



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA IN CHAMBERS)

CIVIL APPLICATION NO. 217 OF 2017 (UR 200/2019)

BETWEEN

FLORENCE WAIRIMU KARIUKI.....1ST APPLICANT

ELIZABETH W. MUTEMBEI.....2ND APPLICANT

JANE ELIZABETH MUNA.....3RD APPLICANT

HELEN WANGARI KAMAE (Suing as the Legal Representative of the

Estate of Wilfred Kamae- Deceased).....4TH APPLICANT

PETER CYRUS MUNIOH.....5TH APPLICANT

LEE KAGO MWANGLI.....6TH APPLICANT

SAMMY NJAU CHEGE.....7TH APPLICANT

AND

CITY COUNCIL OF NAIROBI.....RESPONDENT

*(An application for extension of time to file a Notice of Appeal and the Record of Appeal out of time in an intended appeal against the Ruling of the Environment and Land Court at Nairobi (E. Obaga, J) dated 25th April, 2019*

in

*ELC Case No. 93 of 2008)*

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RULING

1. The applicants herein have filed this application under Rule 4 of the Court Rules seeking extension of time to file and serve their notice of appeal and record of appeal. The intended appeal originates from a judgment delivered in a suit that was filed before the Environment and Land Court (ELC) seeking an order of specific performance, directing the respondent to identify the beacons for some plots which the respondent had allegedly allotted to them. In the alternative, the applicants sought an order for refund for all monies that it had paid to the respondent as stand premium, annual rent, survey fees, etc. in connection with a letter of allotment for the plots and payment of damages for none performance or breach of the contract.

2. Despite being served with summons to enter appearance the respondent did not enter appearance, whereupon the applicants applied for and obtained interlocutory judgment against the respondent. Subsequently the matter proceeded for formal proof before the ELC (**Obaga, J**) who heard the evidence of 7 witnesses. The learned judge then delivered a judgment on 20th December, 2017 in which he dismissed the applicants' claim, finding that the applicants had not proved their claim, and that in any case the claim was statute barred.

3. By a notice of motion dated 26th October, 2018, the applicants moved the ELC seeking an order for review, variation or setting aside of the judgment that was delivered by Obaga, J on 20th December 2017. By a ruling delivered on 25th April, 2019, Obaga, J. dismissed the

applicants' motion for review, maintaining that the applicants should have challenged the judgment by way of an appeal and not by way of review.

4. By a motion filed on 15th July, 2019 the applicants now seek leave of this Court to file and serve their notice of appeal and record of appeal against the ruling of 25th April 2019, out of time. The applicants blame the court for the delay in issuing them with the ruling of 25th April 2019 and explain that a certificate of delay was issued on 10th June, 2019 but the applicants only came to know that the certificate had been issued on 29th June, 2019 as the file was missing from the registry; that the delay was not inordinate or deliberate as it was caused by the applicants' inability to access the file; and that the file was only traced on 29th July 2019. In addition, the applicants contend that their intended appeal raises substantial points of law and has overwhelming chances of success.

5. The respondent did file any response or written submissions despite being given time to do so. Notice had also been given to the parties that the hearing would proceed by way of written submissions without the presence of the parties, due to the Covid-19 pandemic.

6. It is trite that in dealing with an application for extension of time, this Court exercises discretionary powers. The matters that are relevant in the exercise of such jurisdiction are: the length of the delay; the reason for the delay; the degree of prejudice to the respondent if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. (**Mutiso vs Mwangi**, (1999) 2 EA 231).

7. The applicants concede that they were late in filing their notice and record of appeal. The decision that the applicants intend to appeal against, was delivered on 25th April, 2019. The certificate of delay shows that a certified copy of the ruling was applied for on the same date judgment was delivered, and was collected on 9th May 2019 although the certificate of delay was prepared and was ready for collection on 10th June, 2019. That is 14 days later. Although it is alleged that the court file went missing, the applicants have not exhibited any letter addressed to the court inquiring about the delay or complaining about the missing file. The certificate of delay clearly explains that the proceedings were ready for collection on 10th June 2019 and if there was indeed a delay in releasing the certificate to the applicants because of the filing being missing, the Deputy Registrar of the court would have stated so.

8. Be that as it may, assuming I am to give the applicants the benefit of doubt in regard to the issue of the missing file, the applicants admit that they became aware of the certificate of delay on 29th June 2019. Surprisingly, the applicants did not take any action until 15th July 2019 when it filed the current application. However, that delay which has not been explained is only a delay of 16 days and cannot be said to be inordinate.

9. Furthermore, the applicants contend that they have an arguable appeal raising substantial issues. Although the applicants have not exhibited any memorandum of appeal nor have they revealed any of the issues that they intend to raise, I have perused the ruling of 25th April 2019, and I am satisfied that there are arguable issues that would arise from the appeal, and which may possibly succeed

10. The respondent has not bothered to respond to this application nor did it file any submissions. It cannot be said that it will be prejudiced if the orders sought are granted. More importantly, the circumstances of this case are such that I would borrow what Minoti JA stated in **Athuman Nusura Juma V. AFWA Mohamed Ramadhan [2016] eKLR** that:

*Under the overriding objective too, I would lean towards exercising my discretion in favour of the applicant. The aim of the overriding objective is to enable the Court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases. (See **Kariuki Network Ltd & Another v. Daly & Figgis Advocates**, CA No. Nai 293 of 2009). As this Court stated, albeit in a different context, the general trend following the adoption of the overriding objective and Article 159 of the Constitution is that courts now strive, as much as possible, to hear and determine disputes on merit, without being unduly constrained by procedural lapses. (See **Nicholas Salat v. IEBC & 6 Others**, CA No. 228 of 2013)*

11. This application remains the applicants' final opportunity to pursue its claim to its logical conclusion. The applicants maintain that they have suffered injustice loss and damage at the hands of the respondent. If time is not extended the applicant will have lost that very important opportunity to have a second bite of the cherry by being able to challenge the impugned ruling through an appeal. In the circumstances of this case, it is important that I give way to substantial justice.

12. For these reasons I am satisfied that this is an appropriate case in which I should exercise my discretion in the applicants' favour. Accordingly, the motion lodged in this Court on 15th July, 2019 is granted, and time is extended for the applicants to file and serve their notice of appeal and record of appeal within 30 days from the date hereof. As the applicants did not attend this Court nor file any document, there will be no orders as to costs.

**Dated and delivered at Nairobi this 7th day of August, 2020.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**