



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO NAI 111 OF 2014 (UR 89/2014)**

**BETWEEN**

**AMOS WANGEERA NJOROGE.....1<sup>ST</sup> APPLICANT**  
**PERMINUS MUKURIA NJOROGE.....2<sup>ND</sup> APPLICANT**  
**PRISCILAR MWIHAKI NJOROGE.....3<sup>RD</sup> APPLICANT**  
**MONICAH WANJURI.....4<sup>TH</sup> APPLICANT**  
**JAMES KIRIKA NJOROGE.....5<sup>TH</sup> APPLICANT**  
**EDDAH WAMBUI .....6<sup>TH</sup> APPLICANT**  
**ALICE WAIRIMU NJOROGE.....7<sup>TH</sup> APPLICANT**  
**NANCY NJERI NJOROGE.....8<sup>TH</sup> APPLICANT**  
**MINNIE NYAGUTHAIYA NJOROGE.....9<sup>TH</sup> APPLICANT**  
**CATHERIN WANJIKU NJOROGE.....10<sup>TH</sup> APPLICANT**

**AND**

**SERAH WAMUYU MURIUKI.....1<sup>ST</sup> RESPONDENT**  
**ALICE NYAMBURA MURIUKI.....2<sup>ND</sup> RESPONDENT**

***(An application for extension of time to lodge a notice of appeal against the ruling of Mutungi J. made on 27<sup>th</sup> March 2014***

***in***

***ELC No 1440 of 2013)***

**\*\*\*\*\***

## RULING

In an application dated 15<sup>th</sup> May 2014, the applicants seek an order for enlargement of time within which to file a notice of appeal against the order ruling and order of Mutungi, J. made on the 27<sup>th</sup> March 2014.

The genesis of the ruling made by Mutungi J was that the applicants filed an application seeking an order of temporary injunction against the respondents, restraining them from dealing in land parcel known as Kabete/Nyathuna/1888 pending the hearing determination of a suit filed in the High Court between them. The respondents are the widows and the legal representatives of Crispus Muriuki Nderitu, the registered owner that parcel of land. The applicants claim that the property is family land that was charged by the 1<sup>st</sup> applicant to Barclays Bank of Kenya who, in an irregular exercise of its statutory power of sale, fraudulently transferred the subject property to the deceased.

The learned judge, after considering the principles of injunctions and weighing them against the circumstances of the parties, refused to grant the injunction. The ruling was delivered on the 27<sup>th</sup> March 2014 in the absence of representatives from both parties.

The 1<sup>st</sup> Applicant Amos Wangeera states that neither he nor his co-applicants were aware of the date that the ruling was delivered, and that this is what led to a failure to file the notice of appeal in time. He further states that the delay was occasioned by a mistake, and requests this court exercise its discretion in their favour and give the applicants an opportunity to canvass the intended appeal, which in his view raises grounds with high chances of success as the main dispute revolves around a family property.

The respondents oppose the application. They state that the appeal before the court is not arguable as the property in question was lawfully purchased by their late husband, that the reason for delay is untrue as the date of the ruling was posted on the cause list of the day, and that the applicants have simply been delaying the resolution of the matter so that they could continue residing on the suit property and collecting rent therefrom.

As has been stated numerous times before, the discretion of this Court in considering an application of this nature is unfettered and wide. In the words of this Court in **Leo Sila Mutiso v. Rose Helen**

**Wangari Mwangi Civil Application No Nai. 255 of 1997 (unreported):-**

***“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”***

The Court further went on to state the factors upon which the court will normally consider before granting such an application:

***“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.”***

Similar sentiments were expressed by on a reference to full bench of this Court in **Muchugi Kiragu vs James Muchugi Kiragu & Another [1998] eKLR (Civil Application No. Nai 356 of 1996)** where it was stated that:

***"Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context,***

***this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."***

These are the principles, I bear in mind as I embark on determining the application. I have considered the application and the response filed thereto. Rule 74 (2) of this Court's rules requires that a party intending to lodge an appeal against a decision of the High Court do so within fourteen days of delivery of that decision. The applicants herein were therefore required to lodge the notice of appeal within fourteen days of the 27<sup>th</sup> March 2014 which is by 11<sup>th</sup> of April 2014. The applicants have not indicated when they eventually learnt that the ruling had been delivered. The present application was brought over a month later on 19<sup>th</sup> May of 2014. It is therefore apparent that the delay in this case is of over one month.

I know and appreciate that the duration of the time that lapsed between the mandatory period of filing a notice of appeal and the filing of the present application is not long but it is not a straight rule that a time lapse of a short period might be excused. In my understanding the shortness of a time lapse cannot ipso facto result in the success or otherwise of an application for extension, what is of fundamental importance is the explanation for the delay, which must be sufficiently and adequately explained so as to be within the purview of the court's discretion. The discretion can only be exercised upon sufficient grounds. It cannot be exercised on blanket or whimsical basis, for that reason, I think, it is incumbent upon parties seeking to benefit from the discretion of the court to cloth the court with jurisdiction. The jurisdiction and exercise of discretion is hurdle that must be surmounted by the applicant in giving sufficient and satisfactory explanation for the delay. Where the delay is not explained, no matter the duration, the court would be hesitant to extend its helping hand to such a party. It is not sufficient to say that they were not aware of the date of the delivery of the ruling without stating when they became aware of the said ruling and the steps taken hereafter. In this case that is the missing link.

This delay is not adequately explained by the applicants. It is not sufficient to state that they were not aware of the date of delivery of the ruling; without evidence of when the applicants became aware of the adverse ruling against them and the action that they took before bringing the present application. The applicants have therefore failed to satisfactorily explain the reason for the delay.

In addition, it seems to me that to grant the application would ultimately serve to prejudice the respondents bearing in mind the length of the delay. I am also mindful that in refusing to grant the order of temporary injunction, the learned judge was of the considered opinion that the applicants were not in danger of irreparable loss since if they were to carry the day against the respondents, they could always be compensated by an award of damages. I think that this is a true estimation of the matter, and as this was a grant of temporary injunction, the applicants still have recourse in pursuing the matter before the High Court to its logical conclusion.

As matters now stand, the applicants have not placed any material before the Court to warrant the exercise of discretion in their favour. This application is therefore devoid of merit, and it hereby stands dismissed with costs to the respondents.

**Dated and Delivered at Nairobi this 3<sup>rd</sup> day of July 2015**

**M. WARSAME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**