIEGENI.....9TH APPLICANT

LUCY WANJIKU.....10TH APPLICANT

AND

KAMATU GATEMI.....RESPONDENT

hitherto been involved in moving the matter at the High Court; that the said illness created problems in his family and that when they finally visited their former advocates, no proper explanation was given to them on why an appeal had not been preferred; that the intended appeal has high chances of success and for all that I should extend time for filing an appeal out of time.

The respondent, **Kamatu Gatemi**, in a replying affidavit filed on **22nd July, 2016** opposes the application saying that it lacks merit, having been filed almost 4 years from the date of the ruling of the High Court and that no sufficient reasons have been preferred for delay; at paragraph 4 of the affidavit it is stated:

“ 4. THAT the alleged sickness of two (2) family members out of 11 is not enough reason to explain the length of the delay ...” ;

that the applicants should have filed a notice of appeal and should have appointed another lawyer earlier; that the High Court had made a determination on ownership of land and the intended appeal had no chance of success because the applicants' claim was the same as the one their mother had been claiming, at paragraph 12 and 13 of the affidavit.

“12. THAT during those four years, I completed the transmission process and now the land is in my name and their mothers (annexed is a copy of the title deed marked ka-1)

13. THAT the land has been partitioned between the two of us (annexed is a copy marked ka-2)” ;

that he had incurred lots of expenses and spent a lot of time and if the application was allowed he would suffer substantial and irreparable damage and, finally, that the applicant had no claim over land independent of the claim their parents had made at the High Court.

The Motion came up for hearing before me on 18th February, 2019 and I heard oral submissions by **Mr. H.K. Ndirangu**, learned counsel for the applicants, and by **Mr.K.Wachira**, learned counsel for the respondents. According to **Mr. Ndirangu**, the applicants were represented by another lawyer previously who was instructed to file an appeal but did not do so and the applicants then instructed him in the matter in the year 2016. According to counsel, there was an arguable appeal with good chances of success as the ruling intended to be appealed was not in accordance with the law as the Judge had made certain pronouncements which counsel thought were not in accordance with the law. On the issue of delay counsel submitted that two of the applicants' relatives were taken ill thus occasioning delay in instructing him to file the application and for all that I should exercise discretion in favour of the applicants and extend time for filing appeal.

In opposing the application **Mr. Wachira** submitted that the ruling of the High Court was delivered on **16th July, 2012** and no reasonable explanation had been offered why the application was not filed until **26th May, 2016**, almost 4 years after the ruling, a delay counsel thought to be inordinate. While acknowledging that two of the applicants' family members had been taken ill counsel wondered why the other nine (9) applicants had not moved the court. Counsel submitted that a grant had been issued in favour of the applicants' mother in a matter of the estate of their late uncle and there was no chance of an appeal succeeding in the premises where the applicants wanted that grant in favour of their mother revoked. Finally, that the land had already been subdivided.

I have considered the Motion, the affidavits filed and the rival submissions.

It is now well settled that the decision whether or not to extend the time for appealing is essentially a discretionary one. This was well recognized in a decision of the Court on reference in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997**. The principles governing exercise of that discretion were stated to be: 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 to the respondent if the application is granted.

Taking these principles in mind and applying them to the Motion before me I note that the ruling intended to be appealed was delivered on **16th July, 2012** and the application for leave to extend time to file appeal out of time was filed **on 27th May, 2016**, a period of almost four (4) years. I am told that the applicants instructed their former advocates to appeal but that it was not done; that two (2) relatives of the applicants were taken ill thus occasioning delay and that the current advocates for the applicants were instructed sometime in the year 2016. On the other hand, I am told that following the ruling of the High Court land has been subdivided and transferred as is shown in documents annexed to the replying affidavit. I have indeed seen a copy of a title issued under the Registered Land Act (repealed) on **6th October, 2015** in respect of a parcel of land **Nyeri/Warazo/31** in favour of the respondent **Kamatu Gatemi** and one **Mary Muthoni Mwangi**.

On the issue of delay and reasons for delay I am not satisfied that the applicants have proffered any reasonable explanation why a challenge to the ruling of **16th July, 2012** was not made within a reasonable time. Even if two (2) relatives were taken ill, I have not been told why the other nine (9) applicants could not have taken action in the matter.

On the chances of the intended appeal succeeding I am not satisfied that there are such chances, a grant having been issued in favour of the applicants' mother which the applicants moved to challenge. Land has already been transferred. I see no chance of success of the intended appeal.

It is for these reasons that I am of the respectful opinion that the Motion has no merit and I dismiss it with costs to the respondent.

DATED & Delivered at Nyeri this 13th day of March, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR