



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

ELDORET CIVIL APPLICATION NO. 85 OF 2020

BETWEEN

SAMUEL KIPTOO RUTO 1ST APPLICANT
HELEN SAINA..... 2ND APPLICANT
MOSES K. MARITIM..... 3RD APPLICANT
JANE C. TIROP..... 4TH APPLICANT
DAVID K. SAMOEL..... 5TH APPLICANT
SALLY J. MAINA..... 6TH APPLICANT
MATHEW KUTO 7TH APPLICANT
EZEKIEL KEMEI 8TH APPLICANT
KIRONGO CHEPKWONY..... 9TH APPLICANT
JOSEPH K. CHERUIYOT 10TH APPLICANT

AND

SAMUEL MATUNDE MUCHINARESPONDENT

(An application for extension of time to file an Appeal from the Judgement and Decree of the Environment and Land Court at Eldoret (Odeny, J.) dated 05th December, 2019) in

ELC Case No. 133 of 2014

RULING

The applicants herein moved the Court by a Motion dated 5th August 2020 under certificate of urgency, seeking the following orders;

- a) *This application be certified as urgent and service thereof be dispensed with in the first instance.*
- b) *The Honourable Court be pleased to extend time for filing of a Notice of Appeal against the judgment delivered by Hon. Justice M.A Odeny on 5th December 2019 in Eldoret HC Land and Environment Court Case No. 133 of 2014 as per the draft Notice of Appeal.*
- c) *Costs of this application be in the cause.*

I have considered the application, the grounds in support thereof, the replying affidavit filed by the respondent, the submissions as well as the law. **Rule 4 of the Court of Appeal Rules**, on which the application is premised, does not provide for factors the Court ought to consider in an application for enlargement of time. Hence this Court has over the years devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. One such decision is **MURINGA COMPANY LTD V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES**, Civil Application No. 190 of 2019 where it was elucidated that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay 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.”

The applicants are claiming that the delay in filing the notice of appeal was occasioned by the negligence of their former advocates, M/s Kayla & Company Advocates who failed to inform them of the existence of the impugned judgment. The suit at the High Court sought to have them evicted for trespassing on the property of the respondent which the applicants call home, had made developments thereon and even buried some of their loved ones.

Samuel Kiptoo Ruto, the 1st respondent, deposed in the supporting affidavit that M/s Kayla & Company Advocates maliciously ceased acting for them and proceeded to close the defense case without informing them. He only became aware of the said impugned judgement when he was served with an eviction order by the respondent dated 30th July 2020. By this time the 14-day period required to file a notice of appeal had lapsed, and he therefore seeks the intervention of this Court.

There is no maximum or minimum period of delay set by the law hence anyone seeking this relief must satisfactorily explain the cause of the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**. As such the conduct of the party is key in determining whether the or not the delay was inordinate.

The applicants’ woes began on 2/10/2019 during a scheduled defense hearing. Due to non-attendance on their part, the application by the respondent’s advocate to have the defense case closed was allowed. Notably, the appellants’ former Counsel did not object to the said application. Further, the firm of Kalya & Company Advocates sought for leave to cease acting via a Chamber Summons application dated 23rd October 2019, barely two months to delivery of the judgment. The said firm which was representing the applicants on a pro-bono basis, complained that they no longer enjoyed the benefit of instructions from the applicants.

The closure of the defense case had a profound effect on the applicants’ chances as the learned Judge found that they were trespassers and awarded the respondent Kshs 200,000 as mesne profits. The learned Judge clearly indicated that since the applicants did not tender any evidence, their claims remained unsubstantiated. As a result the applicants did not get a chance to be heard and prove their defense and counterclaim.

The remedy of time extension is a creation of equity and anyone seeking it must show himself worthy. Hence one has to show that he was not at fault so as to let time lapse. See **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**.

Much as the respondent swears that the applicants are wholly undeserving of my favorable discretion, from the foregoing and bearing in mind the dictates of **Section 3A of the Appellate Jurisdiction Act**, I find that the delay was excusable as the applicants were not to blame for the delay. They were represented by a firm that was no longer committed to offer its services to them. This denied the applicants a fair hearing, a right that is enshrined in our Constitution. As such, they deserve an opportunity to be heard, considering what is at stake, and have their dispute determined on merit as natural justice demands that no man shall be condemned unheard. I have also considered the fact that the applicants filed this application in less than a week after knowledge of the judgment following service of the eviction order. Their desire to move this Court with speed speaks volumes of how important this matter is to them.

The upshot of my analysis of the circumstances in the matter is that I allow the application and grant the applicants seven (7) days within which the notice appeal shall be filed and served.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 4th 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