



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CIVIL APPLICATION 276 OF 2008 (UR 181/08)**

**JOHN KIMANI NGATA.....1<sup>ST</sup> APPLICANT**

**JACOB KIPKEMBOI BUSIENEI.....2<sup>ND</sup> APPLICANT**

**AND**

**JAMES MAINA LELEY .....1<sup>ST</sup> RESPONDENT**

**MARTIN KURGAT.....2<sup>ND</sup> RESPONDENT**

**PAUL KIMURGOR CHEPOLEL.....3<sup>RD</sup> RESPONDENT**

**MARCELLA NAKHANU.....4<sup>TH</sup> RESPONDENT**

*(Application by Kimaru Kiplagat & Company Advocates to cease acting for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in respect of the application for extension of time to file and serve notice of appeal and record of appeal from the decision of the High Court of Kenya at Eldoret (Omondi Tunya, J) dated 22<sup>nd</sup> May, 2003*

**in**

**H.C.C.C. NO. 207 OF 1998 (O.S.))**

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**RULING**

By an originating motion dated and lodged in the High Court at Eldoret on 26<sup>th</sup> October, 1998, John Kimani Ngata and Jacob Kipkemboi Busienei claimed that they had acquired by way of adverse possession land then known and registered as Land Parcel NO. UG/KIMUMU/224 which was then registered in the name of James Maina Leley. John Kimani Ngata and Jacob Kipkemboi Busienei are now the 1<sup>st</sup> and 2<sup>nd</sup> applicants while James Maina Leley is the first respondent in the notice of motion dated and lodged in this Court on 30<sup>th</sup> September, 2008, some ten years after the originating motion was lodged in the High Court. Omondi Tunya, J (as he then was) dismissed the applicants’ originating motion on 22<sup>nd</sup> May, 2003. The learned Judge did so on the ground that the applicants had failed to prosecute their originating motion. The applicants were dissatisfied with the Judge’s order dismissing their originating notice of motion. It is agreed that the applicants immediately filed a notice of appeal and subsequently lodged Civil Appeal No. 171 of 2003. That appeal was struck out on 24<sup>th</sup> September, 2008. I need not go into the reason or reasons why the Court struck out the appeal. The applicants immediately returned to

this Court by the present motion which, as I have said, was filed in the Court on 30<sup>th</sup> September, 2008, some six days after the Court struck out the appeal. That delay has been satisfactorily explained to me by the applicants and their counsel Mr. Gicheru. Indeed I did not understand Mr. Cheruiyot for the 1<sup>st</sup> respondent and Mr. Nyolei for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Martin Kurgat and Paul Kimurgor Chepolel respectively, to contend that the applicants have not satisfactorily explained the delay of six days. They opposed the motion on different grounds which I shall shortly deal with. Mr. Miyenda for the 4<sup>th</sup> respondent Marcella Nakhanu supported the motion by the applicants. I am satisfied on the material before me that the delay of six days, if it is to be called a delay, was satisfactorily explained and I accept the explanation offered by the applicants.

The grounds put forward in opposition to the motion were, first, that when the originating motion was pending in the High Court, some three persons, namely Joseph Kipkemei Chebatei, Martin Kurgat and Paul Kimurgor Chepolel who described themselves as interested parties had applied to the High Court to be joined to the originating notice of motion as such interested parties. That motion, it would appear, was never heard and determined. Joseph Kipkemei Chebatei died in 2007; that is what Mr. Cheruiyot told me and the 1<sup>st</sup> respondent swears so at paragraph 15 of his replying affidavit that the estate of Joseph Kipkemei Chebatei ought to have been included in the motion. Mr. Cheruiyot and Mr. Nyolei contend on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the failure to include the estate of Joseph Kipkemei Chebolei or Joseph Kipkemei Chebatei or whatever the correct name might be, renders the motion before me incompetent. The motion before me was filed on 30<sup>th</sup> September, 2008. I do not know the exact date on which Joseph died; it is said he died in 2007. I am not told if a personal representative had been appointed by the time the motion was being filed, and if such appointment had been made, who the personal representative is. Mr. Gicheru submitted that since Joseph died in 2007 and has not been, as far as it is known, substituted by any party, the claim by him or against him which is to be debated in the proposed appeal must have abated either under **rule 55(7)** or **rule 96(2)** of the Court's rules. I am not quite certain on this aspect of the matter, particularly in view of the fact that I have not been made aware if any substitution had taken place at all, but I am certain of one thing, namely that I ought not to refuse to extend time because of the death of Joseph. It may well be that any claim he had might well have abated.

The second reason offered why I should not extend time is that the land in the originating summons has been sub-divided and transferred to various other parties who are not included in the motion before me and have not been served with notice or notices of appeal. The answer to that contention must be that the subdivisions and transfers took place after the motion was filed. I am asked in the motion to extend time within which to file the notice of appeal and to lodge the record of appeal. If I accede to the motion, there would be nothing to stop the applicants from serving the notice of appeal and subsequently the record of appeal on:-

**“----- all persons directly affected by the appeal”-----See rule 76(1) of the Court's rules.**

Taking all the circumstances into account, I allow the notice of motion lodged in this Court on 30<sup>th</sup> September, 2008 and order as follows:-

- (i) the applicants shall file and serve their notice of appeal within seven (7) days from the date of this order.
- (ii) the applicants shall thereafter file and serve their record of appeal within twenty one (21) days from the date the notice of appeal is lodged in the Court.
- (iii) The costs of the motion shall be in the appeal.

Those shall be my orders.

**DATED and DELIVERED at ELDORET this 25<sup>th</sup> day of SEPTEMBER, 2009.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**