



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J.A. (IN CHAMBER))

CIVIL APPLICATION NO. 99 OF 2018

BETWEEN

MARY NCHEKEI PAUL.....APPLICANT

AND

FRANCIS MUNDIA RUGA.....RESPONDENT

(An application for extension of time to lodge and serve Notice of appeal and Record of appeal out of time against the Judgment of the Environment and Land Court at Nyeri

(Lucy N. Mbugua, J.) delivered on 11th July, 2018

In

E.L.C. No. 53 of 2005.)

RULING

1. This application is brought under **rules 4, 82 and 90** of the **Court of Appeal Rules**. The applicant seeks leave to serve a notice of appeal and record of appeal out of time. The applicant explained in her affidavit in support of the application that the judgment she intends to appeal against was delivered on 11th July, 2018; that being dissatisfied with it she filed a notice of appeal in person on 18th July, 2018; that she was subsequently informed by the registry that since she had an advocate on record she was not competent to file a notice of appeal on her own; consequently, she withdrew the notice; that by 8th August, 2018 when she filed this application the statutory period for filing and serving a notice of appeal had lapsed. The applicant added that she will suffer great prejudice if the orders sought are not granted as the suit land in dispute, which she has been ordered to vacate, is her only residence since 1981, but the respondent may not suffer any prejudice because he has never been in possession of the land.
2. The respondent opposed the application. He contended that the application is incompetent because M/s C.M. King'ori Advocates, who had filed it on behalf of the applicant, have not filed a notice of appointment of advocates; that in the High Court matter the applicant was represented by M/s G.M. Wanjohi Advocates and the current advocate had not sought leave to come on record or filed any notice of change of advocates. Lastly, the respondent stated that he was entitled to enjoy the fruits of his judgment.
3. Mr. King'ori, the applicant's learned counsel, submitted that the initial notice of appeal had been filed and served in time by the applicant herself; that the applicant instructed him on 30th July, 2018 and he filed the application on 8th August, 2018; that the delay had been well explained; that the intended appeal is arguable in that the learned judge ignored the applicant's adverse possession of the land in dispute and upheld the respondent's counterclaim for the applicant's eviction.
4. Miss Njenga, learned counsel for the respondent, reiterated the grounds raised in the respondent's replying affidavit. She however conceded that the applicant had timeously filed and served them with her notice of appeal before it was withdrawn. She urged the Court to find that M/S C.M. King'ori Advocates were not properly on record and dismiss the application with costs. For this latter submissions that the applicant's advocate was not properly on record, Miss Njenga sought to rely on a High Court decision, **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR** regarding the provisions of **Order 9 rule 9** of the **Civil Procedure Rules, 2010** which provides that :-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

5. I have considered the application and submissions by counsel, including the authorities cited by Miss Njenga. In considering an application of this nature under rule 4 of this Court’s Rules, a single judge exercises wide and unfettered discretions, but which must however be exercised judiciously and never arbitrarily or capriciously. The Court has to take into account, among other factors, the length of the delay; the reasons for the delay; whether the intended appeal is arguable or the chances of its success if the application is allowed; and the degree of prejudice to the respondent if the application is granted. See ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1977] eKLR***.

6. Before I apply those principles to the application before me, I have to first determine whether M/s C.M. King’ori Advocates are rightly before this Court, based on the respondent’s submissions that they did not seek the Court’s leave to come on record in place of M/s G.M. Wanjohi Advocate who was acting for the applicant in the trial court, as per the provisions of **order 9 rule 9** of the **Civil Procedure Rules**.

7. With respect, Miss Njenga’s submissions to that effect are misplaced. This Court has its own rules of procedure, the Court of Appeal Rules, and the cited provisions of the Civil Procedure Rules are therefore inapplicable.

Rule 23 of the **Court of Appeal Rules** that addresses the issue of change of advocate states as follows:-

“(1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.

(2) An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the judge.”

8. M/s G.M. Wanjohi Advocates never acted for the applicant in this matter, they represented her before the trial court. The application before me was filed by C.M. King’ori Advocates. It is a fresh application and so the said advocates are properly on record. If the application had been filed by M/s G.W. Wanjohi Advocates then M/s C.M. King’ori Advocates would have been required to comply with **rule 23** of the Court’s Rules but that is not the case. Having disposed of that preliminary issue, let me now substantively consider the application in light of the aforesaid principles.

9. The impugned judgment was delivered on 11th July, 2018. This application was filed on 8th August, 2018. A notice of appeal ought to have been filed within 14 days from the date of delivery of the trial court’s judgment, which period expired on 25th July, 2018. The application was therefore filed about 14 days outside the stipulated period, which delay in my view cannot be said to be inordinate.

10. Secondly, that short delay has been well explained. As a matter of fact, the notice of appeal that was filed by the applicant in person on 18th July, 2018 was proper in law. The applicant did not have to file it through the firm of advocates that had represented her in the court below. She did not require to withdraw the notice, but for the wrong advice that was given to her. But even after doing so, she promptly appointed an advocate to act for her and the application was filed without delay. From the foregoing, it is clear that the delay is not inordinate and the same has been well explained.

11. Turning to the other considerations, although the applicant did not file a draft memorandum of appeal, from her affidavit; counsel’s submissions and perusal of the impugned judgment, it cannot be said that the intended appeal is frivolous. It is definitely arguable. I need not say more on the issue.

12. Lastly, if the application is not granted, the applicant shall be evicted from the land in dispute, where she is currently residing. On the other hand, if the application is allowed, the respondent will have to wait for about a year or so before the appeal is determined. I do not think that the degree of prejudice that he stands to suffer is too much compared to the prejudice that the applicant shall endure if I do not allow the application.

13. Taking all the appropriate principles into consideration, I am inclined to exercise my discretion in favour of the applicant, which I hereby do. Consequently, I allow the application and direct that the notice of appeal and the record of appeal be filed and served within 14 days from the date of delivery of this ruling. Each party shall bear its own costs of the application.

Dated and delivered at Nairobi this 21st 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