



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 10 OF 2016

BETWEEN

LIVUKANA MAHALANG'ANG'A APPLICANT

AND

FESTUS MWAKHA AMARE RESPONDENT

(Application for extension of time within which to file and serve a notice of appeal and record of appeal out of time arising from the Judgment of (Chitembwe, J.) dated 19th day of May, 2014

in

KAKAMEGA HCCC NO. 60 OF 2008)

RULING

1. The applicant's application dated 4th February, 2016 was brought under **rule 4** of the **Court of Appeal Rules** and seeks extension of time to file and serve a notice of appeal as well as the record of appeal from the decision of **Chitembwe, J.** that was delivered on 19th May, 2014 in **Kakamega HCCC NO. 60 of 2008.**
2. In the affidavit sworn by the applicant in support of the application, he deposed that on 23rd August, 2014 he instructed his present advocate, **Mr. Ateya**, to apply for the proceedings and judgment and the advocate did so on 9th September, 2014. On 19th September, 2014 his advocate paid for the proceedings.
3. Certified copies of the proceedings were supplied on 26th November, 2014 but it was not until 10th August, 2015 when a certified copy of the judgment was supplied.
4. The applicant believes that he has an arguable appeal and ought to be granted an opportunity to pursue an appeal.
5. The respondent filed a replying affidavit in opposition to the said application. He contended that the applicant had slept on his rights and urged this Court not to allow the application.
6. The respondent stated that the application had been overtaken by events since the decree issued by

the High Court had already been executed in the respondent's favour.

7. The decree shows that the respondent had acquired six acres of land out of the original plot **No. North Kabras/Matsakha/457** by way of adverse possession. The Land Registrar and Surveyor, Kakamega, were directed to subdivide the original parcel of land into two portions, one measuring 6 acres for the respondent and the other measuring 3½ acres for the applicant. The copy of the decree that was annexed to the respondent's replying affidavit showed that the decree was served upon the District Land Registrar and the District Surveyor, Kakamega, on 30th September, 2014.
8. **Mr. Ateya**, learned counsel for the applicant, said that between 10th August, 2015 when he received the certified copy of the judgment and 4th February, 2016 he was preparing the current application. In his view, the delay in filing the notice of appeal as well as the record of appeal is excusable.
9. **Mr. Manyoni**, learned counsel for the respondent, submitted that there was no explanation at all for the failure to file the notice of appeal. Further, there was no reasonable explanation for the delay in filing the record of appeal, considering that certified copies of the proceedings and judgments were with the applicants counsel by 10th August, 2015.
10. Mr. Manyoni added that if the application for extension of time were to be allowed, the respondent would be prejudiced because he had already paid the sub-division charges of the land as directed by the High Court.
11. I have considered the application, the affidavits by the parties as well as the brief submissions by counsel. **Rule 4** of this **Court's Rules** empowers the Court, on such terms as it deems just, to extend time prescribed by the Rules for the doing of any act as required under the Rules, the Jurisdiction must however be exercised judicially.
12. In **LEO SILA MUTISO VRS ROSE**, Civil Application No. 255 of 1997, this Court reiterated the factors that must be taken into account in considering an application for extension of time. They include the period of the delay, the reason for the delay, the chances of the proposed appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.
13. The High Court judgment was delivered on 19th May, 2014 and since then, no notice of appeal was ever filed. No reason was given for the failure to file the notice of appeal. A party does not require certified copies of proceedings to file a notice of appeal. That unexplained delay is inordinate. Secondly, even after the applicant's counsel received certified copies of the proceedings and judgment, he did not take any action for more than 6 months. A counsel does not require so much time to prepare an application for extension of time. I find the explanation for the delay unsatisfactory.
14. I have perused the High Court judgment as well as the draft memorandum of appeal. I entertain grave doubts about the chances of success of the intended appeal. I also agree that the respondent shall suffer prejudice if the application is granted, considering that he has already paid for the subdivision of the land, although if this was the only consideration, I would have held that such loss can be compensated for.
15. All in all, I find this application lacking in merit and dismiss it with costs to the respondent.

DATED and DELIVERED at ELDORET this 15th day of June, 2016.

D. K. MUSINGA,

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR