



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 28 OF 2020

BETWEEN

JOHNSON KIMATHI KABURA.....1ST APPLICANT

PATRICK MUGAMBI.....2ND APPLICANT

AND

MAKOKOYO NCHOKE LESHANI.....1ST RESPONDENT

PHILIP RAKITA.....2ND RESPONDENT

JOHN RAKITA.....3RD RESPONDENT

KAJIADO DISTRICT LAND REGISTRAR.....4TH RESPONDENT

KAJIADO DISTRICT LAND SURVEYOR.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Being an Application for extension of time to file a Notice of Appeal and Record of Appeal from the Ruling of the High Court of Kenya at Kajiado (Hon. Lady Justice Ochieng') dated 8th day of May 2019

in

Kajiado ELC No. 108 of 2018)

JOHNSON KIMATHI KABURA.....1ST PLAINTIFF

PATRICK MUGAMBI.....2ND PLAINTIFF

AND

MAKOKOYO NCHOKE LESHANI.....1ST DEFENDANT

PHILIP RAKITA.....2ND DEFENDANT

JOHN RAKITA.....3RD DEFENDANT

KAJIADO DISTRICT LAND REGISTRAR.....4TH DEFENDANT

KAJIADO DISTRICT LAND SURVEYOR.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

[1] Before me is a Notice of Motion dated 6th February, 2020 by the applicants seeking an extension of time for filing a notice and record of appeal out of time against the Ruling and Order issued on 8th May, 2019 in **ELC Number 108 of 2018 Kajiado**. The motion is supported by the grounds stated thereunder which are elaborated further by the supporting affidavit sworn on 6th February, 2020 by the 1st applicant.

[2] According to the applicants, they instituted a suit before the High Court at Kajiado seeking a determination of the actual boundaries between their property known as **Kajiado/Kaputiei North/ 4101** and **Kajiado/Kaputiei North/959**. That on 8th May, 2015 the parties sought to have a joint survey undertaken to establish the boundaries which was done, resulting to a survey report dated 22nd May, 2014 which was adopted in court by way of a consent that was recorded in court on 23rd May, 2014 and a further consent order recorded in court on 4th August, 2014 which was on the implementation of the report.

[3] However, on 8th May, 2015 the applicants filed a notice of motion before the same court seeking among other orders, a review and setting aside of the consent order filed in court as stated above. This was on the grounds that the survey report and mutation that was adopted by the court as the order of the court was fraught with fraud, misrepresentation, corruption and professional malfeasance. This is the motion that was heard and dismissed in the Ruling delivered on 8th May, 2019 against which the applicants wish to appeal.

[4] The applicants state that the delay in filing the Notice and Record of Appeal on time was occasioned by their advocate who was then on record by the name **I O Onyango & Co** who did not inform them of the outcome of the application which was dismissed on 8th May, 2019. The 1st applicant deposes that he made efforts in 2019 (he does not indicate the dates) to contact the said advocate who declined to meet him or answer his calls. Due to that lack of communication with the advocate, he went to court and perused the file on 25th November, 2019 when he found out that the matter was settled in the absence of his advocate. He also discovered the said advocate did not have a practicing certificate for the year 2019.

[5] The applicants state that their appeal has good chances of success as the Judge failed to consider the position on the ground where 25 acres were illegally hived from the applicants' parcel of land. Further in considering the application for review they faulted the Judge for ascribing on them the burden of proof contrary to the requirements of law on review and for failing to allow an examination of the surveyors who undertook the work.

[6] The application was opposed by the 1st, 2nd, and 3rd respondents. **Philip Rakita** (2nd respondent) filed a lengthy affidavit (59) paragraphs in which he detailed the chronology of the suit that was instituted by the applicants on 24th December, 2013 against the 1st to the 3rd respondents. They filed a defence and counter-claim and in the course of the hearing, parties consented to have a joint survey conducted to determine the extent of beacons and boundaries of the two suit properties. The survey was done and the report that was adopted by the consent of the parties was filed in court as afore stated, adopting the surveyors report. The said consent was signed by the applicants' advocate who was also present in court.

[7] As regards the application for extension of time on the grounds stated, the 2nd respondent opposed the fact that the applicants have an arguable appeal, for reasons that they were represented by counsel at every stage of the proceeding. On the delay, it is indicated that after the Judge dismissed the application for review which the applicants had filed after 4 years later to challenge the consent order, the matter was subsequently mentioned in court whereby the applicant's counsel was represented during the mention and the matter was subsequently marked as settled on 25th November, 2019 when the applicant was also present in court. The respondent poured scorn on the allegations that the applicant's counsel did not have a practicing certificate as no one has challenged the proceedings that he had filed. Moreover, there are decisions of this Court where it has been stated that it is not enough for litigants to merely blame their advocates of mistakes occurring in the conduct of litigation as the applicants too bear a responsibility in keenly following up their cases even where they are represented by counsel. The applicants were also faulted for not demonstrating any diligent steps that they took since the consent was filed more than four (4) years ago and the ruling of 8th May, 2019 to enable this Court exercise discretion in their favour.

[7] Parties also filed lengthy submissions and cited the well-known authorities for and against the granting of the order sought which I have duly considered together with the affidavits as per the preceding summary. This application is made under the auspices of **Rule 4** of this Court Rules. As such it invokes the exercise of this Court's discretion. That discretion is however exercised judicially and the guiding principles have been enunciated in a long line of authorities especially the often-cited case of **Fakir Mohamed vs. Joseph Mugambi & Two Others Civil Application No. Nai. 332 OF 2004** thus: -

“The exercise of this Court's discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of delay (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the importance of compliance with time limits: the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive by factors ...”

Also see **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (1999) 2 EA 231**, which is the *locus classicus*, laid down 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.”

[8] That said, I have to subject the instant application to the above criteria, first of all by answering the question whether the appeal has reasonable chances of success. This I do with caution as it is not my role to go into the merit of the intended appeal. However, a cursory glance of the matters disclosed in the application as disclosing an arguable appeal, do not convince me. This is because the factual history of how the matter was settled by consent of the parties in August 2014 and how it took 4 years for the applicants to challenge that consent order in May, 2019 is not disputed. On the second issue whether the applicant has given sufficient reasons for the delay in filing the notice and record of appeal; the applicant largely blames their former advocate **A. I. Onyango** who allegedly failed/ neglected to communicate the outcome until the appellants visited the court to peruse the matter on 25th November, 2019 and came to learn that the matter was settled in his absence.

[9] The applicant is blaming his own counsel for not communicating the outcome of the ruling which was delivered on 9th May, 2019 and in any case the said counsel did not have a practicing certificate for the year 2019. A case belongs to the litigant and therefore if their own counsel failed in his professional obligation to communicate the outcome of the litigation to them, and also failed to renew his practicing certificate, the consequences of those failures cannot be borne by the other side or the court. They must be borne by the litigant who made the choice. Moreover, a litigant also bears the duty of not only instructing counsel but to diligently following up their matter at all stages. The applicants do not even disclose the steps they took to follow the matter but generally states that in 2019, they could not get their counsel. I have also considered the admission by the applicants that they came to know of the outcome of the ruling issued on 9th May, 2019 on the 25th November, 2019 and wondered why it took them nearly 2 months to file the instant application which was done on 7th February, 2020. All in all I find there is no explanation offered at all for this delay to support the exercise of my discretion in favour of extending time.

[10] In conclusion, I think I have said enough to demonstrate that I am unable to exercise my discretion in favour of the applicants. That being my view of the matter, the application is dismissed with costs to the 1st to 3rd respondents.

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

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR