



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPLICATION NO. 38 OF 2019**

**BETWEEN**

**SIMEON OKINGO**

**RAPHAEL AKENDO OSURO**

**JAPHETH HAVI KIYAI**

**ALFRED WANDERA KABAKA**

**PHILIO OMSIMA SHIKUKU.....APPLICANTS**

**AND**

**BENTER JUMA NYAKAKO.....RESPONDENT**

*(An application for stay of execution of the judgment of the Environment and Land Court*

*at Kisumu (M. A. Odeny, J.) dated 24th June, 2019 in ELC Case No. 116 of 2014*

**Consolidated with ELC Case No. 160 of 2014 O.S)**

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**RULING**

[1] By a notice of motion dated 6th March, 2020, the applicants have moved this Court under rule 4 of the Court of Appeal Rules, for leave to file and serve a notice of appeal and record of appeal out of time. The motion was inadvertently listed before a three-judge bench but was instead, with the consent of my two colleagues, heard by myself as a single judge.

[2] The grounds upon which the applicants seek to have time extended are that they applied for certified copies of the proceedings and judgment, but the same were not availed to them in time. A certificate of delay has been attached to the motion. That certificate of delay is confused and does not indicate when the proceedings were ready for collection, nor does it clearly indicate the time that was required for preparation and collection of certified copies. The certificate of delay is however signed by the Registrar of the Environment and Land Court and bears an appropriate stamp. [3] It would appear that there was an intention to certify that copies of proceedings were applied for and that there was delay, but someone appears to have dropped the ball in drafting the certificate of delay. Be that as it may, the applicants have also annexed a copy of a letter dated 1st July 2019 beseeching copies of the proceedings and judgment and that letter was copied to the respondent's advocate. Therefore, the applicants would be entitled under rule 82 of the Court of Appeal Rules to have the time which was required for the preparation and delivery to the applicants of copies of proceedings and judgment, excluded from the computation of time.

[4] Giving the applicants the benefit of doubt, and assuming that the time that was required for preparation and delivery of certified copies was from 1st July to 25th October, 2019, this period would be excluded from computation of time. However, judgment having been delivered on 24th June 2019, that period having been excluded, the 60 days within which the applicants were required to file the record of appeal, expired on 19th December 2019. The applicants have not given any explanation for the delay in filing the record of appeal from 19th December, 2019 to 6th March, 2020 when his application for extension of time was filed. That delay of 76 days is inordinate.

[5] As was stated by The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] eKLR:**

*An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.*

[6] This Court has stated many times that the discretion of a judge under rule 4 of the Court of Appeal is discretionary. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**, the Court stated clearly the matters to be taken into account in exercising such discretion and these includes first, the length of delay, the reasons for the delay, possibly the chances of the appeal succeeding, and the degree of the prejudice the respondent is likely to suffer if the application is granted. In this case the delay is inordinate and not explained.

[7] In her replying affidavit, the respondent has explained that the beneficiaries of the estate of the deceased have already started using the suit property and would therefore be prejudiced by an order extending time to file an appeal. This contention has not been controverted.

[8] In the above circumstances, I find that there is no justification for me to exercise my discretion in favour of the applicants. Accordingly, the application is dismissed.

**Dated and delivered at Nairobi this 9th day of October, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**