



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPLICATION NO. 50 OF 2017**

**BETWEEN**

**PERMANENT SECRETARY, MINISTRY OF**

**STATE FOR DEFENCE.....1<sup>ST</sup> APPLICANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> APPLICANT**

**AND**

**MAHAT KUNO ROBLE.....1<sup>ST</sup> RESPONDENT**

**MOHAMED MAHAT.....2<sup>ND</sup> RESPONDENT**

**AHMED MAHAT.....3<sup>RD</sup> RESPONDENT**

**DAISY MOHAMED.....4<sup>TH</sup> RESPONDENT**

**NAHIYA MOHAMED.....5<sup>TH</sup> RESPONDENT**

***(An Application for extension of time to file a notice of appeal out of time against the judgment of the Environment and Land Court of Kenya at Kerugoya (Olao, J.) dated 19<sup>th</sup> August, 2016***

***in***

**Constitutional Petition No. 10 of 2015)**

**\*\*\*\*\***

**RULING**

1. This application dated 28<sup>th</sup> April, 2017 and filed on 25<sup>th</sup> May, 2017 by the Hon. Attorney General for on and on behalf of the applicants seeks extension of time to lodge and serve a notice of appeal out of time, and it also seeks to have the notice of appeal dated 30<sup>th</sup> September, 2016 and filed on 5<sup>th</sup> October, 2016 deemed as properly filed and served.

2. The application was supported by two affidavits, the first one was sworn by **Mr. J. Motari Matunda**,

an Advocate of the High Court of Kenya practicing as a State Counsel in the Attorney General's Chambers, Nairobi, and the second one by **Mr. Saitoti Torome**, the Principal Secretary in the Ministry of Defence.

3. In his affidavit, Mr. Matunda deponed that the Environment and Land Court in Kerugoya delivered the judgment sought to be appealed from on 19<sup>th</sup> August, 2016 without any notice of its delivery to the applicants; that the failure to notify the applicants as aforesaid denied them the right to know the outcome of the judgment in good time, hence the delay in filing the notice of appeal; that on a routine check on various court matters on 25<sup>th</sup> September, 2016, he realized that the judgment had been delivered, and on 30<sup>th</sup> September 2016 he prepared a notice of appeal.

4. Mr. Matunda further stated that after lodging the notice of appeal he embarked on the process of obtaining a copy of the judgment. He however does not state when he eventually got the same. Copies of the judgment and the proceedings that were attached to the applicant's affidavit indicate that they were certified on 23<sup>rd</sup> November, 2016. The documents were therefore ready for collection on that day.

5. Having stated the reasons for the delay in filing the notice of appeal, counsel urged the Court to exercise its discretion in favour of the applicants, saying that they have “*substantial grounds of appeal and this being a matter of public interest, the applicants and the public at large will suffer irreparable loss if the orders in this application are not granted*” (sic).

6. On his part, Mr. Torome reiterated the reasons for the delay in filing the notice of appeal as advanced by Mr. Matunda. He added that the dispute between the applicants and the respondents is over a parcel of public land at Garissa that was reserved for military activities and is occupied by Garissa Military Camp.

7. Mr. Torome further stated that the land in dispute is at risk of being alienated if this application is not allowed. He added that alienation of the land in dispute will be a security risk.

8. The respondents filed a replying affidavit that was sworn on their behalf by **Ahmed Mahat**, the 3<sup>rd</sup> respondent. He stated that the respondents are the registered proprietors of various parcels of land that are in dispute (suit properties), and he exhibited copies of the certificates of lease in respect of each of those parcels of land.

9. The 3<sup>rd</sup> respondent further stated that the respondents filed a petition dated 17<sup>th</sup> February 2011 in the High Court at Nairobi and an amended petition dated 17<sup>th</sup> April 2012. The matter was transferred to the High Court at Garissa and subsequently to the Environment and Land Court at Kerugoya. The parties agreed by consent that the petition be canvassed by way of written submissions and counsel filed their respective submissions.

10. In the aforesaid suit the respondents were seeking, *inter alia*, a declaration that the applicants' act of trespassing on the suit properties and the threatened forceful acquisition of the same is a gross violation of the respondents' rights to private property and infringement of the protection afforded by **Article 40** of the **Constitution**. He added that the applicants have unlawfully demolished the boundary wall around the suit properties and threatened to forcefully acquire the suit properties on the mistaken assumption that it was government property.

11. Mr. Mahat further explained that by a letter dated 19<sup>th</sup> January 2016, the respondents' advocate requested the Attorney General to send his representative to the court registry on 29<sup>th</sup> January 2016, with a view to fixing a mention date but the office of the Attorney General failed to do so. The matter was set for mention on 7<sup>th</sup> April 2017 and the respondents' advocate served a mention notice upon the Attorney General's office; on 7<sup>th</sup> April, 2017 the trial court, having been satisfied that the mention notice was duly served upon the applicants, directed that judgment would be delivered on 19<sup>th</sup> August 2016.

12. The trial court entered judgment in favour of the respondents in terms of the petition, including an

award of Kshs 1,500,000.00 as general damages for violation of the respondents' rights under **Article 40** of the **Constitution**. The respondents' advocate sent a copy of the decree to the Attorney General's office for approval vide a letter dated 21<sup>st</sup> September, 2016. Shortly thereafter, the applicants filed the notice of appeal on 5<sup>th</sup> October, 2016, but the same was not served until 4<sup>th</sup> November, 2016, which was outside the stipulated period of time, seven (7) days from the date of its lodging, as per **rule 77 (1)** of the **Court of Appeal Rules**.

13. The respondents further stated that since 2011 the applicants have denied the respondents enjoyment of the suit properties and even after delivery of the impugned judgment the applicants have not complied with the orders that had been issued by the trial court.

14. Lastly, the respondents stated that the applicants' application for extension of time was filed nearly eight months after the filing of the notice of appeal and no reason had been advanced for that delay; and further, the applicants had not filed a draft memorandum of appeal to demonstrate that the intended appeal had any chances of success. For those reasons, the respondents urged this Court to dismiss the applicants' application.

15. When the application came up for hearing on 16<sup>th</sup> January 2018, Mr. Matunda made brief submissions reiterating the contents of his affidavit and that of Mr. Torome. He asserted that no mention notice was served upon the Attorney General's office as alleged by the respondents; that the applicants were not notified of the date of delivery of the judgment; that in his view, the delay in filing the notice of appeal had been properly explained.

**16. Miss Agwata**, learned counsel for the respondents, conceded that the applicants were not notified of the date of delivery of the judgment. They had however been invited to the court registry to fix a mention date for the court to indicate when the judgment would be delivered but they failed to show up. That notwithstanding, once the applicants' advocates became aware of the judgment they ought to have filed and served the notice of appeal promptly, counsel submitted. She further stated that the delay in service of the notice of appeal had not been explained at all. Further, the inordinate delay in filing the application, almost six months after filing the notice of appeal had not been explained. Citing this Court's decision in **Macwatt Estates Limited vs. Mbwani Limited [2001] eKLR**, counsel submitted that the Court cannot exercise its discretion in favour of an applicant who had not explained the delay in complying with the timelines as set by the Rules of this Court.

17. Ms. Agwata further submitted that in the absence of the draft memorandum of appeal, this Court is unable to gauge the chances of success of the intended appeal. She cited this Court's decision in **Hezron Alloys Nyachae vs. James Obiri Oenga & another [2016] eKLR**, where the Court held as follows:

***“Regarding the question of whether the appeal is arguable, with chances of success, I have been through the record, and observe that no draft memorandum of appeal was annexed that would have enabled me determine whether on its face, the appeal was arguable.”***

18. Regarding the prejudice that the respondents are likely to suffer if this application is allowed, the respondents' counsel submitted that the applicants had not complied with the judgment they intend to appeal from; were still occupying the suit properties unlawfully; and had not paid the amount of Kshs 1,500,000.00 awarded as damages. She urged the Court to disallow the application and award costs to the respondents.

19. In a brief rejoinder, Mr. Matunda conceded that the notice of appeal has not been served within the stipulated period of time, but in his view, the delay was not prejudicial to the respondent.

20. Mr. Matunda also conceded that the applicants had not filed a draft memorandum of appeal. That notwithstanding, the affidavit of Mr. Torome showed that the properties in dispute are occupied by the military and therefore the matter is of great public interest. He urged this Court to allow the application as prayed.

21. I have considered the application, the affidavits on record, submissions by counsel, and the cited authorities. Under **rule 4** of this **Court's Rules**, the Court exercises its discretion in considering an application for extension of time. That discretion must, however, be exercised judiciously. The factors that the Court must take into account in considering an application as the one before me include; the length of the delay, the reasons for the delay, the chances of success of the intended appeal and the degree of prejudice that may be occasioned to the respondent if the application is granted. See **Mwangi vs. Kenya Airways Ltd [2003] KLR 486**.

22. Although the respondents' advocate stated that they served the Attorney General's office with a mention notice as per their letter dated April 5, 2016, there was no proof to that effect, there was also no evidence that the applicants' advocates were aware of the date of delivery of the impugned judgment. The applicants' counsel cannot therefore be blamed for failure to attend court for delivery of the judgment.

23. That notwithstanding, the applicants' advocates became aware of the judgment on 25<sup>th</sup> September, 2016. They did not prepare the notice of appeal until 30<sup>th</sup> September 2016. They filed it on 5<sup>th</sup> October, 2016 but served it on the respondents' advocate on 4<sup>th</sup> November 2016. The applicants were in clear violation of **rule 77 (1)** of this **Court's Rules** which requires the notice of appeal to be served within seven (7) days from the date of its filing. That is not all. Although the applicants' counsel was well aware that he had filed and served the notice of appeal out of the prescribed period of time, he did not file the application for extension of time until 25<sup>th</sup> May, 2017. All these aspects of delay were not explained at all.

24. It is trite law that before this Court can exercise its discretion under **rule 4** of its Rules, every delay must be explained by the party who is at fault. See **Rael Munyaka & 6 Others vs. Waitaluk Land Disputes Tribunal & 2 others [2007] eKLR**. Similarly, in **Gachuhi Muthanji vs. Mary Njuguna [2014] eKLR**, this Court held that extension of time is not a right of a party, it is a discretionary remedy that is only available to a deserving party who has discharged the burden of laying a basis to the satisfaction of the Court that the Court should exercise its discretion to extend time in his favour.

25. In **Joel Tirop Busienei vs. David Randichi [2016] eKLR**, this Court held as follows:

***“The timelines prescribed under this Court's Rules are not ornamental, they are important if timely dispensation of justice is to be achieved. They provide predictability and level playing field. Where a party has been unable to comply with the same, he has to offer an appropriate explanation before the Court can allow extension of time.”***

26. In my view therefore, all the delay from the date when the applicants' advocates became aware of the judgment until the date they filed the application under consideration has not been explained at all.

27. Turning to the third principle which the Court has to take into consideration in an application for extension of time, that is, the chances of success of the intended appeal, Mr. Matunda did not proffer any reason for the failure to file a draft memorandum of appeal. It is not enough for the applicants to simply state that the suit properties are occupied by the military; they needed to demonstrate that there is a high likelihood that an appellate court will find that their occupation is lawful and does not contravene the protection accorded to the respondents under **Article 40** of the **Constitution**.

28. In the impugned judgment the learned judge found that the respondents had valid titles to the suit properties; that no evidence was adduced by the applicants to show that the suit properties had at any time been gazetted as public land for use by the Garissa Barracks, and neither had the applicants demonstrated that they were in lawful occupation of the suit properties. That notwithstanding, the applicants had demolished the respondents' boundary wall in contravention of a lawful court order. Against such a background, the applicants ought to have filed a draft memorandum of appeal to demonstrate that the intended appeal has high chances of success. They did not.

29. Lastly, the respondents have demonstrated that they shall suffer prejudice if the orders sought by the applicants are granted. The applicants are still in occupation of the suit properties and have not also paid

the amount of Kshs 1,500,000.00 that was awarded to the respondents by the trial court.

30. For all the aforesaid reasons, I am not inclined to exercise the Court's discretion in favour of the applicants. Consequently, the application dated 28<sup>th</sup> April 2017 is dismissed with costs to the respondents. It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of February, 2018.**

**D. MUSINGA**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**