



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: VISRAM, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 338 OF 2009

BETWEEN

JOHN KIPLANGAT BARBARET 1ST APPLICANT
CHRISTOPHER KIPTONUI MARTIM 2ND APPLICANT
WILIAM MAKILOT SANG 3RD APPLICANT
JOSEPH KIPKOSGEI MARITIM 4TH APPLICANT
SIMEON KIPLANGAT NGERECH 5TH APPLICANT
KIMUTAI ARAP KENDUIYWO 6TH APPLICANT
PHILIP KIPKIRUI CHESIMET 7TH APPLICANT
BARTA TESOT 8TH APPLICANT
CHEMIYWA ARAP CHEPKELAT 9TH APPLICANT

AND

ISAIAH KIPLANGAT ARAP CHELUGET RESPONDENT

(An application for extension to time within which to serve a notice of appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Ojwang, J) dated 6th October, 2009

in

H. C. Misc. Civil Application No. 400 of 2003 (OS)

RULING

This is an application under **rule 4** of the Court of Appeal Rules for extension of time to serve the notice of appeal from the judgment and decree of the superior court (Ojwang, J) dated 6th October, 2009. The application is supported by an affidavit sworn by John Kiplangat Barbaret on 23rd November, 2009.

The judgment in the case before the superior court was delivered on 6th October, 2009, and a notice of appeal was indeed filed within time on 12th October, 2009. However, it was not served until 23rd October, 2009 which was four days out of time. The reason given for the delay was mistake on the part of counsel.

Mr. P. Nganga, learned counsel appearing for the applicant, explained that the applicant's previous counsel had not read the rules relating to service. Mr. A. M. Lubullelah, learned counsel for the respondent, conceded that the delay was not inordinate, and that the appeal was an arguable one.

Rule 4 of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this Court stated:

“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.”

Clearly, the delay here is not inordinate – only four days, and is reasonably well explained. As counsel agree, this appeal involves a large parcel of land and is arguable, and that no prejudice will be occasioned to the respondent herein if I allow this application.

Accordingly, I allow the application dated 23rd November, 2009 and extend the time for serving the notice of appeal to 23rd October, 2009 and order that the notice of appeal served on 23rd October, 2009 is deemed to have been properly served. The respondent shall have the costs of the application.

Dated and delivered at Nairobi this 8th day of April, 2011.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR