



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 16 OF 2018 (UR NO. 12 OF 2018)

BETWEEN

MARTIN SISIMWO.....FIRST APPLICANT

SISIMWO SILAS SILE.....SECOND APPLICANT

PHILIP NGEYWA SISIMWO.....THIRD APPLICANT

TONY SISIMWO.....FOURTH APPLICANT

AND

VIRGINIA CHELIMO..... FIRST RESPONDENT

MARGARET CHEPKIZA SISIMWO.....SECOND RESPONDENT

(Application for extension of time to file a Notice and Record of Appeal against the judgment of the High Court of Kenya at Bungoma (Mabeya, J.)

dated 7th April, 2014

in

BUNGOMA HC SUCC CAUSE NO. 89 OF 2002)

RULING

[1] The four applicants seek leave of the Court to lodge an appeal out of time against the judgment of the High Court at Bungoma delivered on 7th April, 2014 in Bungoma High Court Succession Cause No. 89 of 2002. The application is in essence an application for extension of time under Rule 4 of the Court of Appeal Rules (Rules) for lodging a notice of appeal and record of appeal out of time. The applicants are some of the beneficiaries of the estate of Stephen Baron Sisimwo who died on 12th June, 1998 (deceased).

[2] The deceased was survived by two widows; eleven (11) sons and seven (7) daughters. Each of two widows has nine children. The estate of the deceased comprised of fourteen (14) parcels of land (farms and plots); several motors; tractors and cattle.

After the appointment of administrators, the beneficiaries could not agree on the mode of the distribution of the estate. The dispute on the distribution of the estate was eventually heard by the High Court (Mabeya J). By a judgment delivered on 7th April, 2014, the High Court distributed the estate to the beneficiaries and confirmed the grant of letters of Administration.

Each of the immovable properties was distributed to specific beneficiaries. For instance, Musengi Farm land parcel No. 2058/7 comprising of 130 acres was distributed amongst seven beneficiaries and the acreage of each beneficiary specified.

[3] This dispute relates to Cherongos farm parcel No. 2058/5 comprising of 105 acres which was distributed as follows:

- (1) Martin Sisimwo - 24 acres
- (2) Tony Sisimwo - 24 acres
- (3) Kisa Sisimwo - 15 acres
- (4) Margret Chepkiza Sisimwo - 15 acres flat and arable
- (5) Virginia Chelimo - 15 acres flat and arable
- (6) Violet Sisimwo - 9 acres flat and arable

In addition, Tony Sisimwo and Martin Sisimwo were allocated 3 acres each in farm known as Tiot Luget 21 while violet Sisimwo was allocated 5 acres in farm known as Cherongos 2058/4.

[4] While distributing the estate the learned judge made a finding on the basis of the evidence that a part from the two widows, the deceased did not settle any of the beneficiaries on any specific property during his lifetime.

From the averments in the application and in the supporting affidavit sworn by Martin Sisimwo, the 1st applicant herein, it is apparent that if the application is allowed the applicants will be contending that the deceased had settled each of them on portions of Cherongos 2058/5 which each beneficiary had substantially developed and that the allocation of a total of 30 acres to the respondents would dislocate them. They would also be contending that the two respondents should get other lands in another farm in exchange for the 30 acres.

[5] The Court has unfettered discretion under **Rule 4**, *inter alia*, to extend time for lodging a notice of appeal and record of appeal on terms that the Court considers just. However, the discretion should be exercised judicially having regard to the circumstances of each case. In deciding whether to exercise its discretion in favour of a party, the Court is guided by such factors as the merits of the intended appeal or appeal; the length of delay in making the application; the reasons for delay, the prejudice, if any, that a respondent is likely to suffer if the application is allowed and the interest of justice.

[6] The applicants state that the intended appeal has high chances of success and that if the application is not allowed they would suffer irreparable and substantial loss. The grounds of intended appeal in the draft memorandum of appeal include the grounds that the learned judge erred; in finding that none of the beneficiaries had been settled by deceased in any of the properties in his lifetime; in finding that any development carried out by beneficiaries on the properties they have been occupying is subject to final distribution of the estate and in distributing the estate inequitably.

The Respondents stated in the replying affidavit sworn by Virginia Chelimo 1st respondent herein that the intended appeal is not arguable and lacks any chances of success because the land belonged to the deceased; the applicants cannot dictate where beneficiaries should be allocated his share; and the intended appeal does not challenge the entitlement of the respondents as beneficiaries of the estate.

[7] As the learned Judge observed, the dispute was heard by the court after years of protracted proceedings in which the parties failed to agree on the distribution of the estate. The clan elders also failed to satisfactorily distribute the estate. The applicants do not dispute that the two respondents are beneficiaries of the estate. They do not also fault the decision of the court in allocating each of the respondents 15 acres out of the estate. The only dispute relates the location of the share of 15 acres awarded to each respondent.

The applicants claim that the respondents should not have been allocated 15 acres each from land parcel Cherongos 2058/5. The respondents avers that there is no other land from which they can get their shares as the whole estate was distributed. The impugned decision was discretionary and the learned Judge was dealing with the distribution of a large estate to many beneficiaries. If the distribution of the land parcel No. Cherongos 2058/5 is interfered with, it is likely to affect the distribution of the entire estate.

In the premises, I am not satisfied that the intended appeal has high chances of success as alleged.

[8] The present application was filed on 15th February, 2018 nearly four years of the date of the impugned decision.

The 1st applicant does not in his supporting affidavit give any reasons for the delay. However, an explanation has been given in the body of the application, that all along the applicants had the impression that their interest would be taken care of in **Civil Appeal No. 1 of 2016 Grace Chebet Sisimwo & 4 Others vs. Everlyne Cherukut Sisimwo and another.**

The correct serial number of that appeal is Eldoret Civil Appeal 6 of 2016. That appeal is confined to the distribution of Musengi farm parcel No.2058/7.

That appeal is in respect of a dispute amongst the beneficiaries of that farm which is similar to the dispute relating to land parcel Cherongos 2058/5. The respondents submit that the explanation for delay is not reasonable as the 2nd applicant Sisimwo Sila Sile was a co-administrator of the estate from the 2nd house which was represented by a counsel in the dispute.

In the circumstances of this case, I find that delay of nearly four years is inordinate and that it has not been satisfactorily explained.

[9] The respondents state that if the application is allowed, they would suffer prejudice and irreparable loss as they have taken possession of their respective shares, obtained title deeds and are farming their respective portions.

The 1st respondent has annexed a copy of title deed for parcel No. Saboti/Kiboroo Block 5 (Cherongos)/4 issued on 7th July, 2017. Similarly, the 2nd respondent has exhibited a copy of Title Deed for parcel No. Saboti/Kiboroo Blocks (Cherongos)/2 also issued on 7th July, 2017.

Those documents show that the impugned judgment was perfected seven months before the present application was filed. It is thus evident that the respondents would suffer undue prejudice if the application is allowed.

[10] In conclusion, I find that this belated application has no merit. It is in the interest of justice that litigation in respect of the distribution of original parcel **No. Cherongos 2058/5** which has now been sub-divided should come to an end and the respondents be allowed to enjoy the fruits of their judgment.

[11] Accordingly, the application is dismissed with costs to the respondents.

DATED and delivered at Eldoret this 6th day of December, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR