



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 261 OF 2014

BETWEEN

DOMINIC MUSEI IKOMBO 1ST APPLICANT

MATHEW KITUKU IKOMBO 2ND APPLICANT

PETER MUSYIMI IKOMBO 3RD APPLICANT

VERSUS

KYULE MAKAU RESPONDENT

(An application for extension of time within which to file and serve Notice of Appeal and Record of Appeal out of time from a Ruling/Order of the High Court of Kenya at Nairobi (Odunga, J.) delivered on 16th September, 2014

in

H.C. Misc. Appl. No. 246 of 2013)

RULING

1. This is an application brought under **rule 4** of this **Court's Rules**

seeking extension of time to file and serve a notice of appeal in respect of a judgment that was delivered by Odunga, J. on 16th September, 2014

2. The application is supported by an affidavit sworn by **F.M. Mulwa**, the applicant's learned counsel, whose office is in Machakos. Counsel stated that the judgment sought to be appealed against was delivered in the absence of counsel for both parties. He had however requested a clerk at Nairobi to peruse the court file and advise him about the decision. The clerk was not able to retrieve the file in good time and by the time he managed to do so and notified Mr. Mulwa only a day was remaining for the notice of appeal to be filed.

3. The application was filed 6 days outside the statutory time limit, with a weekend in between, and counsel argues that the delay is not inordinate.

4. The applicant's counsel deposed that the intended appeal is arguable and highlighted, *inter alia*, four grounds that shall be raised. They are as

follows:

- “(a) The date of the decision of the Minister in his appeal which gave rise to the proceedings before the High Court being incontestably manifest in his findings, the learned judge of the High Court misdirected himself and erred in holding that the six months limitation period was inapplicable to the proceedings just because the interested parties did not file any affidavit to contrast the averments made by the Ex-Parte Applicant.***
- b. ***The learned judge of the High Court misdirected himself and erred in his interpretation of the award of the Minister. He failed to appreciate that in effect the Minister awarded the land to their descendants and not to Kavuu and Wayua who were deceased.***
- c. ***The learned judge of the High Court misdirected himself in dwelling on the merits of the dispute before the Minister instead of the decision making process.***
- d. ***The said judge erred in failing to distinguish between the Interested Parties preliminary objection and the substantive Notice of Motion. He erred in failing to make a distinct finding with regard to the preliminary objection.”***
5. The respondent opposed the application and filed a replying affidavit. He stated, *inter alia*, that when he filed the judicial review application seeking orders of certiorari and prohibition, the applicants herein filed a notice of preliminary objection pleading limitation of time and thereby challenged the validity of the application. They did not file any replying affidavit to the matters of fact and law raised in the judicial review application. The High Court overruled the preliminary objection and that implied that the respondents had not controverted the factual and legal averments raised.
6. **Mrs. Nzei**, learned counsel for the respondent, submitted that the intended appeal is not arguable, in view of what was established by the High Court that:
 - a. ***The District Commissioner (Kathiani) who heard the land dispute purported to adjudicate over a parcel of land that was registered in the names of deceased persons and which formed part of the deceased persons.***
 - b. ***The District Commissioner purported to take evidence from persons who were not legal representatives of the deceased persons? land.***
 - c. ***The District Commissioner purported to take away estates of the deceased persons and to pass them on to long deceased persons who were not and had never been parties to the land dispute.***

3Counsel further submitted that the 2nd and 3rd applicants have since died yet the applicants' counsel had not brought that fact to the attention of this Court. For the aforesaid reasons, Mrs. Nzei urged the Court to dismiss the application for extension of time.

8. I have considered the arguments advanced by counsel. It is not in dispute that in an application for extension of time under **rule 4 of the Court of Appeal Rules** the Court exercises an unfettered discretion but as with all such discretion, the Court has to exercise it judiciously and not capriciously and/or on the court's whims.
9. The factors that the Court takes into consideration are well known. Among them is the length of the delay, the explanation for the delay, the prejudice of the delay to the other party and the merits of the intended appeal. See **SHAH v SOUTHERN CREDIT BANKING CORPORATION**

LTD. [2008] KLR 173. It is on the basis of the aforesaid factors that I will consider the motion before me.

10. As regards the length of the delay and the reason thereof, I cannot fault the applicant. The delay was for six days. The applicant's advocate's office is in Machakos and the judgment was delivered at Nairobi. Without excusing Mr. Mulwa for his non attendance on the date of delivery of the judgment, all I would wish to say is that it is not uncommon for judgments and rulings to be delivered then the Court files are returned to the registry for administrative processes before certified copies of the decisions are released to the parties. Occasionally there may be some delay before the certification is done. I cannot blame the applicant for that short delay.
11. To my mind, the only factor that I think requires very careful consideration is arguability of the intended appeal, in other words, the chances of its success. The land in dispute, parcel no. 2246, Mitaboni Adjudication Section, was registered in the names of **Peter Musembi Makau** who died in 1993, **Kyule Makau and Kaswii Kileu**, who died in 1997. The appeal to the minister was filed in 1986 before Peter Musembi Makau and Kaswii Kileu passed on. The appeal was however not heard during the life time of the two deceased persons. No legal representatives were formally appointed in respect of the estates of the two deceased persons.
12. Odunga, J; in dismissing the applicants' suit seeking an order of certiorari to quash the decision by the Minister through the District

Commissioner, Kathiani, remarked that:

“.....the said District Commissioner purported to „substitute? the long deceased Peter Musembi Makau and Kaswii Kileu with persons who are/were not legal representatives of the said two deceased persons, and continued to hear such “substituted” persons as if they were parties to the appeal. The District Commissioner further purported to illegally substitute the 3rd appellant, Peter Musyimi, with a person who was not a legal representative and continued to hear such person as though he was a party to the appeal.”

13. The learned Judge concluded that in the aforesaid circumstances:

“It would be erroneous to confer rights and interests in such land on a deceased person. Therefore the award of the disputed land to Kavuu and Wayua who is not disputed were deceased was an illegal order as the said persons were incapable of having any interest in the suit parcels of land.”

14. Commenting on the trial judge's holding, Mr. Mulwa submitted that the Court should have taken into account the local customary law regarding inheritance of land. One of the proposed grounds of appeal is that the learned judge failed to appreciate that the minister awarded part of the land in dispute to the descendants of Kavuu and Wayua (both deceased) and not to the deceased persons.

15. I have also considered other proposed grounds of appeal as reproduced under paragraph 4 of this ruling. I cannot say that the intended appeal is frivolous. In considering arguability of an intended appeal, even a single bona fide point is sufficient, see **DAMJI PRAGJI MANDARIA v SARA LEE HOUSEHOLD & BODY CARE (K) LTD, Civil Application No. 345 of 2004.** An arguable appeal is not necessarily one that must succeed, it is one which can reasonably sustain a legal argument.

See **JOSEPH GITAIHI & ANOTHER v PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 of 2008.** Lastly, I do not think that there will be much prejudice to the respondent if this application is granted. The respondent shall still have an opportunity to defend the appeal.

16. For all these reasons, I allow the application for extension of time to file and serve the notice of appeal as well as the record of appeal. The notice of appeal shall be filed and served within **fourteen (14)**

days from the date of delivery of this ruling while the record of appeal shall be filed and served within **thirty (30) days** from the date of delivery of this ruling, failing which the leave granted shall automatically lapse and the application shall stand dismissed. The costs of the application are awarded to the respondent.

Dated and Delivered at Nairobi this 17th day of April, 2015.

D.K. MUSINGA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR