



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B. M. KARIUKI, J.A. (In Chambers))**

**CIVIL APPLICATION NO. NAI 97 OF 2013 (UR 66/2013)**

**BETWEEN**

**AMINA HASSAN SAITUN & 372 (suing as LEKIJI COMMUNITY).....APPLICANTS**

**AND**

**NIGEL WELBY TRENT..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER FRANCIS TRENT..... 2<sup>ND</sup> RESPONDENT**

***(Application for extension of time to file a Notice of***

***Appeal and record of Appeal against the ruling of the High Court of Kenya at***

***Nakuru (Emukule, J.) delivered 11<sup>th</sup> March 2011***

***in***

**H.C.C.C. 283 OF 2010)**

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**RULING**

The applicants, Amina Hassan Saitun & 372 others (suing as Lekiji Community) wish to contest in this Court the ruling and decision of the High Court (M.J. Anyara Emukule, J.) delivered on 11<sup>th</sup> March 2011 in Nakuru in H.C.C.C. No.283 of 2010. The law enjoined them to comply with rule 75 of the rules of this court which required them to lodge notice of appeal within 14 days of the date of delivery of the judgment. However, they filed notice of appeal on 26<sup>th</sup> June 2011. It should have been filed by 25<sup>th</sup> March 2011 as the 14 days period expired at midnight on 25.3.2011. They were out of time by three months or 90 days. They lodged their application for extension of time under rule 4 of the rules of this Court on 9<sup>th</sup> May 2013, roughly after about two years and two weeks from the date that they were required to lodge their notice of appeal (on 25.3.2011). On the face of it the period of delay appears long. The learned counsel for the applicants, **Mr. Nzioka** holding brief for Advocate Herbert Mwendwa submitted that the delay was not inordinate because there was a satisfactory explanation given in the application for it.

Firstly, the applicants lacked cash to meet fees for lodging the notice of appeal and for applying for

extension of time when time to lodge the notice run out. They eventually went to and sought from Kituo Cha Sheria pro bono services. In addition, there were attempts in June 2011 to evict the applicants from the suit land and the applicants, said their counsel, utilized their limited resources resisting the eviction. The applicant's counsel submitted that the applicants' intended appeal is arguable and in this regard drew my attention to the draft memorandum of appeal in which the applicants have proffered three grounds of appeal namely (1) that the trial Court "*erred in law in holding that the matter brought in Court was res judicata*" and (2) that the court "*erred in law and in fact by concluding that the application was res judicata by making reference to other matters where none of the respondents were parties...*" and (3) that the Court: "*erred in law and in fact in striking out the appellants' application on the reason that they were suing Lekiji Community*" and finally that the Court erred "*in law and in fact in holding that by the applicants suing as Lekiji Community was (sic) fatal to warrant the dismissal of their application*"

The applicants' counsel relied on the grounds on the face of the application and on the affidavit in support of the application sworn on 8.5.2013 by Hassan Hussein Mohammed, one of the applicants. It was the further submission of the applicants' counsel that the respondents would not suffer any prejudice if the court extends time to appeal. In contrast, he said, the applicants shall suffer if extension of time is not granted and the applicants are removed from the land which has been the subject of the litigation.

The respondents opposed the application and relied on the replying affidavit sworn on 20.01.2014 by Nigel Welby Trent, the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> applicant avers in the affidavit (1) that instead of following up on the appeal, the applicants filed petition number 16 of 2011 and (2) that as the applicants number 373, they could have raised fees the quantum of which they have not disclosed and (3) that the applicants wasted time in deciding whether to appeal the decision and that this is a manifestation of lack of seriousness on their part. At any rate, the deponent avers that the issue of ownership of the land in question, to wit LR No.2747 Northwest of Nanyuki Township, has been adjudicated upon in the multiplicity of suits referred to in paragraph 10 of the deponent's affidavit and the applicant's intended appeal has no chances of success. It was averred by the 2<sup>nd</sup> respondent on behalf of both respondents that they have a constitutional right to own and occupy the said land in respect of which an eviction order against the applicants was issued in 1995 yet the applicants continue to remain on the land.

**Mrs. Gatei**, learned counsel for the respondents, (holding brief for Mr. Mwangi of Messrs Ikua Mwangi & Co. Advocates) opposed the application and relying on the replying affidavit of the 2<sup>nd</sup> respondent submitted that the delay in lodging notice of appeal 90 days after it was due was inordinate and inexcusable. Moreover, the application for extension of time was presented after a period of over two years after the notice of appeal became due. In counsel's view, the reasons advanced by the applicants for the delay in seeking extension of time were not plausible.

For starters, although the applicants numbered 373 and could in the counsel's view have managed to pay the fees, the quantum of fees was not stated. If the applicants were interested in pursuing appeal, said counsel, they would not have wasted time in filing constitutional petition number 16 of 2011 but would have gone straight into taking steps to appeal. It was not until their petition became unsuccessful that the applicants' turned to appeal, submitted counsel for the respondents. I observe that it was not in dispute that the applicants lodged on 26.5.2011 a notice of appeal outside the prescribed time. What the applicants did not do was to seek extension of time immediately. They filed their application in this regard 9.5.2013 after their constitutional petition had been dismissed. The application for extension of time was described by respondent's counsel as a delaying tactic.

As regards the applicants' intended appeal, counsel for the respondents contended that it is not arguable. She pointed out that the applicants' claim over the said land is predicated on the doctrine of adverse possession and has no merit as their occupation has not been uninterrupted for 12 year and above. Mrs. Gatei pointed out that Emukule, J. had found that the respondents acquired the said land in 1995 and an eviction order was given in 1994 or thereabout.

Counsel for the applicants cited and relied on the following authorities:

1. **Wasike vs. Khisa & Another [2004] 1 KLR 197**

## 2. **Gachau & Another vs. Pioneer Holdings (A) Limited & 2 Others [2008] KLR 315**

## 3. **Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR**

I have perused the authorities. I have also perused the application and duly considered the rival submissions by counsel. The Court has unfettered discretionary power under rule 4 of the rules of this Court to extend time limited by the rules or by the orders of this Court. This discretion is exercised judicially with the object of serving justice to parties. The policy of the Court was indicated as long ago as 1986 by Apaloo JA, as he then was, when he stated in **Gatu v. Muriuki [1986] KLR 211** that:

***‘The court ought to be inclined to exercise its discretion to enlarge the time to appeal where the applicant has shown prima facie that he has an arguable case for consideration.’***

More recently in 2004, Githinji, JA in **Wasike v. Khisa [2004] KLR 197** re-echoed this when he held that the discretion of the Court under rule 4 is unfettered and must be exercised judicially and that it is not every delay in taking appropriate step required that would disentitle a party to extension of time. It is only unreasonable delay which is culpable, he stated, that would disentitle an applicant to an order for extension of time and whether or not delay is unreasonable depends on the circumstances of each case. The jurisprudence that has emerged from the decisions of this Court on the interpretation of rule 4 shows that the factors to be considered include the length of the 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 of the matter and generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 of the Constitution.

On the basis of the evidence before the Court and applying these principles, have the applicants made out a case for the Court to exercise its discretion in their favour? Firstly, the delay in lodging the notice of appeal on 24.6.2011 was not explained. The notice was filed after three months (90 days) after it fell due. While lack of funds was given as an excuse for failure to pursue the appeal, the applicants have not explained why it was feasible and possible for them to pursue constitutional petition No.16 of 2011. It was not alleged that such Constitutional petition was cheaper to pursue in terms of resources than an appeal. Moreover, the applicants did not disclose what their financial burden was in the intended appeal in comparison with the petition. In any case, I think there is merit in the contention that having regard to the plurality of applicants the fees for the appeal could have been raised. There was no allegation that when they filed constitutional application No.16 of 2011, the applicants did so through Kituo Cha Sheria or obtained *pro bono* services as they have done in this application. I am not persuaded that lack of resources militated against the filing of the appeal. At any rate, having realized that the notice of appeal was filed out of time by three months, the applicants did not come to court to seek extension of time. Instead, they waited for over two years before filing on 9.5.2013 the application for extension of time. A litigant who is indolent or is not diligent in seeking the exercise of the court’s discretionary power in his favour cannot hope to benefit from rule 4. The rule is intended to assist the Court to do justice to parties. It is intended to ensure that where parties for no fault of their own, are unable to meet timelines set in rules or in Court orders they will not be hampered in pursuit of their appeals. The existence of the rule is in recognition that in the conduct of human affairs, circumstances do occur that militate against ability to comply with timelines set by the law and that as long as people remain human, such circumstances will continue to give rise to inability to meet deadlines. The applicants have not advanced a plausible reason why they took over two years to seek extension of time nor why the notice was lodged 90 days out of time in the first place. The issue of ownership of the land in question seems to have been litigated almost *ad nauseam*. Although the applicants contend that they have an arguable appeal, they have not been able to demonstrate, on *prima facie* basis, that it is arguable. If they failed to prove adverse possession against the title holders who sold to the respondents and if adverse possession has not run against the respondents since they acquired title, it is difficult to see, *prima facie*, the basis on which it can be said that an arguable case for adverse possession does exist.

On the three main considerations in this application, namely, the length of the delay, the reasons proffered for such delay and the arguability of the appeal, my finding is that the applicants have failed to persuade the Court to find in their favour. In addition, the degree of prejudice to the respondent is not

such as can adequately be redressed by an award of costs. Justice must be done to both parties, both those who bring their claims to Court and those who are dragged to court. In the instant application, it is shown that the respondents have not been able to enjoy for close to 19 years the property which they purchased in 1995. Law might be blind but justice must be served to all who deserve it. It is my finding that the degree of prejudice to the respondents in the context in which there has been a surfeit of litigation in the matter concerning the ownership of the land would not be redressed by costs if extension of time to appeal is granted. The plurality of the applicants is not of course, lost on me but the scales of justice must be balanced and the Court is called upon to ensure that justice is dispensed in accordance with the law. Accordingly, the application fails. It is dismissed with costs.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of March 2014.**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**REGISTRAR**