



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 176 OF 2014 (UR 137/2014)

BETWEEN

- DICK OUMA OCHIENG.....1ST APPLICANT**
- DAVID AUMA.....2ND APPLICANT**
- PATRICK NDIRANGU.....3RD APPLICANT**
- SAID ALI ABU.....4TH APPLICANT**
- SAMUEL NGATIA.....5TH APPLICANT**
- JAMES NJOROGE.....6TH APPLICANT**
- MARY NDUKU KIOKO.....7TH APPLICANT**
- MAINA MUTAJI.....8TH APPLICANT**
- JOHN MWAURA WAINAINA.....9TH APPLICANT**
- MUDIA MUCHEMI.....10TH APPLICANT**
- NAMA OGEMBO OGWENO.....11TH APPLICANT**

AND

SMUTHITHI INVESTMENTS LIMITED..... RESPONDENT

(Application for Extension of Time for Filing the Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mutungi, J) Dated 13th May,

2014

in

H.C.C.C. (ELC) No. 457 of 2013)

RULING OF NAMBUYE, JA

The Eleven Applicants **Dick Ouma Ochieng, David Auma , Patrick Ndirangu, Said Ali Abu, Samuel Ngatia, James Njoroge, Mary Nduku Kioko, Maina Mutahi, John Mwaura Wainaina, Mudia Muchemi and Naman Ogembo Ogwen** were among a total of twenty three (23) defendants then successfully sued by the respondent **Muthithi Investment Limited** in the High Court of Kenya, vide ELC No. 498/2004. The litigation appears to have centred around a claim of ownership of Land reference No.2391/7. The litigation culminated in the judgment of **J.M. Mutungi, J** dated and delivered on the 13th day of May, 2014 in favour of the respondent.

The applicants were aggrieved by that decision and desired to appeal to this court. As was required of them, they needed to have lodged their notice of appeal within the time line stipulated in rule 75(2) of this Court's Rules of 14 days from the date of delivery of the grieving decision. Instead, their notice of Appeal dated the 26th of June, 2014 was lodged out of time without leave on the 27th day of June, 2014 hence this application.

The application is dated the 9th day of July, 2014 and lodged on the 15th day of 2014. The substantive relief sought is that, the Honourable Court be pleased to issue an order extending the time for the filing and serving of the Notice of Appeal; the Notice of Appeal lodged herein be deemed duly filed and served. The application is supported by the grounds in the body of the application; content of a supporting affidavit of **Benard Maina Mutaha** and oral submissions to Court.

In his oral submissions before me, **Mr. Michael Nderitu** learned counsel for the applicant informed me that they had served the respondent with both the notice of appeal and the application on the 24th July, 2014 but since then the respondent had not filed any affidavit in reply to their application. Neither had they attended chambers to oppose the application under review notwithstanding their receipt of the hearing notice without any protest. The Court being satisfied that the respondents had indeed received notice of both the lodging and service on them of the application under review by the applicants and service of the hearing notice for the hearing date on them by this courts Registry, allowed the applicant to proceed exparte.

On merits, **Mr. Nderitu** urged me to allow the application because, the delay was not intentional. It arose from an excusable mistake in that, the applicants are representatives of a large group of residents of the suit property on which stands developed structures. They had appointed the eighth (8th) applicant as their contact person. The eighth (8th) applicant had unfortunately moved away to Muranga County hence inability to contact him for instructions on the way forward soon after the delivery of the judgment. **Mr. Nderitu** argued further that the litigation is for the benefit of a large group and getting them together to give instructions to proceed on with the appeal process was not easy. That the respondent has already set in motion the eviction process in the High Court. They contend they have an arguable appeal with a probability of success. They intend to argue that the learned trial Judge failed to properly appreciate the intended appellants competing interests as against those of the respondent considering that both parties had title documents in their possessions. Lastly no prejudice will be suffered by the respondent if the order sought is granted to the applicant.

My jurisdiction to grant the relief sought has been invoked under rule 4 of this Court's Rules. It reads:-

“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.”

In the case of **Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997 (UR)**, the following observations were made:-

“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 reasons 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.”

In Githiaka versus Nduriri [2004] 2KLR 67 Ringera Ag JA (as he then was) had this to add:-

“In the exercise of its discretion, the Courts’ primary concern should be to do justice to the parties. Save that in doing so, the Court should bear in mind the length of the delay in lodging the notice and record where applicable, the delay in lodging the application for extension of time as well as the explanation thereof; whether or not, the intended appeal is arguable, the public importance if any of the matter and generally the requirement of the interest of justice in the case”

My understanding of the guiding principles enunciated in the above two decisions is that those prerequisites have to be satisfied irrespective of whether the request for the Courts indulgence is contested or not.

Applying the above principles to the uncontested contention of the applicant, I find nothing to doubt the applicant’s explanation that there was temporary loss of touch with their counsel then on record for them; by the time the applicant’s contact party, the eighth (8th) applicant got to know of the delivery of the judgment time for the lodging of the notice of appeal had already lapsed; there is sufficient demonstration of intention to appeal borne out by the fact that as soon as the applicant learned of the delivery of the Judgment against them, they gave instructions for the lodging of the notice of appeal albeit out of time and soon thereafter promptly presented the application under review for enlargement of time.

The judgment sought to be impugned was delivered on the 13th day of May, 2014. Fourteen (14) days period within which the notice of appeal should have been lodged lapsed on the 27th day of May, 2014. The notice of appeal was erroneously lodged on the 27th day of June, 2014 out of time and without leave, a period of thirty (30) days from the date of the lapse of time for lodging of the said notice. The application to regularize the irregular lodging of the notice of appeal is dated 9th July, 2014 and lodged on 15th July, 2014 a period of about 18 days from the date of the erroneous lodging of the notice of appeal. In my opinion, the above sequence of events portrays a litigant making efforts to comply with this Courts Rules in abid to exercise his undoubted right of appeal.

I therefore make no hesitation in stating that the applicants have brought themselves within the ambit of the prerequisites required to be established before a litigant can earn a relief under rule 4 of this Court’s Rules.

In the result, I find merit in the applicant’s application dated the 9th day of July, 2014 and lodged on the 15th day of July, 2014. Prayer 1 thereof is allowed. Prayer 2 is disallowed. The applicant has fourteen (14) days from the date of the reading of this ruling to lodge a notice of appeal. There will be no order as to costs since the application was not defended.

Dated and delivered at Nairobi this 10th day of October, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRA

D/O