



**IN THE COURT OF APPEAL**

**AT ELDORET**

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

**CIVIL APPLICATION NO. 308 OF 2014**

**BETWEEN**

**WILLIAM KIPTARBEI KORIR ..... 1<sup>ST</sup> APPLICANT**

**PETER KIPSAT LELEI ..... 2<sup>ND</sup> APPLICANT**

**SUSAN KEMEI ..... 3<sup>RD</sup> APPLICANT**

**NIXON KIPCHUMBA ..... 4<sup>TH</sup> APPLICANT**

**DAVID BUTTY ..... 5<sup>TH</sup> APPLICANT**

**WILLIAM BUTTY ..... 6<sup>TH</sup> APPLICANT**

**DINAH KORIR ..... 7<sup>TH</sup> APPLICANT**

**AND**

**DANSON MUNIU NJERU ..... RESPONDENT**

*(An application for extension of time to file appeal from the decision, judgment and the Decree and an application to stay of execution of the said decision pending the hearing and determination of the intended appeal given by the Hon. Justice S. Munyao, J) at Eldoret dated 26<sup>th</sup> February, 2014*

in

HC E & L CASE NO. 170 OF 2012

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**RULING**

1. In their application before me dated 10<sup>th</sup> November 2014, the applicants combined prayers for extension of time under rule 4 of the rules of the Court to appeal the judgment of the High Court given on 26<sup>th</sup> February 2014 out of time with prayers for temporary injunction and stay of execution under rule 5(2)(b). When I drew counsel's attention to rule 53 of the rules of the court to the effect that a single judge cannot entertain an application for injunction or stay of execution,

counsel for the applicants applied to withdraw prayers for temporary injunction and for stay of execution. There being no objection by the respondent I allowed the withdrawal with the result is that the only matter for consideration before me is the application under rule 4 of the rules of the court for extension of time to file an appeal from the judgment of the High Court given on 26<sup>th</sup> February 2014 out of time.

### **Background**

2. By a plaint dated 19<sup>th</sup> June 2004, the respondent as the personal representative and administrator of the estate of James Gachore Njeru filed suit against the applicants seeking orders of permanent injunction to restrain them from trespassing and occupying portions of title number Cheptiret/Cheplaskei Block 3/sertwet/103 owned by the deceased; an order to evict them therefrom; mesne profit and costs.
3. In their defence the applicants pleaded that they are not trespassers on the property; are rightfully and legally in possession pursuant to an agreement for sale entered into with the deceased on 12<sup>th</sup> May 1994 on the basis of which they took possession of portions of the property. They counterclaimed for declarations to that effect and for an order to compel the respondent to execute the necessary transfer or alternatively for refund of the purchase price and cost of developments undertaken on the property.
4. In a judgment delivered on 26<sup>th</sup> February 2014 the High Court at Eldoret (Munyao Sila, J) allowed the respondent's suit and ordered applicants to vacate the suit property within 6 months and restrained them by permanent injunction from entering or utilizing the suit property after vacating. The applicants' counterclaim was dismissed.

### **Submissions by counsel**

5. Mr. Z. K. Yego learned counsel for the applicants appeared before me during the hearing of the application. He referred to the affidavit of the 1<sup>st</sup> applicant sworn on 10<sup>th</sup> November 2014; the supporting affidavit of the 2<sup>nd</sup> applicant sworn on the same date and urged that the applicants did not become aware of that judgment until 8<sup>th</sup> September 2014 when they were confronted with a warrant of auctioneer to give possession of land that was addressed by the court to the officer commanding station, Kiambaa Police Station.
6. Upon enquiring from their advocates then on record they were told that judgment had indeed been delivered way back in February 2014. According to the 1<sup>st</sup> applicant, on learning of the judgment, he also called the respondent who allegedly assured him not to panic and promised to execute a transfer in his favour for the portion of 3 acres of the property in which he has an interest and indeed facilitated him with bus fare to enable him travel to Eldoret for that purpose; that the respondent's assurances came to naught necessitating the applicants to file a notice of appeal on 23<sup>rd</sup> September 2014 and subsequently to file the present application on 11<sup>th</sup> November 2014.
7. Opposing the application, learned counsel for the respondent Mr. Elijah Momanyi Mogona referred to the replying affidavit sworn by the respondent on 23<sup>rd</sup> May 2015 and submitted that the notice of appeal sought to be regularized was filed by an advocate who was not properly on record and is a nullity; the applicants have not applied for copy of the proceedings; that no record of appeal has been filed after approximately 15 months after the Judgment; that the respondent did not make any assurances to the applicants as alleged by the 1<sup>st</sup> applicant and that the intended appeal does not have any chances of success.

### **Disposition**

8. I have considered the application, the affidavits and submissions by learned counsel. Rule 4 of the

Court of Appeal Rules, 2010 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.”***

9. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice.

10. In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** Waki JA stated:

***“The exercise of this Court’s discretion under Rule 4... 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.”***

11. Applying those principles to the present application, I am satisfied that the delay in lodging the notice of appeal is satisfactorily explained. Although it is evident on the face of the Judgment that it was delivered on 26<sup>th</sup> February 2014 in the presence of the advocates for both parties, the assertion by the applicants that they only became aware of it when confronted with the warrant to give possession on 8<sup>th</sup> September 2014 and that they were not informed of delivery of the judgment by their advocates is given credence by the fact that on 23<sup>rd</sup> September 2014 the applicants through different advocates moved the High Court to stay the judgment delivered on 26<sup>th</sup> February 2014 asserting that they were kept in the dark by their advocates “*until unknown people came to my parcel of land with eviction orders.*”

12. This appears to be a genuine case where parties have been badly let down by their advocate and have offered a reasonable and plausible explanation how they came to be faced with the situation they find themselves in. The former Chief Justice Kwasi Apaloo in **Philip Chemowolo & another v Augustine Kubede (1982-88) KAR 103 at 1040** stated that:

***“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”***

13. There does not seem to be an intention on the part of the applicants to overreach. They have furnished reasons for the delay and demonstrated that they took remedial action without inordinate delay on discovering the omission by their lawyers. For those reasons, I allow

prayer (b) of the applicants notice of motion dated 10<sup>th</sup> November 2014. The notice of appeal filed on 23<sup>rd</sup> September 2014 is deemed as duly filed and served. The applicants shall within 45 days from the date of delivery of this Ruling file and serve a record of appeal. The costs of this application shall abide by the outcome of the appeal.

Dated at Eldoret this 24<sup>th</sup> day of June, 2015

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

I certify that this a true

Copy of the original.

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**DEPUTY REGISTRAR**