



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GATEMBU, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 21 OF 2016**

**CHEPTULA TONGELACH ..... APPLICANT**

**VERSUS**

**JACKSON CHAMIR ..... RESPONDENT**

*(Being an application for leave/extension of time to enable the Applicant to file and serve a Notice of Appeal out of time at Kitale, (Hon. E. Obaga, J.) delivered on 7<sup>th</sup> April, 2014 and the consequential eviction order issued on 22<sup>nd</sup> October, 2014*

**in**

**ELC NO. 5 OF 2006)**

\*\*\*\*\*

**RULING**

1. By an application dated 31<sup>st</sup> December 2015, the applicant, Cheptula Tongelach, seeks leave under Rule 4 of the Rules of the Court to file and serve a notice of appeal out of time. She seeks 21 days to do so. She intends to challenge a decision of the High Court “delivered on 7<sup>th</sup> April 2014 and the consequential eviction order issued on 22<sup>nd</sup> October 2014.”
2. Appearing for the applicant, learned counsel J. O. Samba, referred to the grounds in support of the application and the supporting affidavit sworn by the applicant. The applicant says that she was one of the plaintiffs in Kitale High Court Civil Case No. 5 of 2006; that in that suit she complained that the respondent as owner of plot No. 52 had trespassed on plot numbers 51 and 54 situated at Kapsait, West Pokot and sought an order for the District Surveyor, West Pokot to rectify the boundaries between plots 51, 52 and 54. The applicant stated further that the suit was settled and a consent judgment recorded following the adoption of a surveyor’s report. According to the applicant, that consent judgment did not contain any determination on ownership or eviction, since, she asserted, the surveyors report only verified boundaries of the subject parcels of land.
3. The applicant deposed that a title deed in respect of title Number West Pokot/Chepkono/694 was issued to her on 13<sup>th</sup> October 2003 and that she has lived on that property since 1981; that the issue before the High Court related to boundaries and neither party prayed for eviction; that in May 2015 she became aware that her title Number West Pokot/Chepkono/694 had been nullified by the Land Registrar on 30<sup>th</sup> January 2009; and that an eviction order issued against her did not originate from the decree

issued by the court.

4. She urged that an eviction order issued by the Judge on 22<sup>nd</sup> October 2014 did not arise from the judgment and therefore lacked legal basis. She stated that she is illiterate and although she was represented by counsel, she was not properly advised of the ramifications of the consent judgment or of her right to appeal.

5. Opposing the application, learned counsel for the respondent, C.K. Yano, referred us to his replying affidavit sworn in opposition to the application in which he deposes that the suit in the lower court, being Kitale High Court Civil Case No. 5 of 2006 was instituted by the applicant seeking an order for the District Surveyor, West Pokot to rectify the boundaries between plots 51,52 and 54; that the parties recorded a consent order on 20<sup>th</sup> February 2014 in which they agreed that the District Surveyor, Trans Nzoia/West Pokot should ascertain the owners, acreage and occupation of the land parcels known as Title Numbers West Pokot/Kapsait/51; West Pokot/Kapsait 783; West Pokot/Kapsait 54 and West Pokot/Kapsait 694; that the surveyors report in that regard was filed and adopted by the parties as a consent judgment of the court on 7<sup>th</sup> April 2014; that the applicant was represented by counsel in the entire process; that the applicant failed to disclose that on 5<sup>th</sup> November 2014, she filed a notice of appeal dated 29<sup>th</sup> October 2014 by which she and her co-plaintiff intimated that they were dissatisfied with the ruling of the High Court given on 22<sup>nd</sup> October 2014 and intended to appeal that decision.

6. According to counsel, the applicant did not give any good reason why the present application was filed as late as February 2016 when the decision to be challenged was made about two years earlier; that considering the decision of 4<sup>th</sup> April 2014 from which the applicant intends to appeal was made by consent, the present application is an abuse of the process of the court; and the applicant has not informed the court what came of the notice of appeal filed on 5<sup>th</sup> November 2014.

### **Determination**

7. I have considered the application and the submissions by counsel. Rule 4 of the Rules of the Court under which the applicant has moved the Court provides that:

**“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. An application for extension of time involves the exercise of judicial discretion. Waki, JA summarized the principles applicable in exercising such discretion in **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** where he stated:

**“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”**

9. What then are the circumstances in this case? There are two orders against which the applicant intends to appeal. The first is the decree given by the court on 7<sup>th</sup> April 2014 on the basis of a consent judgment

entered into by the parties in which they agreed to adopt a surveyor's report as an order of the court. Other than the assertion by the applicant that she is illiterate, there is no reason given why a notice of appeal was not filed within the required period of time after the decree was given on 7<sup>th</sup> April 2014 or indeed why the present application was not made until 23<sup>rd</sup> February 2016. That is a delay of almost two years that has not been explained at all.

10. As for the assertion that that applicant is illiterate, the record shows that the applicant was represented by counsel all through in the High Court having initially been represented by the firm of Risper Arunga & Co advocates and subsequently by the firm of Simiyu Wafula & Co Advocates.

11. Furthermore, under Section 67(2) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, no appeal shall lie from a decree passed by the court with the consent of the parties.

12. The applicant also intends to appeal against a second order made on 22<sup>nd</sup> October 2014. Based on the attachments to the applicant's application, the High Court made an order on 22<sup>nd</sup> October 2014 that "Cheptula Tongelach, the respondent to vacate from and deliver Land Parcel No. West Pokot/Kapsait/694 to the applicant, Jackson Chamir, and in default she be evicted therefrom." That order was premised on an application dated 19<sup>th</sup> August 2014(which is however not part of the record before me) that is recited in the order. All the parties, it would appear, were heard on that application. Also exhibited is an "Eviction Order" given on 22<sup>nd</sup> October 2014 commanding the Officer Commanding Police Station, Kapenguria Police Station to "evict and remove the said Cheptula Tongelach, her servants, agents, dependants or anyone claiming through her from the said Land Parcel No. West Pokot/Kapsait/694."

13. On 5<sup>th</sup> November 2014, the applicant lodged a notice of appeal dated 29<sup>th</sup> October 2014 with respect to the order given on 22<sup>nd</sup> October 2014. That notice of appeal is exhibited by the respondent in its replying affidavit. Quite apart from the fact the delay in seeking leave is not explained, to allow the present application would result in two notices of appeal with respect to the same decision. That would be untenable.

14. The overall effect of the foregoing is that the application before me is devoid of merit. I dismiss it in its entirety with costs to the respondent.

Orders accordingly.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of November, 2016.**

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

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

.....

**DEPUTY REGISTRAR**