



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KANTAL, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 128 OF 2019

BETWEEN

JULIUS NARANKAIK OLOGOLLIMOT.....APPLICANT

AND

PETER NJUGUNA NJONGE.....RESPONDENT

(An application for extension of time to file, lodge and serve a notice of appeal as well as to file and serve the record from the ruling of the Environment and Land Court at Nakuru (Ohungo, J.) dated 12th November, 2018

in

ELC No. 238 of 2013)

RULING

In the Motion brought under **rule 4** of the **rules of this Court**, amongst other provisions of law, I am asked to grant leave to the applicant to file, lodge and serve notice of appeal and record of appeal out of time. In grounds on the face of the Motion and in an affidavit of the applicant, **Julius Narankaik Ologollimot** sworn in Nakuru on 6th August, 2019 it is stated amongst other things that there was a suit, **SRMCC No. 28 of 2003** between the applicant and the respondent (**Peter Njuguna Njonge**) which was determined in favour of the applicant; an appeal (Nakuru HC Civil Appeal No. 206 of 2005) was filed by the respondent and was allowed wherein Judgment of the subordinate court was reversed; the respondent thereafter filed a suit (HCCC No. 338 of 2009 (O.S.)) claiming adverse possession which suit was compromised by a consent entered by the applicant and the respondent; that the consent was coerced and was illegal; the applicant filed an application challenging that consent but in a ruling delivered on 12th June, 2019 the High Court dismissed the application. Further, that the applicant thereafter fell out with his lawyers forcing him to approach **M/S Kiplenge & Kurgat Advocates** to represent him. The said lawyers applied for proceedings but this was late, time for appealing having lapsed. According to the applicant the respondent will not be prejudiced if I allow the Motion.

The respondent does not agree.

In a replying affidavit and in written submissions the respondent questions why necessary documents were not attached to the application. He says that the reason for delay in filing notice of appeal on time is not properly explained; that the intended appeal has no chance of success and, finally, that he is in the process of obtaining title for the land decreed in his favour.

The case of **Leo Sila Mutiso v Rose Wangari Mwangi [1999] 2 E.A. 233** has often been cited in considering principles for grant of leave to extend time under **rule 4** of the **rules of Court**. Those principles were said to be:

“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”.

I am thus to consider whether there is inordinate delay in taking a necessary step in the intended appeal; why the delay; is the intended appeal capable of succeeding and would the respondent be prejudiced if I allow the Motion.

I have looked at all the documents before me and I have considered the rival submissions filed on behalf of the parties. The ruling of Ohungo, J, intended to be appealed was made on 12th June, 2019. The Motion before me was filed on 7th August, 2019. Apart from the mere allegation that the applicant fell out with his lawyers I have not been given a reasonable explanation why the applicant did not file notice of appeal on time as required in law.

In the said ruling the learned Judge considered the material before him, and, applying the case of **Flora N. Wasike v Destino Wamboko [1988] eKLR**, he held that where there was a consent judgment as was the case before him, the same could not be challenged save on grounds that would vitiate a contract.

I note that consent judgment in respect of 30 acres of land in favour of the respondent was entered in open court in the presence of the applicant and the respondent. I entertain a serious doubt, in those circumstances, that the intended appeal has any chance of success.

I have seen a letter by the District Surveyor, Narok, indicating a date to visit the land to excise the said 30 acres of land as decreed. I agree with the respondent that he will be prejudiced in the circumstances obtaining here if I was to allow the Motion.

I am not satisfied that the applicant is entitled to my exercise of discretion in his favour and I dismiss the Motion. The parties are neighbours on the land. Let each of them meet their own costs of the Motion.

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

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR