



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS )

CIVIL APPLICATION NO. 301 OF 2019

BETWEEN

PARMUAT OLIOSHURUA KORE.....APPLICANT

AND

PHILIP SANTAMO WUANTAI.....1<sup>ST</sup> RESPONDENT

WUANTAI OLE SAIRE.....2<sup>ND</sup> RESPONDENT

NISA OLE WUANTAI

(Suing on their behalf and as the

legal representative of the estate of the late WUANTAI OLE SAIRE).....3<sup>RD</sup> RESPONDENT

KAJIADO RESIDENT MAGISTRATE.....4<sup>TH</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

*(Being an application for extension of time within which to file a Notice of Appeal and Record of Appeal out of time from the Judgment of the Environment and Land Court at Kajiado (C. Ochieng, J) dated 20<sup>th</sup> November 2018*

*In*

*ELC No. 400 of 2014)*

\*\*\*\*\*

**RULING**

This is a boundary cum ownership dispute between parcel Nos. **Kajiado/Olchoro Onyore/ 80 and Kajiado/ Olchoro Onyore / 88** that commenced by the institution of Kajiado North Land Dispute Tribunal Cause No. TC/ 223/100/2010. The award from the Tribunal was adopted by the Principal Magistrate's Court at Kajiado in 2011. Thereafter an originating summons was filed in the High Court in 2014 by the applicant to declare that the adoption of the award by the magistrate's court was null and void and an order to restrain by a permanent injunction the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from trespassing into land title numbers **Kajiado/ Olchoro Onyore/ Kajiado/ Olchoro /Onyore /8767; Kajiado/ Olchoro /Onyore 20463; Kajiado/ Olchoro /Onyore /20464 ; Kajiado/ Olchoro /Onyore 16463; and Kajiado/ Olchoro/ Onyore /20466** or in any way interfering with the original boundaries as fixed.

In a decision rendered on the 20<sup>th</sup> day of November, 2018, the learned Judge dismissed the originating summons and upheld the award as endorsed by the magistrate's court.

The applicant had, in terms of **Rule 75 (2)** of the Court of Appeal Rules, 14 days from that date to lodge a notice of appeal and thereafter, by **Rule 82**, sixty (60) days to file the record of appeal. None of this was done. Instead on 13<sup>th</sup> September, 2019 the applicant took out the instant application praying that time for filing and serving the respondents with both the notice and record of appeal be enlarged, explaining

that the delay was caused by the late receipt of the opinion of the District Surveyor, Kajiado and the Land Registrar, Kajiado as to the manner of implementation of the order issued by the court below; that in trying to understand the order he consulted his advocate, the District Surveyor and the Land Registrar, Kajiado as well as third parties to whom he had sold parts of the land in question; that as it was, the implementation of the order would entail the demolition of his home to create a public road; and that third parties who were innocent purchasers would be adversely affected. After appreciating the implication of the order, he instructed his advocate to apply for stay of execution, which application was, unfortunately dismissed.

Though served with the hearing notice, counsel representing the respondents failed to attend court. No response to the applicant's application was filed.

Though the rules set the time limits within which a notice or record of appeal has to be filed and served, by **Rule 4**;

**“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).

Since the Rule does not provide for factors to be considered by the court in an application for enlargement of time, the courts have developed appropriate principles to be applied in achieving a ‘just’ decision in the circumstances of each case. For example in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231 Court laid the following parameters;

**“ 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 to the respondent if the application is granted”.**

The decision intended for challenge, as stated earlier was delivered on 20<sup>th</sup> November, 2018. On 14<sup>th</sup> January, 2019 the applicant unsuccessfully applied to the court below to stay the execution of the orders. The ruling on that application was rendered on 31<sup>st</sup> July, 2019. It took the applicant one month and a half to bring this application. Though the entire period between the date of the judgment and this application is almost 9 months, I believe that period has been sufficiently and honestly explained. In upholding the judgment entered by the magistrate from the award of the tribunal, the learned Judge ordered that;

**“ b) Out of the twenty eight (28) Hectares of the disputed portion of land, the Applicant be and is hereby allocated eight (8) hectares while the 1st, 2nd and 3rd Respondents are granted the remaining twenty (20) hectares.**

**c) The public road, which had been demarcated by the District Surveyor Kajiado in May 2014, should be excavated as earlier planned by the community and local authorities concerned.**

**d) The balance of the twenty two (22) hectares to be shared equally between the Applicant and the 1st, 2nd as well as 3rd Respondents’ families respectively”. ( Emphasis).**

Though it is not in my place as a single judge to consider the chances of the appeal succeeding if I was to allow the application, I can say *ex facie* that the ultimate orders issued by the court below may genuinely have posed a challenge of interpretation to the applicant. Secondly, the dispute affects not only the parties in this application but also the community, as there is a road reserve involved. It also involves third parties not involved in the litigation but who purchased portions of the suit land.

In reviewing the history and circumstances of this case, it is clear to me that the applicant has exhibited enthusiasm and determination at having the dispute resolved with finality. He has sought relief before the Land Dispute Tribunal before the tribunals were discontinued; before the Environment and Land Court and now he intends to try his luck before this Court.

The respondents having not participated in this application, it is not apparent what prejudice they would suffer if the application is granted.

Accordingly, I grant the applicant leave to file and serve both the notice and record of appeal within 30 days from the date of this ruling, failing which the order shall lapse without further order.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

*Signed*

**DEPUTY REGISTRAR**