



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 390 OF 2019 (UR 338/2019)**

**(CORAM: OKWENGU, JA (IN CHAMBERS))**

**Between**

**MOSES OKATCH OWUOR** (*Sued as trustee of*

*Dandora disabled group*) .....1ST APPLICANT

**PAUL WAREIRE MUNGA** (*Sued as Trustees of*

*Dandora disabled group*) .....2ND APPLICANT

**AND**

**ATTORNEY GENERAL**.....1ST RESPONDENT

**CITY COUNCIL OF NAIROBI**.....2ND RESPONDENT

(An application for extension of time to file an appeal from the Judgment and Decree of the **Environment & Land Court** of Kenya at Nairobi (**Hon. Lady Justice Gacheru**) delivered on 12th October, 2017

in

**ELC NO. 181 OF 2012**

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**RULING**

[1] The applicants suing as Trustees of the Dandora Disabled Group, commenced a suit at the Environment and Land Court against the respondents, contending that they were the beneficial owners of land parcel No. **Nairobi Block 84/1221** (suit property), having purchased it from the 2nd respondent. The applicants claimed that the 1st respondent through the Kenya Police had encroached on the suit property, and therefore sought orders for the 1st respondent, his servants and agents, to be restrained from trespassing on the suit property.

[2] The 1st respondent filed a defence contending that the suit property was public land, and also filed a counterclaim seeking orders that the applicants' title over the suit property be cancelled on account of fraud.

[3] In a decision delivered on 12th October 2017, **Gacheru, J** dismissed the applicant's suit; allowed the 1st respondent's counterclaim; and granted orders cancelling the certificate of lease issued to the applicants.

[4] The applicants who were dissatisfied with the judgment failed to lodge their notice of appeal within 14 days from the date of delivery of the judgment or file the record of appeal within sixty days as per the timelines stipulated under Rules 75(2) and 82 of the Court Rules respectively. They have now filed this application dated 17th December, 2019, praying that the time for filing and serving the notice of appeal and the record of appeal be extended. [5] The applicants explain that the delay in filing the documents was caused by unavoidable circumstances that were beyond the applicants control and that the application has been brought without undue delay.

[6] The 1st respondent did not file any reply or written submissions in response to the application. The 2nd respondent filed written submissions in which it opposed the application and submitted that the applicants have not met the necessary conditions for the court to grant the orders sought; that the applicants have not presented a meritorious case to justify the Court exercising its discretion in their favour; that the Court should warn itself against the danger of being influenced by sympathy; that extension of time was not a right but an equitable remedy granted to a deserving party; that the applicants had not demonstrated that they have a meritorious case as their suit is frivolous and vexatious; and that the application for extension of time is misconceived and an abuse of the court process.

[7] Rule 4 of the Court Rules gives this Court power to extend time as follows:

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.**

[8] The Court has over time, developed principles to be applied while considering an application for extension of time. In Mutiso vs. Mwangi [1999] 2 EA 231 the Court laid 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: firstly, 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”.***

[9] In Muringa Company Ltd –vs- Archdiocese of Nairobi Registered Trustees, [2020] eKLR, *Ouko (P)* explained that:

***“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the day involved, the reason or reasons for the delay, the possible prejudice, if any, 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; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal.”***

[10] The decision that the applicants intend to appeal from, was delivered on 12th October, 2017. The applicants applied for typed proceedings on 6th November, 2017. They have attached a certificate of delay marked as exhibit ‘PWM-1’ in which it was stated that the typed proceedings were ready for collection on 6th August, 2019 and that the typed proceedings were collected on 17th September, 2019. The period between 6th November, 2017 and 6th August, 2019 which is computed to be 638 days is properly accounted for.

[11] The applicants have not explained the delay between the date of delivery of the judgment, that is, 12th October, 2017 and the date when they applied for the typed proceedings, that is, 6th November, 2017, a period of 26 days, and also the period between 17th September, 2019 when they collected the typed proceedings and 17th December, 2019, when the applicant lodged his motion for extension of time, a period of three months. The explanation that it was due to ‘*inadvertent omission that was unavoidable circumstances*’ or ‘*circumstances beyond their control*’ without disclosing the circumstances, cannot suffice.

[12] Nevertheless, although I find that there has been delay which the applicants have not satisfactorily explained, I appreciate that the applicant’s suit involves a dispute over land and that the applicants represent a group of disabled persons who stand a risk of being evicted from the premises.

[13] I have also perused the judgment and the grounds of appeal, and find that the intended appeal is not frivolous, nor can it be concluded that it has no possibility of success. On the other hand, the respondent has not demonstrated any prejudice that will be caused to it or its agents if the orders sought are granted. I therefore find it fair and just that I exercise my discretion in the applicants’ favour by giving them an opportunity to be heard on their appeal.

[14] For these reasons, I allow the application and extend time for the applicants to file their appeal. The notice of appeal and the record of appeal shall be filed within 30 days from the date hereof.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of August, 2020.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original.*

*Signed*

**DEPUTY REGISTRAR**