



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GATEMBU, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 120 OF 2020**

**BETWEEN**

**VINCENT KILOPO.....1<sup>ST</sup> APPLICANT**

**SIMON MATAIYWA.....2<sup>ND</sup> APPLICANT**

**AND**

**PATRICK LUNGALIA (*Suing as the personal representative***

***of the estate of* GEORGE LUNGALIA SHIVEKA.....RESPONDENT**

***(Being an application for extension of time to file and serve a notice of appeal and record of appeal out of time against the Judgment of the Environment and Land Court at Kitale (Mwangi Njoroge, J.) delivered on 30<sup>th</sup> June 2020***

***in***

***Kitale ELC Civil Appeal No. 1 of 2019)***

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**RULING**

1. In their application before me dated 28<sup>th</sup> September 2020, Vincent Kilopo and Simon Mataiwa, the applicants, seek an order for extension of time to file and serve a notice of appeal and record of appeal out of time. The application is made under Rules 4, 42 and 43 of the Court of Appeal Rules. They intend to appeal against the judgment of the Environment and Land Court delivered on 30<sup>th</sup> June 2020 setting aside a judgment of the Magistrates court at Kapenguria given in their favour on 13<sup>th</sup> February 2018.

2. I have considered the application, the affidavit in support, the applicant's submissions, and the replying affidavit. The dispute involves land which it is claimed the 1<sup>st</sup> applicant sold to George Lungalia Shiveka, the deceased (whose estate is represented by the respondent) and also to the 2<sup>nd</sup> applicant. The respondent sought an order for rescission of the sale agreement between the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant.

3. The trial court found that the 1<sup>st</sup> applicant never transferred any interest to the deceased and that the 1<sup>st</sup> applicant was therefore at liberty to deal with the land as he wished. The respondent successfully challenged that decision before the ELC which set aside the judgment of the trial court on 30<sup>th</sup> June 2020.

4. The 1<sup>st</sup> applicant has deposed in his affidavit in support of the application that he only became aware of the judgment on 23<sup>rd</sup> September 2020 when the 2<sup>nd</sup> applicant went to his home and informed him that while at a police station complaining that the respondent was interfering with the property, the respondent then produced a copy of the judgment of the ELC; that the following day they visited their advocate Mr. Samba who on enquiry “also confirmed that he was not aware of the judgment.” Four days later, the present application was filed.

5. The applicants say that the intended appeal has good chances of success because, for instance, the ELC erred in granting the respondent the relief of specific performance of a void contract.

6. In his replying affidavit sworn on 1<sup>st</sup> March 2021, the respondent, Patrick Lungalia asserts that the claim by the applicant that he was not notified of the judgment is not correct and that he has not supported his application with any evidence from the Environment and Land Court

7. Having regard to the legal principles that guide the Court in the exercise of its discretion under Rule 4 of the Rules of the Court (see for example of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997 (1999) 2 EA 23**), I am satisfied that the delay involved is not inordinate; a plausible explanation has been given that notice of judgment was not given (although the respondent says this is not the case without supporting his claim) and immediately the applicants became aware of it they moved with speed and filed this application.

8. The application dated 28<sup>th</sup> September 2020 is hereby allowed as prayed. The applicants shall file and serve a notice of appeal within 14 days of delivery of this ruling. The memorandum and record of appeal shall be filed and served within 45 days of delivery of this ruling. I make no orders as to costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**



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