



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CIVIL APPLICATION NO. 20 OF 2016**

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

**BETWEEN**

GEORGE N. MBUNDI .....1<sup>ST</sup> APPLICANT

PICKFORD BUNDI .....2<sup>ND</sup> APPLICANT

**AND**

PHILIP MAOKA MOGAKA.....PETITIONER (DECEASED)

**AND**

ALICE BONARERI NYABANDO .....RESPONDENT

*(An Application for extension of time within which to file and serve record of appeal out of time arising from the judgment of the High Court of Kenya at Kitale,*

*(Koome, J.) dated 29<sup>th</sup> July, 2011*

**in**

H.C.P. & A NO. 60 OF 2001)

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**RULING**

1. This is an application brought under **rule 4** of this Court's Rules. The applicant seeks extension of time to file and serve the record of appeal out of time.
2. The application is supported by an affidavit sworn by the 1<sup>st</sup> applicant. The applicants were the objectors to the petition filed by Philip Maoka Mogaka, (deceased), in respect of the estate of the late Hellen Nyanduko Maoga. Judgment in the said petition was delivered on 29<sup>th</sup> July, 2011.
3. The trial court ordered that the objectors, as children of the late **Francis Bundi**, a son of the late Hellen Maoga, were entitled to a share of the deceased's estate, known as **Kwanza/Namanjalala/Goseta/103**

(“the suit land”) along-side other beneficiaries.

4. The applicants were aggrieved by that judgment and filed a notice of appeal on 5<sup>th</sup> August, 2011.

5. The applicants’ contention before the High Court was that the suit land was purchased by their late father; and that their late grandmother, Hellen Maoga, held the suit land in trust for them.

6. The applicants conceded that the High Court proceedings were supplied to their advocate on 19<sup>th</sup> October, 2011 and were therefore expected to lodge the intended appeal by 18<sup>th</sup> December, 2011. They did not however do so due to negotiations towards settlement that had been initiated. However, the petitioner, Philip Maoga Mogaka, died on 31<sup>st</sup> May, 2012. There was no substitution until 11<sup>th</sup> September, 2013.

7. The respondent opposed the application and filed a replying affidavit. She categorically denied that there was any form of negotiations aimed at an amicable settlement of the matter in dispute.

8. The respondent further stated that the delay in filing the application was inordinate and had not been explained; that the intended appeal is not arguable; and that the respondents stand to suffer great prejudice if this application is granted since the applicants are in exclusive occupation of the entire suit land.

9. **Mr Samba**, learned counsel for the applicants, submitted that the delay in filing the appeal had been well explained. In his view, the intended appeal has high chances of success.

10. On his part, **Mr Onyancha**, learned counsel for the respondent, submitted that the length of the delay was inordinate and inexcusable. He reiterated that the High Court proceedings, having been supplied on 19<sup>th</sup> October, 2011, there was no reason for delay in filing the appeal, which ought to have been filed by 18<sup>th</sup> December, 2011.

11. Counsel added that the petitioner, the late Philip Maoga Mogaka, died on 31<sup>st</sup> May, 2012, long after delivery of the judgment and supply of the proceedings to the applicants.

12. Regarding arguability of the intended appeal, Mr Onyancha submitted that the same is not arguable, considering that the suit land was registered in the sole name of Nyaduko Mogaka and not in the applicants’ father’s name. The applicants were minors when the suit land was purchased, counsel submitted.

13. Lastly, the respondents’ counsel submitted that his clients would be prejudiced if the Court granted the application for extension of time because the applicants are in occupation of the suit land to the exclusion of the respondents.

14. I have given due consideration to the affidavits on record as well as submissions by counsel. The principles that this Court takes into account in an application of this nature are well settled. In **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI, Civil Application No. Nai. 255 of 1997**, the Court held:-

**“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well settled 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.”**

15. It is not in dispute that the notice of appeal was filed in time, that is, on 5<sup>th</sup> August, 2011. The proceedings were supplied on 19<sup>th</sup> October, 2011. That notwithstanding, nearly five years down the line no appeal has been filed. That delay is simply inordinate.

16. There is no reasonable explanation for the delay. The petitioner died almost eight months after supply of proceedings to the applicants. There was no good reason as to why the intended appeal could not have been filed during the petitioner's life time, even assuming that there were ongoing negotiations to resolve the dispute amicably. Pendency of negotiations cannot be a bar to complying with statutory timelines. In any event, the applicants did not prove that there were any such negotiations. The respondent categorically denied that there were any out of court negotiations.

17. The deceased petitioner was substituted on 17<sup>th</sup> February, 2015. There is no explanation as to why no action was taken until 23<sup>rd</sup> February, 2016 when the application for extension of time was filed.

18. The applicants have therefore failed to satisfy the first two important considerations.

19. Regarding arguability of the intended appeal, in the absence of a draft memorandum of appeal, I am not in a good position to form a prima facie opinion on that important consideration. It is important, though not mandatory, that in an application for extension of time to file an appeal, that an applicant attaches to the application a draft memorandum of appeal. In the absence of such a draft, the applicant should set out clearly in the affidavit sworn in support of the application the grounds that are intended to be raised.

20. Lastly, regarding the degree of prejudice likely to be suffered by the respondent if the orders sought are granted, I note that the applicants are using the suit land to the exclusion of the respondent. I must however state that if the other principles had been satisfied, I would have most likely granted the application, bearing in mind that the prejudice that the respondent would be subjected to is not, in any view, unbearable.

21. Taking into account that the applicants have failed to satisfy the most important principles for grant of the orders sought, I am not inclined to exercise my discretion in their favour. Consequently, this application is dismissed with costs to the respondent.

**DATED and Delivered at Eldoret this 24<sup>th</sup> day of November, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR.**