



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU. JA)

MISC. CIVIL APPLICATION NO. 33 OF 2019

BETWEEN

1. MUHAMMED AWADH SALIM

2. MOHAMED ABDILLAHI YUSUF

3. ATHMAN NAAMAN MOHAMED (Suing as the TRUSTEES OF

THE QURAN AND SUNNA SOCIETY OF EAST AFRICA).....APPLICANTS

AND

1. KALIMUDDIN EBRAHIM HASSANALI

2. K.M. KARIMBHAI & CO. ADVOCATES

3. ABDULNASSER SAID AHMED..... RESPONDENTS

(Being an application for extension of time to file and serve Notice of Appeal and for leave to appeal out of time in an appeal from the decision of the Environment and Land Court of Kenya at Mombasa (Omollo, J) dated 22nd February, 2019

in

ELCC No. 202 of 2013)

RULING

1. By a judgment delivered on 22nd February 2019, in Mombasa ELC Case No. 202 of 2013, the Environment and Land Court (ELC) dismissed the applicants' suit in which they had sought an order to compel the respondents to release to them the original documents of title for parcel land subdivision No. 3368/1/MN. In that suit, the applicants claimed that they purchased the said property from the 1st respondent and that despite paying the entire purchase price the respondents had refused to release the title documents.

2. The respondents in their defence averred that the property had been donated for the construction of a Mosque; that the names of the applicants had been included in the title because as they had persuaded the Masjid Mulla Welfare Committee, in whose name the property should be registered that failure to include their names would impair fund raising efforts from donors in Canada.

3. After hearing the parties, the ELC dismissed the applicants claim. In its judgment delivered on 22nd February 2019, the court held:

“It is therefore my considered opinion and I so hold that although the sale agreement dated 18.12.2007 was entered between the 3rd defendant and Quran and Sunnah Society of East Africa, the said Quran and Sunnah

Society of East Africa was merely acting in trust of and for the benefit of Mulla Mosque and thus the plaintiffs cannot use the said agreement to disinherit Mulla Mosque. Similarly their registration as owner of the suit land can only be inferred to have been done in trust for Mulla Mosque. The registration did not and cannot confer any benefits to the society and or its trustees as their role was shown to be limited to raising funds. This added to the fact that the 1st and 2nd plaintiffs' admission that they are not members of Mulla Mosque."

4. The applicants intend to challenge that judgment. In their application dated 30th April 2019 and filed on 6th May 2019 made under Rules 4 and 5(2)(b), 20 and 47 of the Court of Appeal Rules, the applicants seek orders for stay of execution of the said judgment pending the hearing and determination of their intended appeal. They also seek an order for extension of time within which to file and serve a notice of appeal from the said judgment.

5. During the hearing of the application on 14th May 2019, the prayer for stay of execution of the judgment was withdrawn by consent upon realization by learned counsel for the applicants that the same was premature and could not in any event be heard before a single judge.

6. The application for extension of time is based on the grounds that the applicants became aware that judgment had been delivered on 24th March 2019; that the advocates then on record did not communicate to them in a timely manner that judgment had been delivered; that the delay is not deliberate nor inordinate; that the intended appeal has high chances of success and that the respondents will not be prejudiced if the time for appealing is extended.

7. In his affidavit in support of the application sworn in Canada on 2nd April 2019, the first applicant Muhammad Awadh Salim deposes that the applicant's advocate then on record, Mr. Mwawasi, had instructed another advocate to hold his brief to take the judgment but that advocate did not inform him (Mwawasi) in good time; that immediately on becoming aware of what had transpired, the applicants engaged the advocates currently on record.

8. Appearing before me during the hearing of the application, learned counsel for the applicants **Mr. Titus Kirui** referred to the application and supporting affidavit and submitted that the delay was occasioned by failure of communication by the advocate who held brief for Mr. Mwasasi during the delivery of the judgment; that by the time the applicants learnt of the judgment, time for filing the notice of appeal had lapsed; that some time was lost in the process of the current advocates for the applicants obtaining the consent of the previous advocates to take over the matter; that immediately the consent to take over the matter from the previous advocates was received on 15th April 2019, the current advocates immediately applied for typed and certified proceedings and judgment; that the 1st applicant who is the key person, is based in Canada where the money to buy the suit property was raised; and that the Court should exercise its discretion in favour of the applicants and extend time within which to lodge the appeal.

9. Opposing the appeal, learned counsel for the respondents **Mr. Adam Hamza** referred to the replying affidavit sworn on 13th May 2019 by Abdunnasser Said Ahmed, the 3rd respondent in which he deposes that the applicants were represented by their advocates throughout the proceedings in the lower court, including during the delivery of the judgment; that the applicants are estopped from denying lack of knowledge of the court proceedings; that it was the duty of the advocates for the applicants to establish the outcome of the case from the advocate who held brief; that the 2nd applicant was personally present in court when the judgment was delivered; that the appeal has in any case been overtaken by events as the judgment has been executed and the title to the suit property has already been transferred.

10. According to Mr. Hamza, all the applicants instituted the suit in the court below as trustees and the submission that the 1st applicant is the key person has no basis; that even though the consent letter allowing the applicants present advocates to take over the matter from previous advocates was dated 1st April 2019, it was not filed until 15th April 2019 and that delay has not been explained; that as the applicants slept on their rights, the respondents went ahead to execute the judgment and to have the transfer of the suit property effected; that allowing the application for extension of time will therefore prejudice the respondents by depriving them of the fruits of the judgment; and that no good reasons have been given to justify the exercise of the courts discretion in favour of the applicants.

11. In his brief rejoinder, Mr. Kirui contested the assertion that the 2nd applicant was in court during the delivery of the judgment.

12. I have considered the application, the affidavits and submissions by learned counsel. Rule 4 of the Court of Appeal Rules, 2010 provides that:

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR