



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: MURGOR, J.A.**

**CIVIL APPLICATION NO. 154 OF 2017**

**BETWEEN**

**PETER MBUGUA MUTURI.....1<sup>ST</sup> APPLICANT**

**VIRGINIA WAMBUI KABUGI.....2<sup>ND</sup> APPLICANT**

**AND**

**JAMES WAIGWA KAIRETIA.....1<sup>ST</sup> RESPONDENT**

*(Application for extension of time to file and serve a Notice of Appeal out of time from  
the Judgment of the High Court at Nairobi, J.M. Mutungi, J. dated 15<sup>th</sup> May 2015*

*in*

*Nairobi ELC No. 2076 of 2001)*

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**RULING**

The applicants, **Peter Mbugua Muturi** and **Virginia Wambui Kabugi** have applied for time to be extended to file and serve a Notice of Appeal under **rule 4** of the **Court of Appeal Rules 2010**.

Before considering the application, a brief outline of the facts of the case is of necessity. The facts as can be discerned from the judgment are that, the respondent instituted a suit in the High Court by way of a plaint dated 30<sup>th</sup> November 2001, wherein he sought a permanent injunction to restrain the Attorney General, (*the 1<sup>st</sup> defendant*), Stephen Kamuyu, (*the 2<sup>nd</sup> defendant*), the Director Land Adjudication & Settlement, (*the 3<sup>rd</sup> defendant*) the District Land Registrar Nyandarua, (*the 4<sup>th</sup> defendant*) from occupying or disposing of Land Reference Number Nyandarua/ Oljororok Salient/1840 (*the subject property*); a declaration that the respondent was the legal allottee of the subject property, subject only to a charge in favour of the Settlement Fund Trustees (*SFT*); an order directing the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup>, defendants to cancel the allocation of the title of the subject property to the 2<sup>nd</sup> defendant and to reinstate the allocation to the appellant; an order directing the 3<sup>rd</sup> defendant to cancel the title of the subject property held by the 2<sup>nd</sup> defendant, general damages and costs.

The appellant's case was that by a letter of allotment dated 18<sup>th</sup> May 1992, he was allocated the subject property which was thereafter charged to the SFT to secure a sum of Kshs. 5,425; that by a letter of 11<sup>th</sup> May 2001 the Director, Land Adjudication & Settlement purported to cancel the respondent's allocation, and to reallocate the subject property to the 2<sup>nd</sup> defendant who subsequently subdivided it and sold the portions to the applicants. Upon realizing that the subject property had been reallocated, the respondent registered a caution over it claiming a beneficiary's interest and initiated the suit aforesaid.

The appellant was thereafter granted leave to enjoin the applicants as interested parties to the suit in the High Court following the subdivision and transfer of the portions known as Land Reference Nos. Nyahururu/OlJOROROK Salient/17485 and 17486. The interested parties entered appearance in the suit on 23<sup>rd</sup> June 2011, but did not oppose the respondent's application to have their titles cancelled or file any witness statements or defence to the respondent's claim despite being provided an opportunity to do so.

In the course of the proceedings, by a ruling issued on 15<sup>th</sup> December 2011, Koome, J. (*as she then was*), ordered the 4<sup>th</sup> defendant to cancel entries No. 5 and 6 registered against the title, which appertained to the subdivided portions transferred to the applicants and all other consequential dealings so as to enable the title of the subject property to be returned to its status ante. The record does not show that an appeal was preferred against the court's decision.

In determining the suit, the Environment and Land Court found that the revocation of the respondent's allocation by the 3<sup>rd</sup> defendant was unlawful as it was obtained without adherence to due process and ordered that the subject property revert back to the respondent.

In addition to observing that the applicants' titles were acquired after the respondent had registered a caution over the subject property to restrict any dealings, which titles Koome and Okwengu, JJ. cancelled upon concluding that the caution was unlawfully removed, Mutungi, J. also found that the applicants were not innocent purchasers of the subdivided portions from the 2<sup>nd</sup> defendant as their interest in the properties was defeated by the doctrine of *lis pendens*. As a consequence, the court ordered the applicants deliver vacant possession of the subject property to the respondent within 60 days of the judgment or be subjected to eviction.

It is against this backdrop that the applicants filed the Notice of Motion dated 23<sup>rd</sup> June 2017 which is before me, supported by an affidavit of the 1<sup>st</sup> applicant on behalf of the applicants sworn on the same date, seeking to have time extended to file a Notice of Appeal against the judgment in *ELC NO. 2076 of 2001*; a temporary stay of execution of the judgment and the setting aside of an eviction order in respect of the said judgment.

The application was made on the grounds that following the judgment of the Environment and Land Court of 15<sup>th</sup> May 2015 and an amended decree delivered on 19<sup>th</sup> May 2017, the 1<sup>st</sup> applicant instructed his former advocates, Mwaniki Gitau & Company Advocates to lodge an appeal but the advocates failed to do so; that on 20<sup>th</sup> May 2015, the applicant filed a Notice of Appeal, on the understanding that the former advocates would file an application to extend time to lodge the appeal, but once again the intended appeal was not filed; that the applicants sought the assistance of Kituo Cha Sheria, which appointed Jessica Pekke of the firm of Messrs. Pekke & Company Advocates to take up the matter of the intended appeal.

It was asserted that the delay was occasioned by a mistake of the applicant's former counsel which should not be visited on the applicants; that the appeal has a high chance of success, and that the applicants would suffer substantial loss. The 1<sup>st</sup> applicant's affidavit in support repeated the grounds set out in support of the motion.

In a replying affidavit sworn by the respondent, James Waigwa Kaireti on 31<sup>st</sup> August 2017, it was deponed that the intended appeal was an afterthought, and had no chance of success for the reason that the applicants did not hold title to the subject property as their titles were cancelled by a ruling delivered on

21<sup>st</sup> December 2011 by Koome, J. A copy of the order was annexed to the respondent's affidavit in reply.

In their submissions, learned counsel **Ms. Kariithi** for the applicants holding brief for Ms. Pekke contended that the delay was caused by the failure by the applicants' former advocates to notify the applicants of their unwillingness to appeal against the judgment, which mistake should not be attributed to the applicants. It was also submitted that they did not have the financial capability with which to file the appeal, and hence the reason for having approached Kituo cha Sheria to take up the intended appeal on their behalf; that since the dispute involved land, this Court should focus on delivering substantive justice, instead of adhering to procedural technicalities.

**Mr. Kamere**, learned counsel for the respondent relied on the affidavit of James Waigwa Kaireti, the respondent, and submitted that the applicants should not blame the former advocates for failure to file the appeal, as having himself lodged the Notice of Appeal within the prescribed time, the 1<sup>st</sup> applicant was at all times aware of their reluctance to file the intended appeal.

Counsel further asserted that this application was filed two years after the delivery of the judgment, and no explanation was provided for this inordinate delay. Additionally, it was submitted, no evidence was presented in support of the contention that the applicants lacked monies to file the appeal.

Counsel asserted that the submission that appeal had a high chance of success was fallacious as the applicants participated as interested parties in the proceedings before the lower court, but did not file any pleadings, save for some documents and written submissions; that further, they had not preferred an appeal against the order of Koome, J. canceling their titles. Counsel questioned how they intended to reinstate titles which stood cancelled by the time of the Mutungi, J's. Judgment and without having successfully appealed for reinstatement against Koome, J's order.

In reply Ms. Kariithi argued that the appeal would grant the applicants an opportunity to present their case on the fundamental right to their properties that continued to be interfered with; that the titles were not fraudulently obtained, as the applicants were bona fide purchasers for value without notice.

Prior to hearing the motion, the applicants sought to withdraw prayers 3 and 4 concerning the temporary stay of execution of the judgment and the setting aside of an eviction order sought. As Mr. Kamere did not have any objection, since these were matters outside the remit of a single judge, the prayers were withdrawn, paving way for determining the application for extension of time under **rule 4** of the **Court of Appeal Rules**.

Under **rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the Court stated;

***“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”***

There is no question that the judgment was rendered on 15<sup>th</sup> May 2015, and on 20<sup>th</sup> May 2015, the 1<sup>st</sup> applicant filed a Notice of Appeal, in time, which notice was served on Kamere & Company Advocates on 21<sup>st</sup> May 2015 as prescribed. Though the applicants have sought to extend time to file and serve the Notice of Appeal, as it was filed and served in time, and no application has been made to withdraw it, I consider that the extension of time sought to file and serve the Notice of Appeal out of time does not arise.

Thereafter, no further steps were taken by the applicants to file the appeal, until this application was filed on 23<sup>rd</sup> June 2017, so that the total period of delay amounted to over two years.

Has this delay been explained? In my view, it has not. The applicants' application rests on the premise that the delay in filing the record of appeal was occasioned by the unwillingness and or refusal of his former advocates, Mwaniki Gitau & Company Advocates to lodge the record of appeal within the prescribed time.

Despite this assertion, and the 1<sup>st</sup> applicant having himself lodged the Notice of Appeal, there is nothing to show that the former advocates undertook to file the appeal, or when and how this became their responsibility. The Notice clearly indicated the applicants' address for purposes of the intended appeal as "...care of PETER MBUGUA MUTURI, P.O. Box 334-020300 NYAHURURU." Therefore, unless otherwise demonstrated, it remained at all times the applicants' responsibility to lodge the appeal. Consequently, it goes without saying that, since the former advocates were not on record as being responsible for lodging the record of appeal, the delay cannot be attributed them, but to the applicants.

The applicants' other explanation for the delay was that as they are indigent, they were unable to afford legal representation.

In the case of *Francis Mwai Karani vs Robert Mwai Karani, Civil Application No. NAI. 246 of 2006, Omolo, J.A* whilst addressing a similar application stated thus;

***"I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time."***

In the instant case, I can find nothing in the materials before me to support the contention that the applicants were faced with financial constraints; whether in respect to court filing fees or the advocate's legal fees or both. **Rule 117** of this Court's rules makes provision for relief in a case where an applicant can show that they are faced with financial challenges. But the record does not disclose any attempt made by the applicants to invoke this provision. Additionally, though the name of Kituo Cha Sheria was brought in to lend credence to the applicants' financial impecuniosity, there was no certification or assurance from the said Kituo Cha Sheria to support this position. I am therefore not persuaded that the alleged claim of indigence was the cause of the delay.

As stated above, from the time the Notice of Appeal was lodged until this motion was filed, a period of two years had lapsed.

In *Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98*, this Court stated thus;

***"The inaction" which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion."***

Likewise, having found that the applicants were solely responsibly for the delay in filing the intended appeal, and arriving at the conclusion that the financial challenges alleged to be the cause of the delay were unsupported, I am satisfied that no material was placed before me to explain the inordinate delay of two years.

As concerns the possibility of success of the appeal, the applicants did not lodge a draft memorandum of appeal, but from the application, it is discernable that the applicants' intended appeal is concerned with reinstatement of their cancelled titles. The respondent's reply to this is that, in seeking to appeal against the decision of Mutungi, J. which cancelled the allocation of the subject property to the 2<sup>nd</sup> defendant in the intended appeal, the applicants, are in effect barking up the wrong tree, as it is Koome, J's decision that initially cancelled their titles, which decision they ought to have preferred an appeal. Having failed to lodge an appeal against that decision, the chances of resuscitating the cancelled titles in the intended appeal against the judgment of Mutungi, J highly unlikely. As deponed by the respondent in the replying affidavit, and I agree, it "... would only be an exercise in futility".

I was not addressed by either party on the aspect of prejudice, and therefore will not delve into it, save to say that, in view of the circumstances of the case, the delay of two years in bringing the intended appeal is not only inordinate, but unjustifiable. I find that this delay in itself is prejudicial to the respondent. On the other hand, I do not envisage that the applicants would be subjected prejudice in the event time to extend filing of the intended appeal is declined, as they are not bereft of alternative opportunities to seek legal recourse.

Accordingly, having taken all the required factors into account, I have come to the conclusion that the application for extension of time fails. I decline to exercise my discretion to allow the application, and order that the Notice of Motion dated 23<sup>rd</sup> June 2017 be and is hereby dismissed with costs.

***It is so ordered.***

***Dated and Delivered at Nairobi this 1<sup>st</sup> day of December, 2017.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**