



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. K. MUSINGA, J.A.)

CIVIL APPLICATION NO. 95 OF 2019 (UR 93/2019)

BETWEEN

PIUS MUSIMBA MUASYA.....1ST APPLICANT

GABRIEL MUTUKU NZUKI.....2ND APPLICANT

MALITA NDILA MUASYA.....3RD APPLICANT

BERNARD KYALO NZAU.....4TH APPLICANT

FRANCIS MAKAU MUASYA.....5TH APPLICANT

MONICAH MUENI MUTUA.....6TH APPLICANT

ROBERT MUINDE MUINDI.....7TH APPLICANT

CONSOLATA MUENI MUTIE.....8TH APPLICANT

SYOMBUA MUTUA MAINA.....9TH APPLICANT

ALPHONE MULI MBUVI.....10TH APPLICANT

SALOME NDUNGE MATHEKA.....11TH APPLICANT

MICHAEL NZUKI MUTIA.....12TH APPLICANT

JUSTINA NGONYO NDOLO.....13TH APPLICANT

JOSEPH MUTINDA NDOLO.....14TH APPLICANT

ANCIENT KAVUU MUASYA.....15TH APPLICANT

DAMION PETER MUASYA.....16TH APPLICANT

AND

ONESMUS NDOLO NGETA.....1ST RESPONDENT

BERNARD ARBUNUS NDUBA.....2ND RESPONDENT

JOHN KABAI KIKOLE.....3RD RESPONDENT

STANLEY MUNYAO KIKOLE.....4TH RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal, Memorandum of appeal and the Record of Appeal out of

in

ELC Case No. 4 of 2014.)

RULING

1. This is an application for leave to file an appeal out of time and is brought under **Article 159(2)(b) of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act and rule 4 of the Court of Appeal Rules**. The applicants further pray that the notice of appeal filed on 11th June 2018 be deemed as duly filed and served.

2. The affidavit in support of the application was sworn by **Brian Munyao**, an advocate in the firm of B.M. Mung'ata & Company Advocates which is on record for the applicants. The said advocate deponed, *inter alia*, that the applicants filed **ELC Case No. 4 of 2014** at Machakos Law Courts seeking a declaration that they were the owners by prescription of a parcel of land known as **Kangundo/Kitwii/1313** measuring about 4.9 Hectares (*the suit land*); that the suit was heard before **Angote, J.**; that judgment was delivered on 13th April 2018 in the absence of the parties when the suit was dismissed; that upon learning from the applicants about delivery of the judgment, he wrote to the Deputy Registrar requesting for certified copies of the proceedings and judgment; that the said documents were received on 7th February 2019; that the notice of appeal had been filed on 11th June 2018; and that the applicants have been in occupation for over 50 years and will be greatly prejudiced if their application for extension of time is not granted as they shall be evicted from the suit land without the benefit of any appeal.

3. **Mary G. Kamau**, an advocate in the firm of Anne M. Kiusya & Company Advocates, which is on record for the respondents, swore a replying affidavit for and on behalf of the respondents. She deponed, *inter alia*, that there had been inordinate delay in filing the application, 11 months 13 days from the date of the judgment, 1 month 19 days from the date the applicants obtained certified copies of the proceedings; that the intended appeal has no chance of success; and that the respondents will be highly prejudiced if the application is granted as they had been anxiously waiting to utilise the suit land after years of litigation and had instituted an application to evict the applicants from the suit land following delivery of the judgment. She therefore urged the court to dismiss the application.

4. This application was disposed of by way of submissions only. I have perused the application, the affidavits sworn by the two advocates as well as their written submissions.

5. The principles that guide this Court in an application under **rule 4** of this Court's Rules are well settled. The Court exercises unfettered discretion and is required to consider, *inter alia*, the period of the delay; the reason for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted. See **Mwangi v Kenya Airways Ltd [2003] KLR 486**.

6. Regarding the length of the delay and the reason thereof, there is no dispute that the impugned judgment was delivered on 13th April 2018, without any notice to the parties. Sometime towards the end of May 2018 the applicants visited their advocate's Chambers and told him that they were being threatened with eviction and had been told that the land dispute had been decided in favour of the respondents.

7. On 29th May 2018 the applicants' advocate applied for typed proceedings and filed a notice of appeal on 11th June 2018. The certified copies of the proceedings were ready on 7th February 2019 and were collected on the same day, as shown in the Certificate of Delay dated 5th March 2019. However, the application for extension of time was filed on 26th March 2019, 21 days after issuance of the Certificate of Delay. Although there was some delay, in the circumstances of this case I do not think it was inordinate.

8. Regarding the chances of success of the intended appeal, I have perused the impugned judgment as well as the Draft Memorandum of Appeal and all I can say is that the appeal is arguable. An arguable appeal is not one that must succeed, it is one which is not frivolous and merits full consideration by the Court. See **Stanley Kang'ethe Kinyanjui V Tony Ketter & 5 Others [2013] eKLR**.

9. The parties have been involved in litigation over the suit land for years. The respondents, having been declared by the trial court as the lawful owners of the suit land, are obviously keen on evicting the applicants and the sooner they are able to do so the better. The respondents will however not suffer incurable prejudice if the orders sought are not granted, save that they may have to wait for a little while. On the other hand, if the applicants are not granted the orders they have sought, they will be evicted from the suit land and will not be able to exercise their constitutional right of appeal. As much as possible, litigants in land disputes should not be evicted from the property in contention before they have exhausted the appellate process.

10. Bearing all the above in mind, I am inclined to exercise my discretion in favour of the applicants, which I hereby do. Consequently, I grant leave to the applicants to file an appeal out of time. The notice of appeal filed on 11th June 2018 is hereby deemed as having been filed and served in time. The record of appeal should be filed and served within thirty (30) days from the date hereof. The costs of this application shall be in the appeal.

Dated and delivered at Nairobi this 20th day of November, 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