



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: MUSINGA, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 7 OF 2019**

**BETWEEN**

**SAMMY MWANGI KIRIETHE.....1<sup>st</sup> APPLICANT**

**EVEREADY ENTERPRISES LTD.....2<sup>nd</sup> APPLICANT**

**HELEN NYOKABI KIRIETHE.....3<sup>rd</sup> APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LTD.....RESPONDENT**

*(Being an application for extension of time to file and serve a notice of appeal out of time and for extension of time to make a request for typed proceedings and serve the same out of time in an intended appeal against the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 18th March 2018*

**in**

**H.C.C.C. No. 328 of 1999)**

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**RULING OF THE COURT**

1. The applicants' application dated 7th February 2019 seeks leave to file a Notice of Appeal out of time against the judgment of **Ngaah, J.** delivered on 16th March 2018. The applicants further seek extension of time to apply for the proceedings in the High Court so that he can benefit from the provision to **rule 82(1) of this Court's Rules** in the event that the proceedings are delayed.
2. The affidavits sworn in support of the applications by the 1st and 3rd applicants discloses that the applicants had instituted two suits, one in Nairobi and another one in Nyeri, which were consolidated and ordered to be heard in Nyeri. The suits involved various properties, some of which had been charged to the respondent. The applicants were also contesting the interest and penalties that had been charged by the respondent.
3. The applicants contend that the learned judge failed to determine the issue of the disputed interest, which was the gravamen in one of the suits, and now the applicants desire to appeal against the said judgment.
4. The reason for the delay in instituting the appeal as argued by the applicants is that they had been misadvised by their former advocate that the judgment was in their favour, and that he was making arrangements to have the properties that had been charged to the respondent discharged, only to be advised by another counsel in mid-January 2019 that the judgment was not entirely in their favour and there was need to file an appeal against the trial court's judgment.
5. The applicants believe that their intended appeal has good chances of success; and the respondents shall not be prejudiced by grant of the orders sought since there is no outstanding debt, yet the respondent is still holding two of their documents of title.
6. The respondent opposed the application. It contended that there had been inordinate delay of 328 days that had not been sufficiently explained. The respondent pointed out that the applicants had not provided any correspondence between themselves and their former advocates regarding the advice that the applicants had been given on the impugned judgment.

7. Lastly, the respondent argued that the intended appeal has no chance of success; and that the respondent will be prejudiced if the orders sought are granted because the parties have been litigating on the same subject since 1997. The respondent urged the court to dismiss the application.

8. I have considered the application, the affidavits and submissions on record. The principles upon which this Court determines an application for extension of time under **rule 4** of its **Rules** are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal, and the degree of prejudice that would be occasioned to the respondent if the application is granted.

9. In **NJUGUNA v MAGICHU & 73 OTHERS [2003] KLR 507**, Waki, J.A. held as follows:

***“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless discretion has to be exercised judicially, that is on sound factual and legal basis.”***

10. In my view, although there has been inordinate delay in bringing this application, I believe that the delay has been explained by the applicants in their lengthy affidavits. I have no reason to doubt the applicants’ explanation that their former advocate had informed them that the consolidated judgment was entirely in their favour, only to learn much later that there were various determinations that were not in their interest.

11. As regards the chances of success of the intended appeal, all that a single judge is called upon to do is to make a prima facie observation, otherwise there would be a danger of usurping the powers of the full court if at all the application for extension of time is allowed and the appeal is finally heard. See **IMPERIAL BANK LIMITED (IN RECEIVERSHIP) & ANOTHER v ALNASHIR POPAT & 18 OTHERS [2018] eKLR**.

12. Having perused the impugned judgment and considered the grounds that are intended to be raised by the applicants, I would not say that the intended appeal is frivolous. It is an arguable one.

13. Lastly, although the applicants state that no prejudice will be occasioned to the respondent if this application is granted, I do not agree. The parties have been litigating over the last 23 years or so and have incurred considerable costs. It is in the interest of the respondent that these legal proceedings come to an end. On the other hand, the applicants want to exercise their constitutional right of appeal, as they are pursuing redemption of titles to two of their properties, which they believe are wrongfully held by the respondent.

14. I am of the considered view that the degree of prejudice that the respondent stands to suffer if I grant the orders sought is outweighed by the prejudice that the applicants will suffer if this application is not granted.

15. Consequently, I allow the application and grant the orders as sought. The applicants should file and serve the notice of appeal within seven (7) days from the date of delivery of this ruling. The applicants shall bear the costs of this application.

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

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**