



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: HANNAH OKWENGU, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 90 OF 2018**

**BETWEEN**

**FRANCIS BARASA LURARE ..... FIRST APPLICANT**

**PATRICK WEKESA LURARE ..... SECOND APPLICANT**

**AND**

**DENNIS NYONGESA MALOBA ..... RESPONDENT**

*(Application to grant the applicants leave to file and serve the Notice and Record of Appeal out of time arising from the judgment and ruling of the High Court of Kenya at Bungoma (Aroni,J.) dated 29<sup>th</sup> March, 2018*

**in**

**BUNGOMA SUCC. CAUSE NO. 112 OF 2006)**

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**RULING**

[1] By a notice of motion dated 30<sup>th</sup> August, 2018, Francis Barasa Lurare and Patrick Wekesa Lurare, (the applicants) seek leave to file and serve the notice and record of appeal out of time. The applicants are dissatisfied with the ruling made by the High Court in Bungoma (A. Aroni J) in objection proceedings relating to the estate of the applicants late father Joash Maluba Kitui (deceased). The learned judge had ruled in favour of the objector Dennis Nyongesa Maloba (respondent).

[2] The applicants explain that there was delay in filing the notice and record of appeal because the judgment was delivered without their knowledge and the applicants were misadvised that the ruling would be delivered on 19<sup>th</sup> July, 2018 and it was only later that they learnt that the ruling had actually been delivered on 29<sup>th</sup> March, 2018. The applicants maintain that the intended appeal raises crucial and pertinent issues and has availed a draft copy of the memorandum of appeal in which five grounds are listed.

[3] The respondent has filed a replying affidavit in which he objects to the applicant’s motion contending that the same lacks merit; that it is filed by an advocate who is not on record; that parties were notified of the date for delivery of judgment by the learned judge during the proceedings on 6<sup>th</sup> March, 2018. The

respondent urges the Court to bring the litigation between the parties to an end and allow the respondent to proceed with the execution.

[4] During the hearing of the application, the applicants were represented by **Mr Sichangi** while the respondent were represented by **Mr. Kundu**. Mr. Sichangi urged the Court to excuse the delay and allow the applicants leave to file the notice and record of appeal while Mr. Kundu urged the Court to dismiss the application.

[5] I have considered the application and the submissions made before me. Under Rule 4 of the Court Rules, I do have unfettered discretion as a single judge to extend time for the taking of any action under the Rules. Such discretion must however be exercised judicially. In this case the applicants have explained that there was a confusion regarding the date of delivery of the judgment and that they only learnt that judgment had already been delivered about 3½ months after the judgment had been delivered.

[6] It would appear that the applicant was let down by his previous counsel who ought to have known the exact position concerning the delivery of the judgment. The applicants have now changed counsel and have indicated their seriousness in pursuing the appeal. The subject of the appeal is land and it is only fair that the applicants be given an opportunity to pursue their right of appeal.

[7] Although the applicants contend that they will be prejudiced as they have already initiated the process of prosecuting the judgment, I am of the view that that should not be a ground for denying the applicants an opportunity to challenge the judgment. Indeed, the application before the Court is not one for stay of execution.

[8] For the above reasons, I allow this application, and grant leave to the applicants to file and serve the notice and record of appeal out of time and direct that the documents be filed and served within fourteen (14) days from the date hereof.

Orders accordingly.

**DATED and delivered at Eldoret this 6<sup>th</sup> day of December, 2018.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**