



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 649 OF 2019

BETWEEN

AQUILA PROPERTIES LIMITED.....APPLICANT

AND

BHUPENDRA PATELRESPONDENT

(Being an appeal from the Judgment and Decree of (L. Gacheru, J.) delivered on 7th day of April, 2017

in

E&LC No. 173 of 2012)

RULING

On 7th April 2017 L. Gacheru, J dismissed the applicant's claim that the respondent's property LR. No. 209/346/46 has encroached on its adjacent Plot No. 209/346/47 and allowed the respondent's counterclaim to the effect that parties to the suit should grant cross easement over their respective properties to each other; and that the respondent be restrained by an order of injunction from removing any part of the existing wall erected on the two properties, LR. No. 209/346 and LR. No. 209/347 or the barrier on the private access road.

The undisputed facts are that, the respondent constructed the boundary wall in 1989 before the previous owners of LR. No. 209/346/47 sold it to the applicant on 25th February, 2011. According to the respondent, the previous owners of the applicant's property consented to the construction of the wall; that the construction was approved by the then City Council of Nairobi.

After analyzing the evidence, the learned Judge noted that the applicant did not raise the issue at the time it purchased the property and that;

“The Plaintiff did not request for removal of the boundary wall before it acquired the same from the previous owners. The Defendant testified that he constructed the boundary wall with the consent of the previous property owners of LR.No.209/346/47 and therefore the said agreement gave the Defendant the right to utilize the land owned by the Plaintiff thus creating an easement. The Defendant said the said agreement was oral and therefore the existing easement was an equitable easement....

The Defendant has been enjoying the accrued rights from the year 1989 and the said right was continuous for 20 years. The Defendant was therefore not a trespasser and he could certainly not have trespassed on the Plaintiff's property as the Plaintiff purchased the suit land when the boundary wall was still in place. From the above findings of the court, it is evident that the subsequent owner of a property is bound by pre-existing easement.”

Besides that conclusion, the Judge also held, since the boundary wall was constructed in the year 1989, more than 20 years before the action was brought, the suit was caught by the Limitation of Actions Act. Further, she found that the suit was filed without authority by the applicant Company and was therefore incompetent and a nullity.

Aggrieved by the decision, the applicant filed the notice of appeal within time but took almost one year to lodge the record of appeal on 20th December, 2019.

This was done without obtaining leave to do so, hence this application to the effect that the Court deems the record filed as having been so lodged within time. The application is premised on the grounds that the applicant had to change its advocates and secondly, that the trial court delayed in supplying it with certified proceedings and judgment.

The notice of appeal, having been filed on 20th April, 2007, by **rule 82** the applicant had 60 days to bring the appeal. The applicant obtained a certificate of delay in which it has been confirmed that it was notified of the availability of certified copies of proceedings on 21st June, 2017; that the time taken to prepare the proceedings was between 15th May, 2017 and 21st June, 2017, a total of 37 days.

The court in considering whether or not to grant the relief sought in this application will essentially be exercising a judicial discretion which is wide and unfettered. (See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231). Though wide and unfettered, the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. (See. **Julius Kamau Kithaka V. Waruguru Kithaka Nyaga & 2 Others**, CA. No. 14 of 2013)

Some of the considerations to be borne in mind, and which are certainly not exhaustive of the catalogue, are the length of the delay, the reason(s) for the delay, the possible prejudice that each party stands to suffer; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity.

The delay even of a single day must be declared and satisfactorily explained. If the respondent was notified on 21st June, 2017 that proceedings were ready, why did it take up to 20th December, 2019 to move this Court to extend time? No plausible reason has been availed, yet the delay has been inordinate. The suit was filed almost ten years ago and the delay is therefore likely to be prejudicial to the respondent.

Without expressing any firm position, the intended appeal *ex facie* is unlikely to succeed.

For these reasons, the application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR