



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 238 OF 2017**

**BETWEEN**

**JULIUS OCHIENG OLOO.....1ST APPLICANT**

**FLORENCE THIRA OCHIENG.....2ND APPLICANT**

**VERSUS**

**LILIAN WANJIRU GITONGA.....RESPONDENT**

***(Being an application for an order to extend time for filing the notice of appeal and the record of appeal from the ruling of the Environment and Land Court of Kenya at Nairobi (Obaga, J.), dated 27th June, 2017***

*in*

*ELC No. 225 of 2011)*

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**Ruling**

[1] This is an application under Rule 4 of the Court of Appeal Rules for extension of time to file a notice of appeal and a record of appeal.

[2] The Court has unfettered discretion under Rule 4 aforesaid to extend time on terms it thinks just whether before or after the doing of the act. However, in considering whether or not to extend time the Court has to act judicially guided by principles laid down by this Court in many decision including in the case of **Wasike v. Swala [1984] KLR 591**. The Court is required to consider, among other things, whether the appeal or the intended appeal has merit; whether there is an inordinate delay in filing the application; and, whether a respondent shall suffer undue prejudice if time is extended. The constitutional principle in **Article 159(2)** of the Constitution that justice shall be administered without undue regard to procedural technicalities is a paramount guiding principle.

[3] The application is supported by the grounds on the body of the application and in the supporting affidavit of the 1<sup>st</sup> applicant. The application is opposed on the grounds contained in the replying affidavit of the respondent. The judgment of **Jeanne Gacheche, J.** dated 1<sup>st</sup> April 2011 in High Court Judicial Review Application No. 1355 of 2001 (which is attached to the respondent's replying affidavit) shows that the underlying dispute between the parties relates to the ownership of **L.R. No. Nairobi/Block 63/625 Jamhuri Estate**.

[4] The applicant's claims that the former Nairobi City Council allocated the Plot to **P. Tiema** who sold the plot to **Lucy Muthoni Mmari** who in turn subsequently sold the plot to the applicants. On the other hand, the respondent claims that the plot was directly allocated to her by Nairobi City Council. The applicants filed High Court Judicial Review Application No. 1355/2011 for an order of mandamus which was dismissed on 1<sup>st</sup> April 2011 on the ground that the dispute should have been brought by way of a suit. The applicants thereafter filed ELC

suit No. 225 of 2011 claiming the same property. However, the suit was dismissed by *Nyamweya, J.* on 27<sup>th</sup> January 2015 for want of prosecution. In February 2015, the applicants filed an application for review of the order of dismissal but the application was dismissed by *Obaga, J.* by a ruling delivered on 27<sup>th</sup> June 2017. The applicants intend to appeal against the dismissal of that review application.

[5] The applicants filed a notice of appeal on 5<sup>th</sup> September 2017. In addition, on 4<sup>th</sup> May, 2018 the applicants filed **Civil Appeal No. 148 of 2018** while the application was pending for hearing. *Mr. Gitonga*, learned counsel for the respondent submitted that the filing of the appeal was improper. Rule 12(1) of this Court's Rules, 2010 provides:

***“The Registrar or the register of a superior court, as the case may be, shall not refuse to accept any document on the ground that it is lodged out of time but shall mark the document “lodged out of time” and inform the person lodging it thereof.”***

It is permissible therefore to file an appeal out of time and thereafter make or prosecute an application for extension of time for filing the appeal.

[6] As regards the delay, the applicants aver that the ruling was delivered without notice to the parties; that it is upon inquiry by the respondent's advocates from the applicants advocates whether the ruling was delivered that both advocates learnt from the registry that the ruling was in fact delivered; that the applicants applied for a copy of the proceedings on 4<sup>th</sup> September 2017 and filed a notice of appeal on 5<sup>th</sup> September 2017. The respondent states that the ruling was scheduled for delivery on 26<sup>th</sup> June 2017 which was declared a public holiday; that it was read on 27<sup>th</sup> June 2017, the next working day and that the applicants did not take steps to find out whether or not the ruling was delivered on 2017. The respondents admit that the applicants' advocates inquired from the respondent's advocates on 16<sup>th</sup> August, 2017 whether the ruling was delivered.

[7] I have considered the issue of delay. The learned judge recorded that the ruling was delivered in the absence of the respective advocates for the parties. It is not probable that the advocates for the parties were given notice that the ruling would be delivered on the day following the public holiday and no such notice had been shown. The fact that the applicants were making an inquiry on 16<sup>th</sup> August 2017 from the respondents' advocates supports the applicants' contention that they had no knowledge of the fact of delivery of the ruling. I find the explanation by the applicants that they came to know of the delivery of the ruling on 2<sup>nd</sup> September, 2017 to be credible. The notice of appeal was filed within three days thereafter. The present application and the supporting affidavit are dated 6<sup>th</sup> September, 2017 although it was lodged at the registry on the 16<sup>th</sup> October 2017. I am satisfied that the delay is not inordinate and has been reasonably explained. An award of costs would be adequate compensation

[8] It is true that the grounds of appeal have not been disclosed in the application. It is clear however that the appeal is against the ruling declining to reverse the dismissal of the suit for want of prosecution. The dismissal of a suit for want of prosecution is an exercise of judicial discretion. The review jurisdiction could be exercised on ground of sufficient reason which includes the wider interest of justice. The dispute relates to land and now that the appeal has been lodged albeit out of time, it is in the interest of justice that the applicants be given an opportunity to prosecute it.

[9] The respondent will no doubt be prejudiced by extension of time as the delay in the development of the property will be prolonged. However, the applicants have been litigating over the property for a long time. It is in the interest of parties that the dispute should be finally resolved.

[10] For the foregoing reasons, the application is allowed and time is extended. The notice of appeal filed on 5<sup>th</sup> September, 2017 and the record of appeal filed on 4<sup>th</sup> May, 2018 are deemed to be properly filed. The applicants shall pay the costs of this application to the respondent.

***DATED and delivered at Nairobi this 25<sup>th</sup> day of May, 2018.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**