



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 163 OF 2008 (UR 104/2008)

BETWEEN

ZIMMAN SETTLEMENT SCHEME *through* GLADYS NYOKABI

JOSEPH WERU

EDWIN ODALLO.....APPLICANTS

AND

EAST AFRICAN SISAL ESTATES LIMITED.....1ST RESPONDENT

MUIGAI AND OTHERS.....2ND RESPONDENTS

(An application for leave to file and serve a record of appeal out of time

from the ruling of (Ransley, J) delivered on 27th October, 2005

in

H.C.C.C. NO. 1035 OF 2003)

RULING OF THE COURT

1. The applicants' application dated 30th June, 2008 seeks extension of time to file and serve the record of appeal, and substitution of Gladys Nyokabi and Joseph Weru (both deceased), with Daniel Njoroge Kamau and Edwin Odallo, who are officials of Zimman Settlement Scheme. The application was brought under **rules 1(2), 4 and 42** of the **Court of Appeal Rules**.

2. The application was supported by an affidavit sworn by Daniel Njoroge Kamau, the secretary of the 1st applicant. In a nutshell, on 16th July, 2004 the applicants obtained a decree against East Africa Sisal Estates Limited, the 1st respondent, in **HCCC No. 1035 of 2003**. Their case was founded on the doctrine of adverse possession.

Subsequently, the applicants applied for amendment of the decree, which was done on 30th September,

2004.

3. The 2nd respondent, being aggrieved by the amended decree, filed an application to have the amended decree set aside and discharged and the entire suit struck out. The application was premised on the ground that in obtaining the amended decree a fraud had been committed.

4. The court, (Ransley, J.) agreed with the 2nd respondent that the entire suit had been instituted fraudulently, and in a considered ruling delivered on 27th October, 2005 allowed the application and struck out the entire suit.

5. The applicants instructed M/s Wangalwa Omido & Co. Advocates to lodge a notice of appeal against the said ruling, which he did on 2nd November, 2005. The said advocates then requested for a deposit of Kshs.280,000/= towards their fees but the applicants were unable to raise that sum. It was not until June 2008 when the applicants managed to raise the said sum. That is the stated main reason for the delay in instituting the appeal.

6. The applicants further stated that Gladys Nyokabi, who was their chairlady died on 10th October, 2004 and in March 2007, Joseph Weru, the Assistant Secretary, also passed away. The demise of the two officials also contributed to the delay in filing the appeal, the applicants argued.

7. **Mr. Odhiambo**, learned counsel for the applicants, submitted that the intended appeal raises important and substantial issues of law. He relied on a draft memorandum of appeal that is annexed to the affidavit sworn in support of the application.

8. Mr. Odhiambo further pointed out that the 2nd respondent had embarked on an exercise of subdividing the suit land, had disposed of portions thereof and the purchasers had done various developments thereon.

9. The 2nd respondent opposed the application and filed a replying affidavit that was sworn by **Patrick Githinji Mwangi**. The 1st respondent has never participated in the proceedings at all. It is doubtful if it has any interest in the suit property.

10. **Mr. Omuganda**, learned counsel for the 2nd respondent, submitted that the applicants had not placed any material before this Court to justify a delay of close to 36 months. Secondly, he submitted that financial hardship cannot be a sufficient reason for a court to exercise its discretion in favour of an applicant who delayed in filing an appeal. Thirdly, the intended appeal has no good prospects of success, bearing in mind that Ransley, J. established that the applicants were guilty of fraud, having filed a suit and obtained judgment against a non-existent entity as the purported owner, knowing that the land in dispute belonged to the 2nd respondent.

11. Mr. Omuganda further submitted that although the applicants' advocates had indicated that they had applied for typed copies of the proceedings way back in November, 2005 and the proceedings were availed rather late, the letter bespeaking proceedings had not been copied to the 2nd respondent's advocates.

12. Lastly, counsel argued that the 2nd respondent would suffer great prejudice if this application were to be allowed, taking into account that the impugned ruling was delivered more than 11 years ago.

Following the ruling vide which the applicants' suit was struck out, the 2nd respondent subdivided its land and has disposed of large portions thereof to third parties who have already developed their respective parcels.

13. I have considered the submissions by counsel as well as the parties' affidavits on record. It is well settled that the decision whether or not to extend time for filing an appeal is a discretionary exercise by a court. That discretion must however be exercised judicially. The factors that a court has to consider in

such an application are the length of the delay; the reasons for the delay; the chances of success of the intended appeal in the event that the application is granted; and the degree of prejudice that may be occasioned to the respondent if the application is granted. See **PAN AFRICAN PAPER MILLS (EA) LTD versus OLAKA [2001] KLR 8.**

14. The ruling sought to be appealed against was delivered on 27th October, 2005. A notice of appeal was subsequently filed on 2nd November, 2005. On 3rd November, 2005 the applicants' advocates wrote to the Deputy Registrar, High Court, requesting for typed copies of the proceedings for purposes of lodging an appeal. However, the applicants and their advocates did not do much thereafter.

15. As pointed out by Mr. Omuganda, the letter bespeaking proceedings was not copied to the 2nd respondents' advocates. Consequently, the applicants cannot rely on the proviso to **sub rule 1 of rule 82** of this **Court's Rules** which excludes such time as may be certified by the registrar of the High court as having been required for the preparation and delivery of the proceedings.

16. There was a delay of nearly three years from the date of filing of the notice of appeal to the date of filing of the application seeking extension of time. In my view, that delay is inordinate and I do not think that it has been sufficiently explained.

17. The first reason that was advanced by the applicants is that they were not able to raise the sum of Kshs.280,000/= which their advocates required as legal fees for processing the appeal. In **FRANCIS MWAI KARANI versus ROBERT MWAI KARANI, Civil Application No. Nai. 246 of 2006**, Omolo, JA held 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."

18. The learned judge was, however, not establishing a new principle. He appreciated that each case must be looked at on its own facts. I would agree that in certain rare circumstances, financial hardship may be acceptable as sufficient reason for delay in filing an appeal. In such an instance, an applicant must present to the court sufficient material as to demonstrate that his financial status was such that he was unable to file an appeal in time. In making its decision, one way or the other, the court has to bear in mind that there are several provisions in our laws that enable indigent litigants to access courts.

19. In this application, Zimman Settlement Scheme is a society that has a membership of more than 170 members. It was suing through its officials. The applicants did not exhibit a copy of their advocate's letter requesting for Kshs.280,000/= as legal fees for prosecuting the appeal. The applicants have been represented by various firms of advocates since 2003 or thereabout when they instituted **HCCC No. 1035 of 2003**. There are also several other matters that the applicants, through their advocates, have filed in the High Court. It is inconceivable that as soon as the main suit through which the applicants were asserting their right to the suit land was struck out the applicants were unable to raise legal fees to mount an appeal.

20. The demise of Gladys Nyokabi, the society's chairlady, was in 2004, long before the notice of appeal was filed. Her demise could not therefore have affected the prosecution of the appeal. The same may be said of the demise of Joseph Weru, who was the Assistant Secretary. With a membership of more than 170 members, I believe other persons must have been elected to take the positions of the deceased officials.

21. As regards the chances of success of the intended appeal, although I entertain serious doubts that the intended appeal has reasonable chances of success, that *per se* would not have been a bar to exercising my discretion in favour of the applicants if they had demonstrated that there were good reasons for the delay in presenting this application.

22. Lastly, regarding the degree of prejudice that may be occasioned to the 2nd respondent if the application is allowed, both parties agree that following the impugned High Court decision nearly 11

years ago, the 2nd respondent has subdivided the subject land and sold portions thereof to third parties who have already carried out substantial developments on their respective plots. The third parties are not parties to this application. An order in favour of the applicants will prejudice not only the 2nd respondent but also the innocent purchasers.

23. All in all, I find this application lacking in merit and dismiss it with costs to the 2nd respondent.

Dated at Nairobi this 16th 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