IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE JA (IN CHAMBERS)

MISC. CIVIL APPLICATION NO. NAI.143 OF 2014

BETWEEN

JAMALDIN YAHYA

BARNABA AGAR NYANDIERO

SAMUEL KETAI

LUCY MUTHONI t/a LUCY HOTEL

REBECCA SAMBEKI t/a SAMBEKI PUB

JAIRUS SAW t/a WOTE BUTCHERY...APPLICANTS

AND

NANCY BOMMET (Suing on behalf of a Jamhuri East Residents

Association in her capacity as the Chairlady thereof)

JOHN EVANS AREK (Suing in his capacity as the Secretary thereof)

FRED KINUTHIA (Suing in his capacity as the Treasurer thereof.............RESPONDENTS

(An application for Extension of time to file and serve Notice of appeal and Record of appeal, respectively

out of time in an intended appeal from a Ruling of the High court of Kenya at Nairobi (Gitumbi J)

dated 2nd May 2014

in

High Court ELC. No.289 of 2012)

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RULING OF NAMBUYE, JA

The respondents Nancy ***Bomet, John Evans Arek and Fred Kinuthia*** suing on behalf of Jamhuri East Residents Association in their capacities as Chairlady, Secretary and Treasurer respectively filed Nairobi HCCC ELC No. 289 of 2012 against the applicants; Jamaldin Yahya, Barnaba Agar Nyandiero, Samuel Ketai, Lucy Muthoni t/a Lucy's Hotel, Joseph Mungai Kimani, Rebecca Sambeki t/a Sambeki Pub, Jairus Sawe t/a Wote Butchery and others namely; Ali Bulls, Khadija RRII, Khalfan Juma Suleiman, Jenniffer Kisuru Musiwa, Hellen Chepkemboi, Pamela Chepkemboi, Mwangi Kawaya t/a Thinker's Pub and Ezekiel Rema. The plaint was dated 24th May, 2012. It sought various reliefs.

On the plaint was anchored a notice of motion brought under Order 40 rule 1(1) (a), 2(1) and (4), Order 51 rule 1 and Order 5 rule 17 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(c) and 63(e) of the Civil Procedure Act (Chapter 63*(sic)* (21) of the Laws of Kenya) and all other enabling provisions of the law. It sought a temporary injunction to issue to restrain the applicants, their respective agents, servants, employees, personal representatives and/or assigns from continuing to purport to unlawfully possess, own, occupy, enjoy, trespass or lease all those parcels of land owned and duly registered in the names of members of Jamhuri East Residents Association namely land Nairobi Block 62/762,Nairobi Block 62/763, Nairobi Block 62/764, Nairobi Block 62/765, Nairobi Block62/766, Nairobi Block 62/767, Nairobi Block 62/749, Nairobi Block62/750, Nairobi Block 62/751, Nairobi Block 62/752, Nairobi Block62/753, Nairobi Block 62/768, Nairobi Block62/769, Nairobi Block62/770,Nairobi Block62/771, Nairobi Block62/772, Nairobi Block62/773, Nairobi Block62/774, Nairobi Block62/775, Nairobi Block62/776, Nairobi Block62/777, Nairobi Block62/778, Nairobi Block62/779 pending the hearing and determination of the application and then the suit together with further orders and /or directions of the Court; a mandatory injunction to issue to compel the applicants to vacate and or surrender actual possession of all those parcels of land described above and further court order and or directions of the court.

The application was supported by the grounds in the body of the application and a supporting affidavit deposed by ***Thuita***. That application was opposed by the replying affidavit of ***Samuel Ketai*** deposed on the 24th day of June, 2013 and filed on the 25th day of June, 2013. Parties were heard on their merits resulting in the ruling of ***Mary M. Gitumbi, J*** delivered on the 2nd day of May, 2014. In summary, the learned trial judge allowed both limbs of the application in favour of the respondents limited to parcels of land whose titles had been exhibited but dismissed the application with regard to 14 named parcels but whose titles had not been exhibited.

The applicants are aggrieved by that decision. They are desirous of appealing to this Court against that decision. They failed to lodge the requisite notice of appeal within 14 days from the date of the delivery of the ruling sought to be impugned in terms of rule 75(2) of this Court's Rules. From the 2nd day of May, 2014 the fourteen days fell on 16th May, 2014. It was not until the 23rd day of June 2014, that the application under review was lodged, a period of fifty one (51) days from the date of the delivery of the ruling and 37 days from the last date the notice of appeal ought to have been filed.

Initially two substantive reliefs were sought. Prayer 1 sought leave of Court to extend time within which the applicant could file and serve a notice of appeal from the ruling of ***Hon. Lady Justice Mary G. Gitumbi*** delivered on 2nd May, 2014 in Nairobi ELC No. 289 of 2012; Prayer 2 sought stay of execution of the same orders. Prayer 2 was found to be premature and was subsequently abandoned or withdrawn on the hearing date.

The application is supported by the grounds in the body of the application and a supporting affidavit of ***Samuel Ketai.*** In summary, Miss ***Munyasya*** for the applicant argued that the applicants were sued in the High Court by the respondents; the respondents anchored on the plaint an interim application seeking injunctive reliefs; the interim injunctive application was heard and ruling reserved for delivery; the ruling was delivered in the absence of the applicants and their advocate on record; by the time the applicants came to learn of the delivery of the ruling, time for filing of the notice of appeal had lapsed hence the application to regularize that position.

It is also ***Miss Munyasya's*** contention that the applicants have an arguable appeal with a probability of

success as they intend to raise the claim of adverse possession. The learned Judge was also wrong in terminating the proceedings at an interlocutory stage by issuing a mandatory injunction against the applicants.

The application has been opposed by a replying affidavit of ***Thuita Ritho*** deposed and filed on the 3rd day of October, 2014 and oral submission in Court. It was ***Mr. Jaoko's*** arguments that though rule 4 of this Court's Rules gives wide latitude to me in the exercise of my judicial discretion under the said rule, the applicants have not met the threshold for the exercise of that discretion.

To ***Mr. Jaoko***, the applicants are undeserving of this Court's indulgence because, they have been indolent. It is ***Mr. Jaoko's*** argument that the applicants were served with the notice for the delivery of the ruling; thereafter on the 29th day of May 2014 the respondents served them with the extracted order; it was not until the 23rd day of June, 2014 that the application under review was filed. It is ***Mr. Jaoko's*** arguments that both of these two sets of delays have not been satisfactorily explained by the applicants hence the request that may not be indulged.

Turning to the other ingredients, ***Mr. Jaoko*** maintained that it is contrary to public policy for the applicants to perpetuate their trespass on to the suit properties to the detriment of the rightful owners whose titles have not either been impeached or alleged to have been fraudulently obtained.

Turning to the arguability of the intended appeal, **Mr. Jaoko** maintained that the intended appeal would be an exercise in futility as the applicants never raised the issue of adverse possession before the learned judge who gave the orders sought to be impugned. Alternatively, even if the applicants were to be given an opportunity to raise the issue of adverse possession on appeal, there is no way the respondents' titles can be impeached on appeal. On that account **Mr. Jaoko** urged me to disallow the application.

My jurisdiction to intervene in this matter has been invoked under rules 1(2) 4 and 42 of this Courts rules. Rule 1(2) enshrines the inherent power of this Court. This is the unwritten power of the Court invoked for purposes of making orders necessary for ends of justice to be met to both parties before it. Rule 42 is merely procedural, simply describing the mode of approach to the Court by a party seeking an interlocutory relief. Rule 4 is the substantive rule on extension of time. 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"***

The parameters of the powers donated by this rule have been a subject of interrogation in a long line of decisions of this Court. 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 extention of time or not 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] 2KLR67 Ringera Ag JA*** as he then was had inter alia this to add:-

> ***In the exercise of its discretion the Court's 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.***

Applying the above principles to the rival arguments herein, I proceed to make the following findings thereon.

1. There is no dispute that the applicants participated in the merit disposal of the interlocutory injunctive relief application. It is apparent the ruling was reserved to be delivered on notice.

2. The ruling was indeed delivered on notice. The applicants allege that no notice of delivery of the said ruling was served on them or their advocates then on record for them. The respondent asserts that that is not the correct position but there is nothing exhibited by them to show when or by whom the notice for the delivery of the said ruling was served on the applicants. The applicant's assertion that the ruling was delivered without notice to them is therefore plausible.

3. The finding in number 2 above notwithstanding the respondents allege that the extracted order was served on the applicants soon after the delivery of the ruling. Reliance has been placed on the affidavit of service deposed by one **Alexander Ochuo Alala**. In it there is deposition that the applicants were served with the extracted order on 29th May 2014 together with a notice of penal consequences. No rebuttal was made of this deposition by the applicants. I am therefore satisfied that indeed the applicants were alerted of the delivery of the ruling through service on them of the extracted order. This was 13 days from the last day the applicants ought to have filed a notice to appeal. In paragraph seven of the supporting affidavit, the deponent deposes that they learned of the delivery of the ruling when they were served with the court order on 28th May 2014. There is however silence as to why they did not move to court to seek a reprieve until 26 days later. I therefore agree with the respondents contention that no sufficient reason has been given as to why the applicants did not move swiftly to present an application to regularize their position soonest.

4. My finding in number 3 above notwithstanding I am obligated to interrogate the other ingredients for the grant of a relief under rule 4 of this court's Rules. One such consideration is whether the delay in moving to regularize the default was inordinate.

In the case of **George Mwenda Muthuri versus Mama Day and Nursery School Limited [2014] eKLR** and **Moses Odero Owuor and 2 others versus Andronico Otieno Anindo (2013) eKLR** ***Koome and Azangalala JJA*** declined leave to appeal on account of a delay of 20 months and 2 years respectively. Herein the delay is less than two months. I do not find this to be inordinate.

5. On arguability of the intended appeal, the applicants intend to ventilate their grievances on the learned trial judges' action of making drastic orders of eviction at an interlocutory stage thereby short-circuiting the merit disposal of the suit. They also stand aggrieved by reason of the learned judge's failure to allow the merit interrogation of issues raised by the applicants' in relation to fraud and authenticity of the title documents relied upon as a basis for the issuance of the injunctive relief. They also feel that rules of natural justice were infringed.

6. It is now trite that matters of the arguability of the intended appeal are only a possible consideration. The above notwithstanding, it is now trite that an arguable appeal need not be one that must succeed. It is simply one which a court of law properly directing its mind will make a finding that there is good cause shown by the appellicant thereby making it necessary for the respondents to be called upon to make a response. In my opinion all the above raised points are arguable irrespective of their ultimate success or otherwise. The applicants therefore have genuine concerns to be addressed by the court of appeal and it is only proper that they be allowed an opportunity to exercise their undoubted constitutional right of appeal.

7. As for prejudice likely to be suffered by the opposite party, I find none demonstrated to exist, as this is not an application for stay; secondly, the granting of an order for leave to appeal does not automatically act as a stay of execution. This being the case the process already set in motion by the respondents for the eviction of the applicant will not be interfered with by the issuance of a positive order in favour of the applicants vide this ruling.

In the result and for the reasons given above, I find this is a proper case in which the applicants should not

be denied access to appellate justice. I therefore allow prayer 1 of the application.

1. The applicants have 14 days from the date of the reading of this ruling to file and serve their notice of appeal out of time.

2. The Respondent will be sufficiently compensated for by way of costs.

Dated and delivered at Nairobi this 7th day of November, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR