



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE J.A IN CHAMBERS)

CIVIL APPLICATION NO. 367 OF 2019

BETWEEN

RESIA ENE NASOTOKINI

NADUNGU ENE NASOTOKINI

SAKIMBA OLE LESANE

KAMURITA OLE NASOTOKINI.....APPLICANTS

AND

STEPHEN NDUNGI KINYANJUI.....1<sup>ST</sup> RESPONDENT

GEORGE KARORI WAINAINA.....2<sup>ND</sup> RESPONDENT

*(Being an application for extension of time to file the notice of appeal and Record of Appeal out of time against the judgment of the High Court at Kajiado (Nyakundi J.) dated 7<sup>th</sup> June, 2019)*

in

Succession Cause No. 48 of 2017)

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**RULING**

**Resia Ene Nasotokini, Nadungu Ene Nasotokini, Sakimba Ole Lesane and Kamurita Ole Nasotokini** (hereinafter “the applicants”) have filed a Notice of Motion dated 13<sup>th</sup> November, 2019 seeking orders that:-

*“ (i) This Honourable Court be pleased to extend time within which the Applicants may file a notice of appeal challenging the Judgment delivered on 7<sup>th</sup> June 2019 by the Honourable Justice Nyakundi in the High Court of Kenya at Kajiado and the Notice annexed herein be deemed as filed.*

*ii. This Honourable Court be pleased to extend time within which the Applicants may file a Memorandum of Appeal and Record of*

*Appeal challenging the Judgment delivered on 7<sup>th</sup> June 2019 by the Honourable Justice Nyakundi in the High Court of Kenya at Kajiado and the Memorandum of Appeal herein be deemed as filed” .*

The applicants seek the orders above in order to challenge the judgment of the superior court which declined to confirm the grant of letters of administration and found that **Stephen Ndungi Kinyanjui** and **George Karori Wainaina** (the 1<sup>st</sup> and 2<sup>nd</sup> respondents) had a purchasers interest in six and ten acres of land in the suit property respectively.

The application is premised on **Rule 4** of the Court of Appeal Rules (hereinafter ‘the Rules’) and is supported by the supporting affidavit of

one of the applicants- **Sakimba Ole Lesane**, sworn on **13<sup>th</sup> November, 2019** who depones that:-

- a. Judgment in the superior court was to be delivered on notice given the transfer of the learned judge (**Nyakundi, J**) to Malindi;
- b. the said judgment was delivered without notice on **7<sup>th</sup> June 2019**;
- c. they wrote to the deputy Registrar of the High Court on **10<sup>th</sup> June, 2019** requesting a copy of the judgment but were informed that the learned judge had taken the file to his new station to correct some errors;
- d. they were able to receive a copy of the judgment on **12<sup>th</sup> July, 2019** after writing another letter to the Deputy Registrar requesting the same, but the statutory time for filing the notice of appeal had expired;
- e. that on **17<sup>th</sup> July, 2019** they mistakenly filed an application seeking extension of time to file their appeal in the High Court;
- f. they rectified their error and filed the application before this court on **13<sup>th</sup> November, 2019**;
- g. the intended appeal has high chances of success;
- h. they stand to suffer great prejudice if the application is not allowed as they will be disposed of a substantial part of their inheritance.

The application was opposed vide a replying affidavit sworn by the 1<sup>st</sup> respondent- **Stephen Ndungi Kinyanjui** dated **16<sup>th</sup> December, 2019** where he deponed inter alia: that upon filing the application in the High Court Mwita J. who was seized of the matter, advised the applicants on **24<sup>th</sup> July, 2019** to file the appropriate application before this Court which was the correct forum; that the applicants failed to heed the Court's advice until **8<sup>th</sup> October, 2019** when they filed the notice of appeal and **22<sup>nd</sup> November, 2019** when they filed the instant application; that the delay in filing the notice of appeal and the instant application is inordinate and unexplained; that the applicants failed to attach the memorandum of appeal which they urged the court to deem as filed; that the application is without merit.

In his submission before me, **Mr. Mwangi**, for the applicants, reiterated the events that led to the delay as outlined in the 1<sup>st</sup> applicant's supporting affidavit. He emphasized that the mistake of advocate should not be visited upon a litigant.

Opposing the application, **Mr. Kirimi** who appeared for the 1<sup>st</sup> respondent, contended that no plausible explanation had been advanced for the four-month delay in filing the current application after the applicants were advised by **Mwita J.** on **24<sup>th</sup> July 2019** that this court was the proper forum to get the orders sought. He submitted that the 1<sup>st</sup> respondent was likely to suffer great prejudice if the application was allowed, given that he had settled on the land being claimed by the applicants for more than 30 years without his proprietary rights being fully acknowledged.

**Mr. Mulandi** who appeared for the 2<sup>nd</sup> respondent, also opposed the application. He argued that there has been inordinate delay in the filing of the application and that no memorandum of appeal had been annexed.

I have anxiously considered the application, the affidavits on record and the submissions of counsel. The Court in **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi No. NAI. 255 of 1997 (Unreported)** has summarized the factors which guide the Court in the consideration of an application under **Rule 4** of this Court's rules 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 to the respondent if the application is granted".*

Applying the guidelines above to the rival positions submitted before me, it is clear that in order for this Court to exercise its discretion in favour of an applicant, an applicant must explain satisfactorily the reason for the delay. The impugned judgment was delivered on **7<sup>th</sup> June, 2019**. It is not in dispute that the applicants were not aware of the delivery date as no notice was served upon them. The applicants have attributed the delay to a failure to receive a notification of the judgment date from the High Court and the learned Judge maintaining custody of the file to correct errors. There was also the miss-step in that the application for extension of time was initially filed in the wrong forum.

The 1<sup>st</sup> respondent has taken issue with the second arm of the applicants' explanation for delay which has been attributed to mistake of counsel. The 1<sup>st</sup> respondent's objection is emphasized in paragraph 10 of his replying affidavit where he avers that:

*"The applicants' averment that the delay in filing the notice of appeal is attributable to filing of application for extension of time in appropriate avenues is misleading and incorrect. The inappropriate avenue referred by the applicants rightly advised them to file the application and lodge the filed notice of appeal in this honourable court, which advice they didn't promptly heed to and they can't pretend not to have been aware of the right forum"*

In **Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & another Civil Application No. NAI 236 of 2009**, the Court restated the

principle that a litigant should not suffer because of his advocate's oversight. In *Belinda Murai & Others vs. Amos Wainaina (1978) LLR 2782 (CALL)* Madan, JA stated that *"the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better."*

In my view, the applicants have offered sufficient explanation on the delay resulting from the fact that judgment was delivered without their knowledge and thereafter the file was not available as the same was with the judge for corrections. The applicants thereafter took a wrong step and filed an application for extension of time at the high Court. I also note that on **24<sup>th</sup> July, 2019**, the applicants were advised by **Mwita, J** that the proper place to file their application was this Court. This was on **24<sup>th</sup> July, 2019**. The applicants did not file the instant application until **22<sup>nd</sup> November, 2019**.

However, of paramount consideration to me and of grave concern is the fact that the judgment was delivered without notice to the applicants. This was a misdirection on the part of the court that can only be atoned by enlargement of time in order to allow the applicants exercise their undoubted right of appeal.

As regards the failure to attach a draft Memorandum of Appeal, it is my view that this is not fatal to an application made under rule 4 of this Court's Rules (see *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013]* eKLR).

Accordingly, the Notice of Motion dated **13<sup>th</sup> November, 2019** is allowed.

The annexed Notice of Appeal is deemed as filed on payment of the requisite Court fees within 7 days from the date of this ruling. Secondly, the Record of Appeal is to be filed within 45 days of the filing of the Notice of Appeal.

Failure to comply with any of the above timelines, the Notice of Motion application dated **13<sup>th</sup> November, 2019** shall stand dismissed.

Costs shall be in the intended appeal.

***Dated and delivered at Nairobi this 8<sup>th</sup> of May, 2020.***

***F. SICHALE***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

***Signed***

***DEPUTY REGISTRAR***