



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 27 OF 2019

BETWEEN

RAPHAEL MUSILA MUTISO.....1ST APPLICANT

MATTHEW MUTISO.....2ND APPLICANT

KALOKI MUSILA.....3RD RESPONDENT

NZIOKA MUSILA.....4TH RESPONDENT

AND

JOSEPH NDAVA NTHUKA.....1ST RESPONDENT

RUTH KAMENE NDUVA.....2ND RESPONDENT

(An application to seek leave to file and serve a Notice of Appeal and Record of Appeal out of time against the judgment of the High Court at Machakos (M.N.

Nduma, J) dated 24th November 2017)

In

HCCC No. 220 of 2010

RULING

On 22nd September, 2017 Angote, J of Environment and Land Court at Machakos in dismissing the applicants' amended counter-claim and allowing the respondents' suit ordered the eviction of the former from the suit land and further restrained them by an order of permanent injunction from "entering, remaining, tilling or in any other manner howsoever from interfering" with the suit land.

The applicants were aggrieved and ought to have lodged their notice of appeal within 14 days from the date of the dismissal of their counter-claim but did not, hence the instant application for enlargement of time to do so.

On the strength of a long line of authorities it is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. See **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Appeal No. 255 of 1997.

After parties put in their written submissions in the court below the applicants received a notification that judgment would be rendered on **2nd June, 2017**. It was however not delivered on that day and counsel representing the applicants continued to make follow ups by writing a letter while the 1st applicant deposed in his affidavit of 29th January, 2019 that in July, 2018 he personally went to the registry to find out when the judgment would be delivered. It was on that occasion that he learnt that judgment had in fact been delivered on 22nd September, 2017; that on 15th October, 2018 they filed an application similar to this for enlargement of time but had to withdraw it when they realized that the names of the parties were mixed up.

The applicants have urged me to allow the application as they have lived on suit land since 2004; that the respondents held it in trust for them; that if not restrained the respondents will evict them; and that for that reason they have an arguable appeal.

The respondents have argued on their part that it took the applicants upto one year to ascertain the position of the judgment; that the applicants have not explained why they did not file this application once they learnt in July, 2018 that judgment had been delivered; that instead they took 3 months to file the application that was subsequently withdrawn; that it was not necessary to have copies of the proceedings and judgment in order to file a notice of appeal; and that the intended appeal would be frivolous.

Rule 4 of the Court of Appeal Rules grants a single judge the power to extend the time limited by the Rules, or by the Court or of any superior court, **“on such terms as it thinks just”**. Pursuant to this rule and on the authorities of a long line of decisions, the leading one being **Leo Sila Mutiso V Rose Hellen Wangari Mwangi**, Civil Application No. Nai. 255 of 1997, as a single judge I am only required to satisfied myself that the delay was not inordinate; that the reason or reasons for the delay is or are plausible; that granting the relief will not be prejudicial to the respondent; and (possibly) that the appeal has reasonable chances of succeeding if the application is granted.

Though the judgment was delivered on 22nd September, 2017 without notice to the applicants, they learnt about the delivery in late July, 2018 and filed the withdrawn application three months later and the instant one on 30th January, 2019, a further period of three months from the date of the withdrawn application and a total of five months from the date the applicants learnt that the judgment had been delivered.

In an application for extension of time the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation. There are, on the other hand many decisions where delays of many months and even years have been excused because the applicant in those applications provided plausible explanation See: **Kamau Mugwima V Nganga Njoroge & 3 Others**, Civil Application No. Nai 60 of 2006 where the delay was 392 days. In the present case, while the delay before July 2018 has been explained on the failure by the court to notify the parties of the date of delivery of judgement, there has been no attempt to explain the delay thereafter.

So, although the delay was not inordinate, the reason for the delay has not been furnished. I believe that granting the extension of time will be prejudicial to the respondents considering that the judgment was rendered nearly two years ago. Without expressing any definitive position, I also do not think the appeal has any reasonable chances of succeeding as I think trust was not proved.

In the result this application must fail. It is accordingly dismissed. I make no orders as to costs.

Dated and delivered at Nairobi this 19th day of July, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR