



IN THE COURT OF APPEAL

AT NYERI

(CORAM: D. MUSINGA, J.A.(IN CHAMBERS))

CIVIL APPLICATION NO. NYR. 56 OF 2017 (UR 38/17)

BETWEEN

ANN WAMBUI ELIZA.....APPLICANT

AND

RUITA KABUTU.....RESPONDENT

(An Application from the judgment of the Environment and Land

Court at Kerugoya (Olao, J.) dated 11th November, 2016

in

E. L. C. No. 207 of 2013)

RULING

1. This ruling is in respect of an application by the applicant brought under **rules 4, 42, 74 and 82** of the **Court of Appeal Rules** and **Article 40** of the **Constitution of Kenya**. The applicant is seeking extension of time to file a notice of appeal against the judgment of **Olao, J.** delivered on 11th November, 2016 in **Kerugoya ELC No. 207 of 2013, Ruita Kabutu vs. Anna Wambui Eliza** where the applicant was the defendant.
2. The application was supported by the applicant's affidavit where she depones *inter alia*; that in the suit before the trial court the respondent was seeking a declaration that she was entitled to a parcel of land known as **KABARE/NYANGATI/826** under the doctrine of adverse possession; that the applicant instructed one Igati Mwai Advocate to represent her in the matter; that the said advocate filed a replying affidavit; and that the trial court issued directions to the effect that the Originating Summons be deemed to be a plaint and the replying affidavit be deemed as a defence.
3. Subsequently, the advocates of both parties consented to have the matter disposed of by way of written submissions but the applicant's advocate did not file any submissions, though he was served with the respondent's submissions.
4. The applicant further deponed that the judgment was written without her submissions and even on the day of its delivery her advocate did not attend court. The trial judge allowed the respondent's claim and the applicant, being aggrieved by the said judgment, made considerable effort to get in touch with her advocate without any success.
5. Subsequently, the applicant instructed **Mr. Gacheche wa Miano**, Advocate, to institute an appeal against the said judgment and the advocate filed a notice of appeal on 21st November 2016. The advocate also applied for certified copies of the proceedings and judgment vide a letter dated 19th December 2016.
6. Sometimes in March 2017, the applicant's advocate received a letter from the court registry informing him that the proceedings were ready for collection but each time he went to pick them up he was told that the file could not be traced. It was not until 18th May 2017 that the proceedings were eventually availed to the applicant's advocate.

7. The applicant believes that her intended appeal has high standards of success and has annexed a draft memorandum of appeal to her affidavit and urges this Court to exercise its discretion in her favour so that she can exercise her right of appeal.

8. The respondent opposed the application and filed a replying affidavit through the firm of **Ikahu Ng'ang'a & Company Advocates**. The respondent depones, *inter alia*; that no certificate of delay was sought so as to clarify when the proceedings were completed; that no reasons have been given as to why a notice of appeal was not filed in time since the applicant was present in court on 11th November, 2016 when the impugned judgment was delivered; and no good reasons have been advanced by the applicant for the delay in filing the intended appeal.

9. The respondent further averred that there was no evidence that the trial court file had been missing from the registry as alleged because on 10th February, 2017 the applicant instructed the firm of **C. S. Macharia & Co Advocates** to file an application seeking various orders and a ruling thereon was delivered on 31st May, 2017. The respondent urged this Court to dismiss the applicant's application.

10. When this application came up for hearing before this Court on 16th January, 2018, the applicant was represented by Mr. Gacheche wa Miano but there was no attendance on behalf of the respondent. Ikahu Ng'ang'a & Co Advocates, who are on record for the respondent, were served with a hearing notice on 5th December, 2017 but did not attend Court on the aforesaid hearing date.

11. Mr. Miano reiterated the applicant's averments as contained in her affidavit. He told the Court that he had personally made effort to trace the court file for purposes of collecting the certified copies of proceedings and judgment but the same could not be traced until sometimes in May 2017. Counsel further submitted that the applicant should not be made to suffer because of her former advocate's mistake in failing to file submissions as directed by the trial court. He urged this Court to allow the application so as to afford the applicant an opportunity to challenge the trial court's judgment.

12. I have considered the application, the affidavits on record and the brief submissions made by the applicant's advocate. Under **rule 4** of this **Court's Rules**, this Court is empowered to exercise its discretion to extend time for filing an appeal. That discretion has to be exercised judiciously and in accordance with the well known principles that have been set by this Court. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai. 251 of 1997**, this Court stated:

“It is now settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled 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 reason 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.”

13. Regarding the length of the delay, the judgment sought to be appealed against was delivered on 11th November, 2016. The notice of appeal is dated 21st November, 2016. The applicant as well as her advocate stated that it was filed on the same day, although the date stamp on the notice is not clear. It may therefore be presumed that the notice of appeal was filed within 14 days from the date of the judgment as required under **rule 75** of this **Court's Rules**.

14. On 22nd December, 2016 the applicant's advocate applied for copies of the proceedings and judgment for purposes of filing an appeal. He also paid a deposit of Kshs 1,000/= on the same day. The balance of Kshs 680/= for the proceedings and judgment was paid on 18th May, 2017. The applicant alleged that between March and 18th May, 2007 the court file was missing but has not provided any evidence in form of a letter written to the court in proof of that allegation. However, I have no reason to doubt Mr. Miano's word that he personally went to the registry a number of times to pursue the proceedings without any success.

15. In view of the foregoing, I find that the length of the delay, excluding the 60 days within which an intending appellant is required to file an appeal amounts to about 4 months. In my view that delay is not inordinate and the same has also been explained.

16. Regarding the chances of success of the intended appeal, I have perused the draft memorandum of appeal and I do not think that the proposed grounds of appeal are frivolous. I need not say more at this stage lest I prejudice the Bench that will hear the appeal.

17. Lastly, the respondent has not shown that she will suffer any prejudice if the application is granted. The dispute between the parties herein is over a piece of land measuring about 5.8 acres. I am of the considered view that it will be in the interest of justice to afford the applicant an opportunity to exercise her constitutional right of appeal.

18. In view of the foregoing, I grant the application dated 13th May, 2017. Each party shall bear its own costs of the application.

Dated and delivered at Nyeri this 21st day of February, 2018.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR