



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MURGOR, J.A.

CIVIL APPEAL (APPLICATION) NO. 25 OF 2019

BETWEEN

1. WINNIE MWAKA MJAMBILI

2. MARK FANDE MJAMBILI (suing as the administrator

of the Estate of PETER BAMBULA MJAMBILIAPPLICANTS

AND

1. AISHA SAID AMRI

2. NATIONAL LAND COMMISSION.....RESPONDENTS

(Being an application to extend time to file an appeal out of time from decision of the Malindi Environment and Land Court, Olola, J. delivered on 29th November 2017

in

Malindi Environment and Land Court Misc. Civil Application No 10 of 2017)

RULING

The applicants, Winnie Mwaka Mjambili and Mark Fande Mjambili (suing as the Administrator of the Estate of Peter Bambula Mjambili) are seeking leave to extend time to file an appeal out of time against the decision of Olola, J. delivered on 29th November 2017.

To this end, they filed a Notice of Motion dated 5th March 2019 which was supported by the affidavit of Winnie Mwaka Mjambili. Soon thereafter, the respondent filed a Notice of Motion dated 10th April 2019 supported by the affidavit of Aisha Said Amri where orders were sought for the Record of Appeal dated 23rd November 2018 to be struck out. On 20th May 2019, the applicants filed an amended Notice of Motion dated 16th May 2019 supported by the affidavit of Winnie Mwaka Mjambili wherein the following orders were sought;

1. That the Honourable Court do extend time for the applicant to file an appeal out of time against the Ruling/decision of the Honourable Justice J.O. Olola delivered on 29th November 2017.
2. That the Record of Appeal dated 23rd November 2018 and filed on 28th February 2019 be deemed to have been filed within time.

When the Notice of Motion of 5th March 2019 came up for hearing before me, **Mr. Tindi** learned counsel for the applicants sought leave to file the amended Notice of Motion dated 16th May 2019. In his submissions, Mr. Tindi, learned counsel for the applicants sought leave of the Court to have the amended Notice of Motion admitted and heard in place of the Notice of Motion dated 5th March 2019 which was filed earlier. Counsel stated that he would rely on **section 100** of the **Civil Procedure Act** which gives the court general powers to amend pleadings, and that the purpose of the amendment was to include a prayer for the record of appeal filed on 23rd November 2018 to be deemed as filed within time. It was asserted that the respondents would suffer no prejudice, as they would have an opportunity to respond to the amended motion; that, if anything, it was the applicants who would be prejudiced if the amended Notice of Motion seeking to extend time to

lodge the record of appeal was not admitted. Counsel further asserted that it was in the interest of both parties for all issues to be addressed together in the motion; that the record of appeal had already been filed, and the only issue was whether it should be admitted or not. And that finally, the objection to admission of the amended notice of motion was premature as no hearing date has been fixed in respect of the appeal.

In response to this application, **Mr. Ole Kina**, learned counsel for the respondents strenuously opposed the application. Counsel begun by stating that **section 100** of the **Civil Procedure Act**, had no bearing on the application, as the Appellate Jurisdiction Act, and the Court of Appeal Rules govern proceedings in this Court. Counsel referred to the Notice of Motion dated 10th April 2019 which seeks to strike out the applicants' record of appeal dated 23rd November 2018 and filed on 20th February 2019, and asserted that **rules 82 and 84** of the **Court of Appeal rules**, which require the application to strike out to be filed within one month of service of the record of appeal had been complied with, and that therefore, the amended notice of motion should be addressed separately. It was further argued that, since the motion to strike out the record of appeal is awaiting hearing, if the court were to permit the applicant's amended notice of motion to be heard before the application to strike out the record of appeal, this would undermine the earlier in time striking out application. Counsel urged the Court to consider placing both applications, that is, the amended notice of motion, as well as the application to strike out the record of appeal before a full bench, so that the both applications can be heard at the same time.

Mr. Omondi, learned counsel for the 1st respondent holding brief for Mr. Nyachiro supported Mr. Ole Kina's submissions, and had nothing further to add.

In a brief reply, Mr. Tindi conceded that both applications be heard together before a full bench of this Court.

It is apparent from the pleadings and submissions that both parties consider the status of their respective applications to be precarious, depending on which application is heard first. This is because after the applicant filed its Notice of Motion of 5th March 2019, it was followed by the respondent's motion of 10th April 2019 seeking to strike out the record of appeal. This motion was then followed by the applicant's amended motion of 16th May 2019. The respondent argues that the motion to amend will prejudice its motion to strike out, and since its motion was filed before the motion to amend, it should be heard and determined before the amended motion.

There would have been no difficulty in hearing and disposing of both motions at the same time, save that under this Court's rules a motion to strike out an appeal is the preserve of a full court, and though a single judge has jurisdiction to hear and determine an application to extend time, as well as the application to amend the application to extend time, the single judge does not have jurisdiction to hear and determine an application to strike out an appeal. And in fairness to the respondent whose application was filed in April, they have been awaiting a hearing date before a full court.

The applicant has sought leave to file an amended motion. **Rule 16** of this Courts rules allows for admission of amendments, so that all matters can be placed before the Court for consideration. Since the respondent's objection to the filing of the amended motion is specific to having their application prosecuted prior to the hearing and determination of the applicant's amended motion, as opposed to any other substantive reason, leave is hereby granted to the applicant to file the amended motion dated 16th May 2019.

Further, to forestall any prejudice being visited on either party, I order that both applications, that is the applicants' amended motion of 16th May 2019 and the respondents' motion to strike out dated 10th April 2019 to be placed before the full court for hearing and determination together on a priority basis. Costs in the application.

It is so ordered.

Dated and Delivered at Malindi this 20th day of June, 2019.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR