



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 61 OF 2020

BETWEEN

DR. NEHEMIAH KIMATHI.....1ST APPLICANT

STELLA NKATHA MWIRARIA.....2ND APPLICANT

AND

GRACE WAMBUI MURIUKI.....1ST RESPONDENT

MARY NG'ENDO TIBA.....2ND RESPONDENT

JAQUELINE PAULINE WAIRIMU THARAO.....3RD RESPONDENT

RUTH WANJIRU THARAO.....4TH RESPONDENT

MUNGAI MBURU.....5TH RESPONDENT

MARGARET NJOKI RUTHA.....6TH RESPONDENT

DAVID ODANGA.....7TH RESPONDENT

DANIEL KURIA WAWERU.....8TH RESPONDENT

OPONDO OTIENO PATRICK.....9TH RESPONDENT

GRACE KANGAI GACICI.....10TH RESPONDENT

SAMUEL KIARIE MBURU.....11TH RESPONDENT

COMMISSIONER OF LANDS.....12TH RESPONDENT

DISTRICT LAND REGISTRAR THIKA.....13TH RESPONDENT

(An application for extension of time to file an Appeal from the Judgement and Decree of the

Environment and Land Court at Thika (G.M.A Ong'ondo, J.) dated 14th June, 2019)

in ELC Case No. 449 of 2017)

RULING

Dr. Nehemiah Kimathi and Stella Nkatha Mwiraria, the applicants have moved the Court by a Motion dated 3rd May 2020, seeking the following orders;

a. THAT this Honourable court be pleased to grant the Applicants leave to lodge an appeal out of time against the judgment and resultant decree/order of the Environment and Land Court of Kenya at Thika (Mr. Justice G.M.A Ong'ondo J) dated and delivered on 14th June, 2019 in Cause No. 449 of 2017.

b. THAT upon grant of the leave to appeal out of time and extension of time, the Record of Appeal lodged herein be deemed as duly filed and the same be served upon the Defendants.

Being a **Rule 4** application, I shall be guided by the appropriate principles, devised by this Court, to be applied in order to achieve a just decision. In the exercise of my discretion, which is free and unfettered, I am persuaded by the decision in **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231**, the locus classicus which laid down 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: 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.”

The applicants, through Dr. Nehemiah deposed that the delay was occasioned by the Environment and Land Court Registry in furnishing them with typed proceedings. He explained that a notice of appeal was filed on 18th June 2019. On the same day, a letter bespeaking the typed proceedings was written to the Deputy Registrar of the said court. The typed proceedings were collected on 19th November 2019 and subsequently a certificate of delay was prepared in evidence of the said delay. To him, the delay was not inordinate as the same was occasioned by the need to secure documents necessary in the compilation of the record of appeal.

The 2nd, 3rd, 4th, 5th, 6th, 8th, 10th, and 11th respondents filed various responses, all claiming that the applicants did not serve them with the Notice of Appeal within the 7 days as stipulated in **Rule 77 (1)** of the **Civil Appeal Rules**. While the Notice was lodged on 18th June 2019, the 2nd, 3rd and 4th respondents were served on 13th August 2019, while the 5th, 6th, 8th, 10th, and 11th respondents were served on 7th October 2019.

Further, the letter bespeaking the proceedings was never served on the respondents as required by **Rule 82 (2)** of the **Court of Appeal Rules**. They indicated that the typed proceedings were ready for collection on 9th October 2019 yet the same were collected on 19th November 2019. It was contended that the applicants did not demonstrate due diligence in observance of statutory appellate rules and are therefore not deserving of the relief sought.

Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**. As earlier stated, applicants herein indicated the cause of delay was occasioned by the Environment and Land Court registry. I note that the applicants have on record a certificate of delay in evidence of the same. The certificate is what enables the Court to exclude the time taken for preparation of the typed proceedings from the computation of the required 60days as stipulated in **Rule 82 (1)** of the **Court of Appeal Rules**.

However, this exclusion is not automatic since the party appealing must comply with **Rule 82 (2)** which introduces a condition precedent to the accessing the relief in **Rule 82 (1)** as follows;

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

The 2nd, 3rd, 4th, 5th, 6th, 8th, 10th and 11th respondents have all confirmed that there was no service of the said letter on them. On perusal of the record, the letter does not indicate a copy to any of the respondents confirming the glaring omission on the part of the applicants. Without proof of such service, the 60days as stipulated by the law ran uninterrupted and had obviously ran out long before this application was filed. I am persuaded by the holding of this Court in **MISTRY PREMJI GANJI (INVESTMENTS) LIMITED V KENYA NATIONAL HIGHWAYS AUTHORITY [2019] eKLR** where it stated;

“In other words, the computation of the 60 day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent.....It is common ground that the letter bespeaking proceedings was never served upon the respondent in this case. The appellant therefore was obliged to file the record of appeal 25th strictly within sixty uninterrupted days of filing the Notice of appeal, this period lapsed on April, 2017.”

The Rules of this Court must be adhered to by parties at all times. Their importance cannot be overstated and therefore a party that has a casual approach to their adherence is not deserving of this relief.

In the result, I decline to grant the prayer to extend time to file the appeal, and accordingly dismiss the application with costs.

Dated and delivered at Nairobi this 18th day of December, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR