



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 226 OF 2017

BETWEEN

**SIMON MURIITHI MAINA**

*(Suing on his behalf and on behalf of 33 others).....***APPLICANTS**

AND

**ANTHONY NZUKI & EMMANUEL KAKULA**

*(both being sued in the capacities as administrators of the estate of the late*

**RAPHAEL KAKULA NZUKI.....1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS**

**DIVISIONAL INTEGRATED DEVELOPMENT**

**PROGRAMMES COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

*(An application for extension of time and for leave to file the record of appeal from the Ruling and Order of the High Court of Kenya at Machakos (G. Dulu, J.) dated 22<sup>nd</sup> November, 2012*

*in*

**H.C.C.C. No. 18 of 2008)**

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**RULING**

[1] This application is for extension of time to file a record of appeal and is mainly brought under **Rule 4** of the **Court of Appeal Rules** which rule gives the Court discretion to extend time in terms that it may think just. The discretion to extend time is exercised judicially and upon principles laid by this Court in many decisions including in **Wasike v Swala [1984] KLR 591**.

[2] The application is supported by the affidavit of **Simon Muriithi Maina** sworn on his own behalf and on behalf of 33 others. The application is opposed on the grounds contained in the replying affidavit sworn by **Anthony Nzuki**, the 1<sup>st</sup> respondent herein.

[3] The appellant suing on his behalf and on behalf of 33 others filed Machakos High Court Civil Suit No. 18 of 2008 on 29<sup>th</sup> February, 2008 for specific performance of sale agreement entered between the applicant and 3<sup>rd</sup> respondent for the sale of LR. No. 12715/197 Plot No. 25 (**suit land**) and for an order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to execute transfer forms in favour of the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a defence and counter-claim. By the counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought an order of eviction against the applicant.

In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an application for interlocutory injunction to, among other things, restrain the applicant from entering and constructing on the suit land pending the hearing and the determination of the suit.

[4] The application was allowed by **Dulu, J.** by a ruling dated 22<sup>nd</sup> November, 2012. The applicant filed a notice of appeal against the ruling on 3<sup>rd</sup> December, 2012 and applied for certified copies of the proceedings on the same day. Further, the applicant filed an application dated 3<sup>rd</sup> December, 2012 for stay of execution of the ruling of Dulu, J. pending appeal. The application was heard in 23<sup>rd</sup> April, 2015 by **C. Kariuki, J.** who reserved the ruling for 17<sup>th</sup> July, 2015. The ruling was however delivered by **Angote, J.** on 10<sup>th</sup> March, 2017. By the ruling, Angote, J. ordered status quo on the ground to be maintained until the appeal is heard and determined on condition that the record of appeal is filed within 45 days from the date of the ruling.

[5] The present application was filed on 2<sup>nd</sup> October, 2017. The applicant states in the supporting affidavit that on 10<sup>th</sup> March, 2017 his advocates wrote to the Deputy Registrar inquiring whether the proceedings were ready but received no response. However, in September, 2017 the advocate followed the matter and was informed that the proceedings were ready for collection in June 2017.

[6] There has been an inordinate delay in filing the present application which has not been reasonably explained. The applicant blames the court for delay in supplying the proceedings. Before the ruling of 10<sup>th</sup> March 2017, when the Court put a condition that the appeal should be filed within 45 days, there is no evidence that the applicant or his advocates took any steps to obtain the proceedings other than merely writing the letter dated 3<sup>rd</sup> December 2012. Moreover, the intended appeal is against an interlocutory order given on 22<sup>nd</sup> November 2012. There is no evidence that the applicant has taken any steps to prosecute the suit which has been pending in the High Court for over 10 years. The prosecution of the suit would have resolved all the matters in controversy and would have rendered an interlocutory appeal unnecessary. Furthermore, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not taken steps to enforce the order of injunction. There is no imminent danger which would justify giving priority to an interlocutory appeal rather than the pending suit.

Lastly, the intended appeal is against the exercise of judicial discretion. The applicant has not stated in the body of the application or in the affidavit or otherwise that the intended appeal is not frivolous nor has he disclosed the ground of the intended appeal.

[7] In the premises, the application has no merit and is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**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**