



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME, G.B.M. KARIUKI & KIAGE, JJ.A.)**

**CIVIL APPLICATION NO.286 OF 2013 (UR 149/2013)**

**BETWEEN**

**JAMES MASILA MULI ..... 1ST APPLICANT**

**MUSYA MULI ..... 2ND APPLICANT**

**AND**

**KWALE MATI ..... 1ST RESPONDENT**

**AGNES KASYOKA ..... 2ND RESPONDENT**

**SHEDRACK MUNYALO NZENGE.....3RD RESPONDENT**

***(Application for leave to file and serve record of appeal out of time from the Judgment of the High Court of Kenya, Machakos (Mwera, J) delivered on 14th day of March 2001 2007 in H.C.C.A. NO.69 of 1998)***

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**RULING OF G.B.M. KARIUKI JA**

1. This ruling ought to have been delivered a lot earlier. The misplacement of the court file precipitated the regrettable delay. I apologize for this mishap.

2. The two applicants, James Musila Muli and Musya Muli, sought in their undated but signed application made by way of notice of motion leave to file out of time (and serve) Notice and Record of Appeal from the judgment of the High Court at Machakos in H.C.C.A. No.69 of 1998. In effect, they seek the exercise by this court of its discretionary jurisdiction to grant extension of time to appeal.

3. The brief background leading to the application shows that the appellant's claim against the respondents in the Senior Resident Magistrate Court was for a portion of land allegedly wrongfully taken away from him by the respondents who caused the title thereof to be registered in their names as titles Nos.2060, 2420 and 1958. The trial court found no merit in the 1st appellant's claim and dismissed it. Aggrieved, the 1st appellant and the 2nd appellant who has been joined as a party in this court filed Civil Appeal No.69 of 1998 in the High Court at Machakos against the said decision. Judgment was delivered on 14th March 2001 (by Mwera J, as he then was) dismissing the appeal by James Musila Muli against the three named respondents.

4. On 23rd October 2013, exactly 12 years and 6 months after the High Court judgment, the appellants lodged in this court the application seeking extension of time to appeal out of time. In the grounds for making the application stated in the notice of motion, the applicants aver that time to appeal expired some years ago; that James Musila Muli became seriously ill on his right eye; that Musya Muli, the 2nd applicant, had to take care of James Musalia Muli; that Musya Muli did not know how to appeal; that James Musalia Muli received medical treatment and eventually his right eye was healed; that it was due to this illness that the 1st applicant was disabled from appealing; and that the delay in appealing was not deliberate. The application was also supported by an affidavit sworn by both applicants on 22nd July 2013.

We have perused it. It reiterates the grounds for making the application.

5. When the application came up for hearing, the two applicants appeared in person and told the Court that they had nothing to add to their application.

6. Learned counsel **Mr. Kimani Horeria** holding brief for Mr. B. Musyoki appeared for the respondents. Counsel submitted that the High Court had on 14th March 2001 at Machakos dismissed a similar application made by the applicants. He pointed out that the delay by the applicants in filing appeal was inordinate and that the applicants had failed to satisfactorily explain the reasons for the long delay. In counsel's view, it would be very prejudicial to the respondents if the applicants were allowed to revive the land matter finalized over 12 years ago through an appeal.

7. We have carefully perused the application and considered the submissions made by both parties. The application evokes this court's discretionary power under rule 4 of this Court's Rules which states –

***“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.*”**

8. The application seeks extension of time to file Notice of Appeal and Record of Appeal out of time. The delay in filing appeals span a period of over 12 years.

9. As a matter of policy, this court has a predisposition towards exercise of its discretionary power to extend time to facilitate filing of appeal where, prima facie, an applicant shows that he has an arguable appeal and the respondent would not suffer harm that cannot be compensated by an award of costs if time to appeal is extended. This policy was echoed by Apoloo JA, as he then was, in the case of **Gitau v. Muriuki** [1986] KLR 211. This Court has in many decisions stated that the factors to be considered in an application under rule 4 (supra) include the length of the delay; the reasons for the delay; the arguability of the appeal; the degree of prejudice to the other party if time is extended; the public interest of the matter in appropriate cases; and generally the requirements of the interest of justice under Article 48 of the Constitution which stipulates that “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”; and regard to human errors or mistakes including errors by legal advisors as was the case in **Gulam Hussein Cassmand & Another versus Shashikant Ramji** [Civil Application No. Nai 1 of 1981] where C.B. Madan, JA, as he then was, held that errors by a legal advisor can be pardoned.

10. In the recent decision of this court in **Consolidated Finance Bank Ltd versus Kapurchand Debar Shah** [Civil Application No. Nai 256 of 2013, (unreported)] it was pointed out by a Bench of this court that –

***“where an applicant has acted with dispatch and has an arguable appeal and there is no harm caused to the respondent in extending time that cannot be compensated with costs”, the court ought to exercise its discretion to extend time.*”**

11. Applying these principles to the instant application, should the extension of time sought be granted?

For starters, the length of the delay spans a period in excess of 12 years. The explanation proffered for it is that the 1st applicant was ill. The evidence tendered to buttress the allegation does not show that the 1st applicant was ill throughout the period from 14th March 2001 when the judgment intended to be appealed from was delivered to the 23rd of October 2013 when the instant application was lodged in this court. In short, the long period of delay has not been satisfactorily explained. Secondly, the intended appeal has not been shown to be arguable. The judgment intended to be challenged on appeal concerned land. It is not shown what aspect of the law was breached or in what way the lower court erred. Moreover, the status of the legal titles to the subject parcels of land is not shown nor whether the extension of time to appeal would be prejudicial to the respondents and if so whether such prejudice could be compensated for by an award of costs. Besides, it has not been shown whether there are innocent third parties whose interest in the subject parcels of land would be affected.

12. All in all, the application does not attain the required threshold under rule 4 (supra) to warrant the court to exercise its discretionary power in favour of the applicants to extend time. In short, the application lacks merit.

13. Accordingly, I dismiss the application with costs to the respondent the applicants' application by the undated notice of motion lodged in this court on 23rd October 2013. It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of March, 2017.**

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**RULING OF WARSAME JA**

Regrettably, the delivery of the ruling by my brother G.B.M. Kariuki, JA has, as he avers, been delayed on account of misplacement of the court file. I have read it in draft and I concur that the application for extension of time to appeal did not disclose any plausible explanation for the delay spanning over 12 years.

I agree that the application should be dismissed.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of March, 2017.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**RULING OF KIAGE JA**

I am in agreement with the ruling by my brother G.B.M. Kariuki JA which I have perused in draft. In my view, the delay in seeking extension of time was inordinate and was not satisfactorily explained.

I concur with the finding that the application lacks merit and agree that it should be dismissed.

Regrettably, the delivery of the ruling has, as averred by my brother G.B.M. Kariuki, JA, been delayed

for a long time on account of misplacement of the court file.

**Dated and delivered at Nairobi this 24th day of March, 2017.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**