



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, JA (IN CHAMBERS) CIVIL APPLICATION NO. NAI 213 OF 2017 BETWEEN**

**CATHERINE NDUKU AND 11 OTHERS.....APPLICANTS**

**VERSUS**

**AFRICAN INLAND CHURCH.....RESPONDENT**

*(An application for extension of time to file notice of Appeal and stay of execution of the orders of eviction from the judgment of the High Court of Kenya at Nairobi (Gacheru, J.), dated 4<sup>th</sup> August, 2017*

*in*

*H.C.C.C. No. 37 of 2017)*

\*\*\*\*\*

**RULING**

[1] The applicants have brought this application under Rule 4 of the Court of Appeal Rules and seek an extension of time for filing a notice of appeal against the judgment of the Environmental and Land Court (**Gacheru, J**) delivered on 4<sup>th</sup> August 2017.

[2] By an originating summons filed in ELC, the respondent herein sought eviction of the respondent, Kenya Ports Authority, and others from Land Parcel No. 209/11924. The respondent averred that it obtained title to the land in 1990 that the applicants and others were illegally occupying the land and had erected temporary mabati business structures, kiosks, tea room and garage; that the respondent had issued notices to them to vacate and that despite being given time to vacate, they had refused to vacate the land. The Kenya Ports Authority gave evidence at the trial that the land claimed by the respondent was Aerodrome land belonging to Wilson Airport, the predecessor of Kenya Airports Authority, which was illegally excised from the Aerodrome land. It sought the cancellation of the title. By a judgment delivered on 4<sup>th</sup> August 2017, the ELC gave judgment for the respondent and ordered the applicants to give vacant possession of the land within a period of 45 days and in default the respondent to apply for an eviction order. The applicants filed a notice of appeal on 29<sup>th</sup> August, 2017.

[3] The application is supported by the grounds on the body of the application.

It is further supported by the affidavit of **Patrick Mugo**, who states *inter alia*, that the applicants were not notified of the date of judgment; that they learnt of the judgment from the Business Daily Newspaper of 21<sup>st</sup> August, 2017, that there are over 100 people who have occupied land and are operating businesses since 1990 and, that eviction would cause hardship and suffering to the occupants. The respondent did not file a replying. However, **Mr. Katwa Kigen** appeared for the respondents and opposed the application. He submitted that the respondent has been deprived of the use of the land since 1990; that the learned Judge recorded that all parties were served with the notice for delivery of the judgment; and that it would be wrong to exercise discretion in favour of the applicants.

[4] Rule 4 gives the Court unfettered discretion to extend time on such terms as it considers just. However, the discretion is exercised judicially and the Court is guided by principles developed by the Court and stated in many decisions including **Wasike v Swala [1984] KLR 59T**.

[5] The applicants were required to file the notice of appeal within 14 days of the decision. Thus the time for filing the notice of appeal expired on or about 19<sup>th</sup> August, 2017. The notice of appeal was filed about 10 days late, on 29<sup>th</sup> August 2017. The learned judge recorded that the judgment was delivered in the absence of all parties. The applicants have explained that they learnt of the judgment on 21<sup>st</sup> August 2017 upon reading a newspaper, a copy of which they have annexed. In the circumstances, the delay is not inordinate and has been reasonably explained.

[6] Although the applicants did not clearly articulate at the trial any right to occupation of the land, it was admitted by the respondent that the applicants and others have constructed temporary business structures and are running various business on the property since 2005. That is for

a period of over 10 years. From the point of view of the period given by the ELC to the applicants to vacate, the intended appeal is arguable.

[7] It is manifest that the respondents will suffer prejudice by extension of time as it would prolong the period of occupation by the applicants. However, balancing the prejudice that the applicants will suffer by denial of a right of appeal, and the prejudice that the respondents would suffer, and having regard to the fact that the applicants have been in occupation for over 10 years, it is in the interest of justice that the dispute should be finally determined by this Court.

[8] For the foregoing reasons, the application is allowed. The time for filing a notice of appeal is extended and the notice of appeal filed on 29<sup>th</sup> August 2017 is deemed as properly filed. The costs of the application shall be costs in the appeal.

***DATED and delivered at Nairobi this 18<sup>th</sup> day of May, 2018.***

***E. M. GITHINJI***

.....

***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**