



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MUSINGA, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. 23 OF 2015

BETWEEN

WELLINGTON LUSWETI BARASA & 74 OTHERS APPLICANTS

VERSUS

LANDS LIMITED FIRST RESPONDENT

KIBOGY PROPERTIES LIMITED SECOND RESPONDENT

(Being an application for extension of time within which to lodge and serve the Notice of Appeal and the Record of Appeal from the judgment of the High Court Of Kenya, Environment and Land Court at Eldoret, (HON. MUNYAO SILA, J.) dated 30/10/2014

in

E & L Case No. 931 of 2012

(Formerly

Eldoret HCCC No. 49 of 2008,

initially

Nairobi HCCC No. 188 of 1991(O.S)

RULING

1. On 26th May, 2015 the applicants filed an application brought under **rule 4** of the **Court Of Appeal Rules** and **sections 3, 3A and 3B** of the **Appellate Jurisdiction Act**. They sought the following orders:

“(a). The time within which the Applicant is required to lodge and serve the Notice of Appeal and the Record of Appeal in the intended appeal from the judgement of Hon. Munyao Sila, J. dated and delivered on 30/10/2014 in Eldoret E & L Case No. 931 of 2012 between WELLINGTON LUSWETI BARASA AND 74 OTHERS VERSUS LANDS LIMITED AND KIBOGY PROPERTIES LIMITED be extended.

(b). This Honourable Court be pleased to grant an order for status quo pending the hearing and determination of the application.

(c). Costs of this application be costs in the cause in any event.”

2. The application was supported by an affidavit sworn by Wellington Lusweti Barasa, one of the 75 applicants, who averred that he had authority from the other applicants to do so.

3. The judgement that is intended to be appealed against was delivered on 30th October, 2014. The trial court had dismissed the applicants' suit seeking to be registered as the proprietors of a parcel of **land reference number 8319 Moiben (“the suit land”)** under the doctrine of adverse possession.

The court granted the 2nd respondent, the registered proprietor of the suit land, liberty to apply for orders of eviction and on 4th November, 2014 the applicants, through M/s. Rioba Omboto & Company Advocates, filed a notice of appeal. The notice was however not forwarded to the deputy registrar for endorsement as required. The notice was also not served upon the respondents.

4. The applicants' advocates applied for certified copies of the proceedings vide a letter dated 3rd November, 2014 but the letter was also not copied to the respondents' advocates.

5. On 10th November, 2014 the second respondent filed an application seeking eviction orders against the applicants. On the same day the applicants also filed an application seeking stay of execution of the judgement pending the hearing and determination of an intended appeal.

Ombwayo, J. dismissed the application for stay of execution and granted the second respondent's application for eviction of the applicants from the suit land.

6. The applicants, who have now instructed a new firm of advocates, **M/s. Maritim Omondi & Company**, blame their former advocates for failure to serve the notice of appeal in good time and also the court registry for failure to forward the notice to the deputy registrar for endorsement.

The applicants contended that they have an arguable appeal with high chances of success. They added that unless the orders sought are granted they stand to suffer injustice.

7. **Mr. Okala**, learned counsel for the applicants, submitted that the applicants have been in occupation of the suit property since 1954 and they intend to challenge the trial court's finding that their occupation was as licencees who were not entitled to be declared as owners of the suit land by way of adverse possession.

8. The application was opposed by the respondents. **Mr. Kiarie**, learned counsel for the first respondent, relying on his own replying affidavit, submitted that the intended appeal has no chances of success, saying that pursuant to the notice of appeal dated 4th November, 2014, the applicants filed before this Court an application for stay of execution which was dismissed on 8th May, 2015. In that ruling the Court expressed grave doubts as to the arguability of the intended appeal.

9. Being dissatisfied with that ruling, the applicants filed an application seeking leave to appeal to the Supreme Court and the application is scheduled to be heard on 24th June, 2015. In the circumstances, Mr. Kiarie added, the filing of the present application amounts to abuse of the court process. Counsel added that the applicants had already been evicted from the suit land and therefore their application had no basis.

10. The second respondent filed a replying affidavit and grounds of opposition. **Mr. Kibii**, learned counsel for the second respondent, associated himself with the submissions made by Mr Kiarie. He stressed that the application had been overtaken by events since his client had already executed the decree and evicted the applicants from the suit land. He referred to several documents contained in the second respondent's replying affidavit, among them being a letter dated 9th June, 2015 from the Officer

Commanding Police Division, Eldoret East, **Nelson Taliti**, confirming that ***“the eviction exercise was carried out on 28/5/2015 vide High Court, Eldoret, Order No. E & L No. 931/2012 dated 17/03/2015. Routine Surveillance is still ongoing and as at now there is no squatter residing on the suit parcel of land.”***

11. Mr. Kibii further submitted that before the eviction was done the applicants had done massive destruction to the suit land to the tune of over K.Shs.20 million and it would therefore be highly prejudicial to his client if this Court were to grant the orders sought as the applicants would destroy the suit land even further.

Counsel added that there was no sufficient explanation for the delay in service of the notice of appeal and the record of appeal. No certificate of delay had been issued by the High Court, he stated, and the present application was filed more than 6 months since expiry of the period for filing the intended appeal and the delay was inordinate.

12. In his brief reply, Mr. Okala stated, *inter alia*, that it was a disputed fact whether the applicants had been fully evicted from the suit land. He however conceded that there had been attempts to evict the applicants but added that those who had been evicted are still living within the peripheries of the land.

13. I have considered all the submissions by counsel, the affidavits on record as well as the authorities filed by the 2nd respondent. In **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI**, Civil Appeal No. Nai 255 of 1997, this Court restated the principles under which an application such as the one before me is considered. The Court expressed itself thus:

“It is now well settled that the decision whether or not 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 reason 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.”

See also **POTHIWALLA V KIDOGO BASI HOUSING**

CO-OPERATIVE SOCIETY LIMITED & 31 OTHERS, [2003] eKLR 733.

14. The Court's discretion has to be exercised in a reasonable manner, keeping in mind all the relevant facts and circumstances of the case, including the conduct of the applicant, and whether a belated grant of leave would cause prejudice to the respondent or take away a vested right which has accrued to the respondent by lapse of time.

15. In this application, the judgement sought to be appealed against was delivered on 30th October, 2014. The notice of appeal, though defective, was filed on 4th November, 2014. The notice was not served upon the respondents and the applicants have not given any reasons for that failure.

16. The applicants' letter bespeaking the proceedings was not copied to the respondents' advocates and so the applicants cannot seek to rely on the proviso to rule 82 of this Court's Rules. No certificate of delay has been filed by the applicants. From 4th November, 2014 to 26th May, 2015 when this application was filed is over 7 months and without any sufficient explanation, I find that delay to be inordinate.

17. That is not all. The applicants brought to this Court an application for stay of execution of the eviction orders pending hearing and determination of an intended appeal. One of the issues that was argued by all the parties in that application is arguability of the intended appeal. In rejecting the application, the Court expressed grave doubt about arguability of the intended appeal and stated, *inter alia*:

“ ... all the applicants are and have been either employees or children of employees of the successive owners of the suit land, and that they are and have been on the suit land with the permission of the

successive owners of the land including the 2nd respondent. It is trite law that, for purposes of a claim for adverse possession, time does not run in favour of a person who is in occupation of land with the consent of the owner.”

18. Having expressed that view, the applicants did not advance any argument or avail any authority that would have persuaded me that the Court may have erred in law in taking that position and thereby show that the intended appeal is arguable.

19. Going by the exhibits annexed to the second respondent's replying affidavit, the applicants have already been evicted from the suit land and that being the case, this application has clearly been overtaken by events.

20. The application is lacking in merit and is consequently dismissed with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF JUNE, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR