



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 16 OF 2019

BETWEEN

PETER KIRAGU MWANGI

AND 39 OTHERS.....APPLICANTS

AND

TSANGWA NGALA CHOME.....1ST RESPONDENT

TOWN COUNCIL OF MARIAKANI..... 2ND RESPONDENT

KETRACO COMPANY LTD.....3RD RESPONDENT

MWABEJA, MWAMUNDU &

MWAKAI CLANS.....4TH RESPONDENT

THE ATTORNEY GENERAL..... 5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

KATEMBE NZEMBE LEWA & 13 OTHERS7TH RESPONDENT

OSCAR MUMO NZANAH.....8TH RESPONDENT

HAMISI YAWA & 34 OTHERS9TH RESPONDENT

(Being an application for extension of time and leave to appeal out of time from judgment and decree of the Environment and Land Court at Malindi, Angote, J. delivered on 19th July 2018

in

Malindi ELC No. 243 of 2014

formally Mombasa Environment and Land Court Case No. 95 of 2011)

RULING

By a Notice of Motion dated 27th March 2019 premised on *sections 3A and 3B* of the *Appellate Jurisdiction Act* and *rules 4, 42, and 47* of the *Court of Appeal Rules*, the applicants sought orders for; (i) extension of time within which the applicants could lodge and serve a Notice of Appeal and be granted leave to file an appeal and or to participate in all pending appeals arising from the impugned judgment and ii) the

affected parties to be granted leave to participate and be heard together with the other appellants or respondents in all appeals emanating from the judgment of the Environment and Land Court (Angote, J.) delivered on 19th July 2018.

The application was brought on grounds that the applicants did not participate in the *ELC Case No. 243 of 2014* in the Environment and Land Court as they were unaware of its existence; that they are in possession and have been residing on various portions of all that parcel of land known as *Kilifi/Madzimbani/Mitangoni/B/1 (the land parcel)* in respect of which the 1st respondent, **Tsangwa Ngala Chome** holds title; that by the time the area was declared an adjudication area, the applicants who were in occupation were not invited to participate in the adjudication process; that as a consequence, the 1st respondent's title was obtained fraudulently and irregularly, which fact the applicants intend to prove before the Court. They further contended that they did not participate in any of the earlier suits concerning the land parcel.

It was claimed that the failure or delay in filing the Notice of Appeal against the impugned judgment was not deliberate but was occasioned by ignorance of the existence of the suit; that two other appeals are pending before this Court, namely, *Malindi Civil Appeal 126 of 2018 Oscar Mumo Nzanah vs Tsangwa Ngala and Others* and *Mailndi Civil Appeal No. 127 of 2018 County Government of Kilifi vs Tsangwa Ngala Chome and Others* which the applicant would wish to take part in. Their case was that they stand to suffer immense prejudice if they are not allowed to exercise their constitutional right to be heard, and that in the event the orders are granted no prejudice will be suffered by any of the parties.

In support of the motion **Dickson Oigara Okero** swore an affidavit on behalf of the applicants which largely repeated the grounds of the motion.

The 1st respondent filed replying and supplementary affidavits on 24th May 2019 and 12th July 2019 where it was deposed that the applicants were provided an opportunity to join *ELC Case No. 243 of 2014 (Malindi)*, but they declined to do so, as they were apprehensive that their participation would prejudice their case. It was averred that the trial court's judgment made provision for their participation, and all that was required of them was to present themselves for identification, verification and validation so as to qualify to participate in the settlement scheme.

It was further deposed in the supplementary affidavit, that the 1st to 14th applicants attended a meeting to negotiate an out of court settlement, and in particular Peter Mangi Kiragu, Patrick Masai, Andrew Mwinzangu and other representatives of the Mwakai clan held a meeting in Nairobi on 23rd May 2017, which was demonstrative of the fact that all along the applicants were aware of the suit.

As a brief background, the dispute as can be discerned from the record, is concerned with the ownership of the land parcel. The 1st, 4th and 5th respondents claim that by virtue of the parcel having been occupied by their ancestors, each claimed to own it to the exclusion of the other. The 1st respondent's case is that the dispute over the land parcel was between the Ngala and the Duruma families and dated back to 1970. The ownership claims had led to various suits being filed in court. Of relevance was suit filed in a Complaint dated 14th April, 2011 against the 3rd respondent amongst others to restrain it from setting apart 200 acres to enable it construct a substation for the transmission line destined for the Mariakani area. After negotiations, a consent was made between the 1st, 2nd and 3rd respondents on 11th May 2012, that allowed 200 acres to be set apart, and the 1st respondent accepted as the rightful owner of the land parcel, thus settling the dispute. In accordance with the law, the 3rd respondent deposited Kshs. 26,000,000 with the District Commissioner as compensation to persons affected by the setting apart of the 200 acres. Later the 4th and 7th respondents joined the suit. The 4th respondent claimed that they were the first occupiers of the land parcel, and had for generations resided on various portions. The 5th respondent filed a similar claim.

On 27th February, 2017, the consent between the 1, 2, and 3rd respondents was adopted as a judgment of the court and together with the setting aside of 200 acres to the 3rd respondent, the consent recognized the Town Council of Mariakani's title over Land Reference Number 29836. It also confirmed the collection of Kshs. 26,000,000 from the District Commissioner amongst other agreed terms.

The consent left the trial court to determine the 4th, 5th and 7th respondents' claims. And in the end, the court declared that the land parcel was owned by the Mumba Chome Ngala clan, and ordered *inter alia*, the National Land Commission to resettle the parties who were living on the land parcel.

When the parties appeared before me, by consent, it was agreed that prayer 3 of the application which sought an order for the applicants to be joined in *Malindi Civil Appeal No. 126 of 2018 Oscar Mumo Nzanah vs Tsangwa Ngala and Others* and *Mailndi Civil Appeal No. 127 of 2018 County Government of Kilifi vs Tsangwa Ngala Chome and Others* be abandoned.

Mr. Onyango, learned counsel for the applicants begun his submissions by asserting that the Notice of Appeal ought to have been served on the applicants who are directly affected by the appeal as they have an interest in the subject property of the appeal. The appellants are the 2nd and 8th respondents, and all the others are parties to the appeal. The appeal is based on the Notice of Appeal lodged by the 8th respondent who did not oppose the application, which was an admission that the Notice of Appeal was not served on the applicants and that they are directly affected by the appeal.

In the event the reason specified above was insufficient, it was submitted that *sections 3A and 3B* of the *Appellate Jurisdictions Act* empowered this Court to grant the application sought. Counsel cited **MSK vs SNK [2010] eKLR** for the proposition that affected parties are entitled to justice. It was argued that the two pending appeals arising from the same judgment have not been fixed for hearing and as such the respondents will suffer no prejudice.

With regard to the 1st respondent's replying affidavit, it was submitted there was no evidence showing that the applicants were aware of the suit in the trial court, that the applicants were not parties to the suit, and nothing showed that they claimed any other interest in the County.

With regard to the allegation that the 1st to 14th applicants attended a meeting to negotiate an out of court settlement, apart from Mwabeya, Mwamwai and Mwamundu, none of the other parties are involved in the appeal.

Mr. Ogada, learned counsel holding brief for Prof. Ojienda, SC for the 8th respondent supported the application, as well as the applicants' submissions. Counsel asserted that the inclusion of the minutes in the supplementary affidavit were an afterthought, and intended to deny the applicants the right to be heard.

Mr. Kadima, learned counsel for the 1st respondent opposed the application. Counsel submitted that the persons who sought to be joined in the appeal are not known, since some of the persons who have signed the undated Authority to Act and Represent them in the appeal did not indicate their identity card number; that the failure to authenticate the signatures with an identity card was fatal as it rendered them to be fictitious entities or 'professional squatters'.

Turning to the 1st respondent's replying affidavit, counsel asserted that the applicants were losers in the Tribunal proceedings, where the objectors were the successful party. They were invited to be joined in the proceedings before the trial court but declined, and this application is an attempt to appeal against the decision of the trial court from the back door.

As to whether the delay of three months was explained, counsel asserted that it was not. The delay was self-created, and should not be the basis upon which this Court should exercise its discretion to extend time.

Learned counsel **Mr. Shimalla**, for the 4th respondent and also holding brief for Mr. Muchiri for the 4th respondent supported the 1st respondent's submissions, and had nothing further to add.

On his part **Mr. Kiarie Kariuki**, learned counsel for the 3rd respondent did not take a position on the issue.

An application for extension of time is governed by **rule 4 of** this Court's Rules. As a single judge, my jurisdiction is limited to determining whether to exercise my discretion to extend time for filing of the appeal. Under **rule 4**, it is settled that, the Court has unfettered discretion on whether or not to extend time for filing of an appeal. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

Bearing these principles in mind, I will begin by ascertaining the length of period of delay. The Environment and Land Court rendered the impugned judgment on 18th July 2018, and this application was filed on 26th March 2019. In effect, an 8 months' delay in filing of an appeal.

As to whether the period of delay has been explained, when the applicants' motion and the affidavit in support is considered, there is not much to go by in so far as reasons for delay are concerned. The most that was proffered was that, the failure and or delay in filing the Notice of Appeal was not deliberate, but was “...occasioned by their ignorance of the existence of the suit”.

In seeking to rebut this contention, the 1st respondent asserts that the applicants were at all times aware of the proceedings in the trial court but declined to participate; that at some point they were part of negotiations between the parties that were aimed at hammering out a consent. They could not therefore purport to plead ignorance of *ELC Case No. 243 of 2014*.

The parties' averments notwithstanding, what requires to be addressed is whether the applicants have provided a satisfactory explanation for the 8 months' delay.

As stated above, there is little or no information provided on the cause or causes of the 8 month delay. Besides indicating that they were unaware of the date of delivery of the judgment, the applicants have not indicated when and how they came to learn of the judgment, or the steps taken to file the Notice.

Conversely, despite the 1st respondent's assertion that they were aware of the proceedings, which may indeed have been the case, it was not demonstrated, that the applicants followed the proceedings to the point where they would have known the judgment date. The respondent has not also shown that they were served with a notice to attend court for delivery of judgment, or that they were served with the judgment following its delivery, and that as a consequence, the applicants deliberately delayed the filing of the Notice of appeal. Clearly, if they were not parties to the suit in the ELC, they would not have been expected to know when the judgment would be delivered. Given the circumstances in which the applicants found themselves, I am persuaded by their explanation that they were not aware of the date the judgment was delivered as without anything showing that they were, it would follow that they were not in any position to know when to file the Notice of Appeal.

Turning to the question of the likelihood of the intended appeal's success, the parties did not address the court on this condition, and the record did not disclose the inclusion of a draft Memorandum of Appeal. Without information on the nature of their appeal, I am unable to opine on the success or otherwise of the intended appeal. But having said that, the applicants' are disputing the 1st respondent's ownership of the land parcel they also contend that his title was fraudulently and illegally obtained. Such assertions would require documentary proof that will require to be tested. It therefore begs the question as to how they intend to canvass these allegations in the appeal.

On whether an order of extension will prejudice the respondent, in the case of Mwaniki Njoroge Kamau & Another vs Lee Sheth Poong Civil Application No Nai 55 of 1998 (unreported) Lakha, JA stated,

“As it often happens, the application highlights two principles, each in itself is salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by rule 4, a discretion to be exercised in accordance with the requirements of justice in the particular case.”

That said, though the parties did not address me on the issue, it cannot be gainsaid that land disputes are enduring and emotive. In such disputes the interests of the parties are better served when comprehensively ventilated, with a view to having them concluded with finality. I am not convinced that by extending time for filing of the Notice of Appeal that the parties will suffer significant prejudice in the short term, as to my mind, the long term gain of having the dispute settled once and for all far outstrips any short term discomfort the parties may experience. I would add that it is not lost on me that two other appeals arising from the same judgment are pending before this Court, and therefore, an additional one will not be of detriment to the parties.

In the result, the applicants’ motion dated 27th March 2019 is meritorious. It is allowed on the following terms;

1. The applicants to file and serve a Notice of Appeal within fourteen (14) days from the date of this ruling.
2. Thereafter the applicants shall file and serve the record of appeal within sixty (60) days from the date of this ruling.
3. Each party to bear their own costs.

Dated and Delivered at Mombasa this 26th day of September, 2019.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR