



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 31 OF 2008

**KINYUA NG'ANG'A
PETER MBURU NG'ANG'A
RACHAEL WANJIRU NGARIHU.....APPLICANTS**

AND

NAHASHON NJENGA NG'ANG'A

AGNES GATUYA

JOHNANA KIMANI.....RESPONDENTS

(Being an application for extension of time to file and serve the Notice of Appeal and leave to file an appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Khamoni, J.) dated 5th December, 2007

in

H.C.C.A. No. 662 of 2002)

RULING

1. By a notice of motion dated 6th April 2011, the applicants are seeking to have time extended for them to file and serve the record of appeal. The applicants were the respondents in the superior court. Judgment was delivered against them on 5th December 2007. They filed a notice of appeal on 11th December 2007, and applied for copies of proceedings and judgment on the 7th January 2008. The notice of appeal was however misplaced in the court registry as a result of which the applicants applied for leave to appeal out of time. On the 25th May 2010, the applicants were granted leave (**Tunoi, JA**) to file the notice of appeal within 7 days from that date and the record of appeal within 30 days from the date of the notice.

2. The applicants filed a notice of appeal on 2nd June, 2010. However, they did not lodge the record of appeal within the prescribed time. They have now moved the court under Rule 4 of the Court of Appeal Rules for time to be extended to enable them file and serve the record of appeal. **Peter Mburu Ng'ang'a** who is one of the applicants has sworn an affidavit in support of the application. He explains that the delay in filing the record of appeal was due to inability to obtain crucial appeal documents from their former advocates, and also because the court file could not be traced.

3. **Mburu Nganga** further swears that the applicants who are all senior citizens of over 60 years are

suffering ill health and lack the necessary finances to pay for the court filing fees. Thus it has taken them several months to raise the court filing fees. The applicants pleads that the subject matter of the intended appeal is family land and that the applicants have strong grounds of appeal against the decision of the superior court. They therefore urge the court to exercise its discretion in their favour.

4. In reply to the application, **Jeremiah Ndung'u Mbutia** who is the advocate for the respondents has sworn a replying affidavit. He points out that the applicants have come to court almost one year after the time they were supposed to have filed the record of appeal. Counsel avers that the explanation for the delay given by the applicants is not candid as the advocates of the previous firm have not been disclosed nor have any documents been annexed. The court is urged to find that the applicants are guilty of excessive and unexplained indolence and should not therefore be granted the orders sought. When this application came up for hearing on 14th February 2012, there was no appearance for the respondents even though the respondents counsel was duly served. Hearing of the application therefore proceeded ex-parte.

5. I have given careful consideration to this application bearing in mind the guidelines for exercising my discretion under Rule 4 of the Court of Appeal Rules as stated in **Dickson Ndegwa Mbugua vs. City Council of Nairobi & 3 Others [2010] eKLR**, as follows:

“The exercise of this court’s discretion under rule 4 has followed a well beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors – see Mutiso vs. Mwangi Civil Application No. Nai. 255 of 1997, (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igwete vs. Murika M’Ethare & Attorney General Civil Application No. Nai, 8 of 2000 (ur) and Murai vs. Wainaina (No. 4) [1982] KLR 38.”

6. In this case, the applicants were granted indulgence by the court and time extended for them to file their notice and record of appeal. In granting the previous application for extension of time, the court took note of the circumstances of the delay and the fact that the intended appeal involved family land occupied by the respective parties.

7. The explanation, that the applicants were unable to file their record of appeal because they could not trace the court file, has not been supported by any document such as a letter addressed to the Deputy Registrar requesting for the court file or raising an issue regarding the alleged missing court file. Indeed, it is common knowledge that where a party is constrained by a time line, such as that which was facing the applicants, the least that they can do is to put their complaint on record through a letter addressed to the court to show that they are ready and willing to file the appropriate papers but for the non availability of the court file. To wait until almost one year later is evidence of indolence and lack of interest in the matter.

8. The applicants have also talked of ill health and lack of the necessary finances to pay the required court fees. However, the court fees in this case, were only Kshs. 1,340/- and if the applicants truly could not afford to pay that amount, they could have applied to be allowed to bring the application as paupers so that the fee is waived. But again the applicants have neither exhibited any documents as evidence of the alleged illness nor have they offered anything in support of the alleged impecuniosity.

9. An attempt has been made to blame an associate in the firm of advocates representing the applicants for being unable to take the necessary steps to pursue the missing file or missing primary appeal documents. However, no affidavit has been filed by the senior advocate in the firm to support this contention, nor have the alleged crucial primary appeal documents which could not be traced been identified.

10. I find that the applicants have not been candid. The delay of almost one year is inordinate and the explanation they have given is not acceptable. I am alive to the fact that the subject matter of this appeal involves family land wherein the applicants are residing. Nonetheless, the court having exercised its discretion in favour of the applicants under Rule 4 of the Court of Appeal Rules, and the applicant have failed to take advantage of that indulgence, the applicants have only themselves to blame.

11. I therefore reject the application dated 6th April 2011, and order that the same be dismissed. The respondent having failed to attend court for the hearing of the application, I make no orders as to costs.

Dated and delivered at Nairobi this 2nd day of March, 2012.

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR