



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J.A.

(IN CHAMBERS))

CIVIL APPLICATION NO. 78 OF 2018

BETWEEN

1. DAVID KAMAU MWANGI

2. NAOMI WANJUGU GITHUI T/A

**KAMAU GITHUI & COMPANY ADVOCATES.....APPLICANTS**

AND

1. IRIA-INI TEA FACTORY LIMITED

2. JOHNSTONE MUCHAI MUTHANGA

3. LEAH WANJIRU MURUGI

4. MUCHASTONE LIMITED

**5. FREDRICK MUNYUA WAIYAKI..... RESPONDENTS**

*(An application for extension of time to file and serve a Notice of Appeal against the Ruling and Order of the Environment and Land Court at Nyeri (L.N. Waithaka, J.) dated 29th March, 2017*

*in*

*E.L.C. Case No. 108 of 2013)*

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**RULING**

1. This ruling is in respect of an application brought under **rule 4** of the **Court of Appeal Rules** where the applicants seek extension of time for the filing and service of a notice of appeal against the ruling of the Environment and Land Court at Nyeri (the trial court) dated 29th March, 2017 in Nyeri **ELC No. 108 of 2013**. The applicants urged the Court to deem the notice of appeal filed on 27th June, 2017 as having been filed and served within time.

2. The application was premised on grounds that the notice of appeal was filed out of time for the reason that the trial court delivered the ruling on 29th March, 2017 without notice to the applicants or their previous advocates on record, M/s Kiplangat & Associates; that the applicants became aware of the ruling on 8th June, 2017 upon perusing the Court file, by which time it was

practically impossible to file and serve the notice of appeal within the prescribed period; and that the respondents shall not suffer any prejudice if the orders sought are granted.

3. Mr. Kipngeno Richard, the applicants' advocate, practicing in the firm of Kipngeno & Associates, stated in his affidavit in support of the application that on 20th June, 2016 the 2nd and 4th respondents filed an application seeking leave to issue and serve a Third Party Notice upon the applicants; that the application which was opposed, was heard and the Court indicated that the ruling would be delivered on 22nd February, 2017; that the ruling was not delivered on that day and the court notified parties that it would be delivered on notice.

4. On 2nd June, 2017, the applicants were served with a Third Party Notice and as a result they became apprehensive that the ruling could have been delivered without notice to them; that upon perusal of the court file he realized that the ruling was delivered on 29th March, 2017 without any notice to the applicants or the firm of Kiplangat & Associates Advocates who were then on record for the applicants; that the applicants' advocates drafted a notice of appeal on 15th June, 2017 and sent their clerk, one Jonathan Mutua, to file and serve it on the respondents but the clerk did not file the notice until 27th June, 2017. The notice was served on the following day.

5. The 1st respondent opposed the application. Mr. Mathias Ithigah, its Factory Unit Manager, deposed that a notice for delivery of the impugned ruling was issued to all the parties through their respective advocates, including M/s Kiplangat and Associates Advocates, who were then representing the applicants; that no one from the said firm of advocates had sworn an affidavit to confirm that they did not receive the notice; that the delay between 29th March, 2017 and 28th June, 2017 had not been explained; that Jonathan Mutua who allegedly delayed the filing of the notice of appeal had not sworn an affidavit to confirm the allegations; and that the applicants had subsequently participated in the Court proceedings without complaining about non-service of the delivery notice, until a hearing date was confirmed in their presence.

6. The 1st respondent further contended that the objective of the application was to derail the hearing of the case; that it would be prejudiced by any extension of time as the case before the trial court was filed in June, 2013 and had never been heard; that it had been kept away from L.R. NYANDARUA/GILGIL WEST/18 and a sum of Kshs.31,750,000/= that it paid for the land; and in the 1st respondent's view the intended appeal has no chance of success for the reason that the application giving rise to the challenged ruling is essentially an *ex parte* application to issue a Third Party Notice. For those reasons the Court was urged to dismiss the application.

7. The 2nd, 3rd and 4th respondents did not file any replying affidavits and neither did they participate in the hearing of the application, although each had been served with a hearing notice. The 5th respondent filed a replying affidavit. He reiterated more or less the same arguments that were raised by the 1st respondent in opposition to the application.

8. Mr. Kipngeno Richard swore a further affidavit where he deposed, *inter alia*, that as at 29th March, 2017 he was still practicing as an associate in the firm of Kiplangat & Associates Advocates; that he left the firm at the beginning of May, 2017 and joined the firm of Kipngeno & Associates Advocates; that if the ruling had been served on the said firm as alleged the same would have been brought to his attention since he was the one having personal conduct of the matter; that Jonathan Mutua deserted work after he was asked to give an explanation for the delay in filing the notice of appeal; that the mere fact that the applicants had subsequently participated in the proceedings, including filing a statement of defence; a witness statement; Third Party list of documents, and an *ex parte* application for leave to issue a Third Party Notice upon one Joshua Macharia Kihara, does not imply that they had abandoned their right to appeal against the ruling of 29th March, 2017.

9. The applicants also filed a further affidavit sworn by one Christine Asanya, a Secretary/Receptionist with the firm of Kiplangat & Associates Advocates to the effect that if the ruling notice had been served on the said law firm when Mr. Kipngeno Richard was working there she would have been the one to receive it and would have brought it to the attention of Mr. Kipngeno.

10. During the hearing of the application, Mr. Richard Kipngeno appeared for the applicants and Miss Macharia held brief for Ms Lucy Mwai for the 1st respondent. As earlier stated, there was no appearance for the 2nd, 3rd, 4th and 5th respondent. The said advocates made submissions that were no more than a rehash of the contents of their respective clients' affidavits that I have already summarized.

11. I have considered the application, the submissions on record and the relevant case law. In an application under **rule 4** of this **Court's Rules**, a single judge of this Court exercises his or her unfettered discretion, which must however be exercised judiciously and never arbitrarily or capriciously. Some of the considerations that the Court has to bear in mind include the length of the delay; the reasons for the delay; the possible prejudice, if any, that each party stands to suffer if the application is allowed or disallowed; 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 constitutional 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 chances of success of the intended appeal, among others. See **Imperial Bank Limited (In receivership) & Another v Alnashir Popat & 18 Others [2018] eKLR.**

12. In this application, the notice of appeal ought to have been filed within fourteen (14) days from 29th March when the impugned ruling was delivered but was not filed until 27th June, 2017. The delay was almost 65 days. This Court has severally held that every delay, however short, must be explained. In **Joel Tirop Busienei vs David Randichi [2016] eKLR** the Court held:-

***“The timelines prescribed under this Court’s Rules are not ornamental, they are important if timely dispensation of justice is to be achieved. They provide predictability and level playing field. Where a party has been unable to comply with the same, he has to offer an appropriate explanation before the Court can allow extension of time...”***

13. Whereas I am prepared to give the applicants the benefit of doubt that their advocates may not have received the notice of delivery of the ruling, the applicants’ advocates became aware of the ruling on 8th June, 2017, but did not draft the notice of appeal until 15th June, 2017. Why did they have to waste another 7 days? But that is not all; having sent their clerk to Nyeri to file and serve the notice, they did not diligently follow up the issue with their clerk on the following day to ensure that the clerk executed the urgent mission. The notice was filed 12 days later. And it was not until 5th July, 2017 when Kipngeno Advocate asked the clerk for an explanation for the late filing of the notice of appeal that the clerk allegedly disappeared. In my view, the further delay in drawing the notice of appeal, filing and serving of the same was not well explained.

14. The conduct of the applicants after they learnt about delivery of the impugned ruling is also quite telling. On 8th June, 2017, they filed a notice of change of advocates; on 27th June, 2017 they filed a memorandum of appearance and the notice of appeal; on 12th July, 2017, they filed their statement of defence; and on 25th August, 2017, they filed an ex parte Chamber Summons seeking leave to issue a Third Party Notice to one Joshua Macharia Kihara trading as Kihara and Associates, which application was allowed on 2nd November, 2017. The said Joshua Macharia Kihara has already filed a memorandum of appearance. On 21st February, 2018 and on 16th May, 2018 all the parties were before the trial court and took a hearing date for the suit by consent. If at all the applicants were serious about challenging the ruling of 29th March, 2017, they ought to have done so much earlier before they participated in all the aforesaid processes. It is now too late for the applicants to challenge their inclusion into the proceedings when they themselves have equally applied for Third Party Proceedings against Joshua Kihara and their application has been granted.

15. Regarding the chances of success of the intended appeal, under **Order 1 rule 15** of the Civil Procedure Rules, an application for leave to issue a Third Party Notice is made ex parte. The rule sets out the requirements that a defendant must satisfy before a court grants such leave. Having perused the impugned ruling as well as the applicants’ statement of defence and its witness statements, I highly doubt whether the intended appeal has any chances of success.

16. Lastly, on the question of prejudice, considering that the suit before the trial court has been pending since 2013, and considering that it involves a substantial sum of money that was paid by the 1st respondent for a parcel of land that the 1st respondent has never benefited from, the 1st respondent will be highly prejudiced by any further delay if this application is allowed. On the other hand, I do not think the applicants will suffer any prejudice if their application is disallowed because they will still be heard by the trial court before a decision is arrived at. In the event they are not satisfied with that decision, they would be at liberty to prefer an appeal to this Court.

17. For all these reasons, I am not inclined to exercise my discretion in favour of the applicants. Consequently, I dismiss the applicants’ application dated 19th June, 2018. The 1st and 5th respondents are awarded costs of the application.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of June, 2019.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

