



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM : D. MUSINGA, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 49 OF 2016**

BETWEEN

ROSE NJOKI KING'AU.....1<sup>ST</sup> APPLICANT

MICUGU WAGATHARA.....2<sup>ND</sup> APPLICANT

AND

SHABA TRUSTEES LIMITED.....1<sup>ST</sup> RESPONDENT

CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT

*(Being an application seeking leave to file a memorandum of appeal out of time from the ruling/order of the High Court of Kenya at Nairobi (Sitati, J) delivered on 29<sup>th</sup> day of April, 2010*

*in*

***H.C.C.C. No. 986 of 2006)***

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**RULING**

1. The applicants' application filed on 3<sup>rd</sup> March, 2016 seeks leave to file a memorandum of appeal out of time. The applicants had instructed the firm of Mutuli & Apopo Advocates to file an appeal from the ruling of the High Court in **HCCC No. 986 of 2006** (Sitati, J.) that was delivered on 29<sup>th</sup> April, 2010.
2. The said firm of advocates did not however file the memorandum and record of appeal. Unknown to the applicants, the two partners in the said law firm, Mr. Patrick Lubanga Mutuli and Mr. Joab Apopo, were suspended from practice of law sometimes in 2013 and subsequently struck off the Roll of Advocates.
3. When the applicants learnt of the fate of her erstwhile advocates, they instructed the firm of Wandugi & Co. Advocates, who have lodged the present application.
4. The first respondent is represented in this application by Kale Maina & Bundotich Advocates while Maosa & Company Advocates are on record for the second respondent. The respondents' advocates were

served with a hearing notice for 6<sup>th</sup> September, 2016 but none of them attended court on that day when the application was heard.

5. The second respondent did not file any replying affidavit. The first respondent filed a replying affidavit on the date of the hearing but it was brought to court's attention after Mr. Karoki, learned counsel for the applicants, had argued the application and left my chambers. As a matter of fact, Mr. Karoki had told the court that the application was not opposed as he had not been served with any replying affidavit.

6. Notwithstanding the fact that the first respondent's replying affidavit was not filed and served in time, I do not consider it prudent to disregard its contents altogether, yet at the same time I do not think that I can base the court's findings on the contents of an affidavit that was not served upon the applicants' advocate as he was not accorded an opportunity to comment on the depositions therein.

7. Although the first respondent stated, inter alia, that the notice of appeal was filed by Njenga Mbugua & Nyanjama Advocates way back in April, 2010, I do not know when the applicants instructed Mutuli & Apopo Advocates to file the memorandum and record of appeal. There is, however, no dispute that the firm of Mutuli & Apopo Advocates is no longer operational.

8. In considering an application for extension of time to file an appeal, a court exercises its discretion. The discretion must, however, be exercised judicially. The factors that have to be taken into consideration in such an application are well settled. They include the length of the delay; the reasons for the delay, the chances of success of the intended appeal; and the degree of prejudice that the respondent is likely to suffer if the application is granted. See **PAN AFRICAN PAPER MILLS (E.A.) LTD versus OLAKA [2001] KLR 8.**

9. Although here the delay is inordinate, about 6 years, considering the explanation advanced by the applicants, I do not fault the applicants for the delay.

10. The draft memorandum of appeal reveals that the intended appeal is not frivolous. Lastly, I am not persuaded that the degree of prejudice that will be occasioned to the respondents by grant of the orders sought is immense.

11. Consequently, I grant leave to the applicants to file and serve the memorandum and record of appeal out of time. The same should be filed and served within thirty (30) days from the date of this ruling. I make no orders as to costs.

***Dated at Nairobi this 16<sup>th</sup> day of September, 2016.***

**D. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy*

*of the original*

**DEPUTY REGISTRAR**