



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(SITTING AT NAIROBI)**

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

**CIVIL APPLICATION NO. NAI. 60 OF 2014 (UR 47/ 2014)**

**BETWEEN**

**PHILIP KIPKORIR SAMICH**

**ROBERT KIPKEMBOI KIRUI**

**LABAN CHERUIYOT**

**TANAN KIPKURUI YEGO..... APPLICANTS**

**AND**

**THOMAS KIPELEL SUM..... RESPONDENT**

(Being an application for extension of time within which to serve the Notice of Appeal out of time,

to lodge the Appeal and to serve the Record of Appeal out of time arising from

the Judgment of Justice Sila Munyao delivered on the 7<sup>th</sup> Day of November, 2013

in

Eldoret H.C.E. L.C. No. 495 of 2012)

**RULING**

Before me is an application brought by the applicants by way of Notice of Motion principally under the provisions of Rule 4 of the Court of Appeal Rules. The brief background of the matter is that the applicants were sued by the respondent in the High Court. The respondent sought for an order inter alia that he be declared as the registered owner of land parcels, Uasin Gishu/Tapsagoi Settlement Scheme/ 929, 981 and 982, and the applicants be evicted from the suit land. The matter was heard by Munyao, J., and by a judgment delivered on 7<sup>th</sup> November, 2013, the respondent's suit was allowed in the following terms;

"On the whole and given the circumstances surrounding this case, I make the following final orders;-

- a. That a declaration is hereby issued that the plaintiff is the registered owner of the land parcels Uasin Gishu/ Tapsagoi Settlement Scheme 929, 981, and 982 and the defendants have not demonstrated any right to occupy the said parcels of land.
- b. That the defendants do vacate the land parcels Uasin Gishu/ Tapsagoi Settlement Scheme 929, 981, and 982 by 31<sup>st</sup> December, 2013.
- c. That no order is made as to the claim for mesne profits or damages.
- d. That there shall be no order as to costs."

Aggrieved by the aforesaid orders, the applicants claim that they intended to appeal; according to the matters deposed upon in the supporting affidavit by the 3<sup>rd</sup> applicant, they instructed their counsel on record, Mwinamo Lugonzo and he filed a Notice of Appeal on the 20<sup>th</sup> November, 2013. However, the Notice was never served upon the respondent, and it was not until the 8<sup>th</sup> February 2014, when the applicants decided to change the advocates. Upon instructing M/s Arap Mitei advocates, he is the one who realized that an appeal was not filed. It was argued for the applicants that the delay in filing the appeal was occasioned by the transition from one Law Firm to another. The delay was not inordinate and the respondent will not suffer any prejudice. On the appeal being arguable, Mr. Mitei submitted that the applicants have been in occupation of the suit land since 1970's. They had developed the land thus they should be allowed to ventilate their grievances before the Court of Appeal. The few lapses that occasioned the delay are excusable while bearing in mind the overriding objectives in the administration of justice.

This application was opposed by Mr. Shivaji, learned counsel for the respondent. He submitted that there was a delay of 92 days which was not explained by the applicants. There was no explanation of how the change of Advocates affected and stopped the service of the Notice of Appeal. Counsel was of the view that the applicants do not deserve the exercise of this Court's discretion.

The prayers sought in this application call for the exercise of the court's discretion which is generally unfettered. However, where the court has to exercise its discretion, there must be some reasonable basis of fact or law to warrant the orders being made. In other words, judicial discretion cannot be exercised whimsically or capriciously. The parameters that guide the court are well set out in a long line of authorities. See the case of *Leo SUa Mutiso v Rose Hellen Wangari Mwangi*, C. A. Appl. No. Nai. 251/97 (ur):

"It is now 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."

The above list is of course not exhaustive as held in the case of *Mongira & Another v Mukaria & Another*, 2005 2 KLR 103 at page 106-107, **where the Court** again cited *Leo Sila Mutiso* (supra), and went on to state:

"These, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion and so long as the discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way."

With the above principles in mind, I now approach the application before me. The applicants were late in filing the Notice of Appeal by a period of about three months. The applicants contend that they are aggrieved by the order that dispossessed them of the suit land which they occupied in the 1970's and carried out extensive developments. They were late in filing the Notice of Appeal because their advocate on record filed it but failed to serve the respondent pursuant to the provisions of Rule 77 (1) of the Court of Appeal Rules. This was a major lapse on the part of counsel for the applicants, however if this was the only factor, I would have ruled that the applicants choose their own lawyers and, therefore, they should bear the consequences of their advocates' mistakes which should not visit upon the respondent.

I havenonetheless tolook at the merit of the appeal and that is not to say an arguable appeal will of necessity be successful. These are the grounds raised in the proposed memorandum of appeal:

1. The learned trial Judge erred in law and fact by failing to find that the appellants and especially the 1<sup>st</sup> appellant who bought the said suit lands in 1970's and had been in actual control and possession of UASIN GISHU/TAPSAGOI SETTLEMENT SCHEME 929, 981 & 982 (formally Plot no 206) to- date had acquired ownership rights by adverse possession to the detriment of the respondent.
2. That the learned trial Judge erred in law and fact by issuing declaratory orders in favour of the respondent and ordering that the appellants did not demonstrate any right to occupy the said parcels of land in UASIN GISHU/TAPSAGOI SETTLEMENT SCHEME 929, 981 & 982 contrary to the solid and truthful evidence and submissions by the appellants.
3. That the learned trial Judge erred in law and fact by failing to find that the plaintiff evidence was contradictory, untruthful, insincere to warrant the orders issued in his favour.
4. That the learned trial Judge erred in law and fact by not finding and holding that the appellants had tendered sufficient documentary evidence that fulfilled the requirements of law to warrant full enforcement of contract between the parties for the sale of land in the year 1970.
5. That the learned trial Judge erred in law and in fact by relying entirely on questionable plaintiff exhibits documents whose authenticity is doubtful and challengeable.

From the submissions of counsel for the applicants, and also a cursory glance at the pleadings that were before the High court, and the grounds raised in the aforesaid draft memorandum of appeal, the intended appeal in my humble view is arguable. It is not my province as a single Judge to comment substantively on the merit of the appeal that is for the Three Judge Bench to decide. What I can say at this point is that the issue of the applicants' beneficial interest over the suit land is an arguable issue. The delay in filling the appeal by about three months may not greatly prejudice the respondent, when the entire circumstances are looked into; the applicants should be allowed a right of appeal. Also any inconvenience caused to the respondent by the present appeal can be compensated by costs which I do hereby award to the respondent.

In view of the foregoing, I am satisfied that this is a proper matter for me to exercise my discretion in favour of the applicants and to grant them leave to appeal. Accordingly the applicants' Notice of Appeal is deemed properly filed and the Record of Appeal should be filed within the next 30 days from today. The respondent shall have the costs of this application in any event. Dated and delivered at Nairobi this 14<sup>th</sup> day of November, 2014.

**MARTHA .K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**