IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E231 OF 2020

BETWEEN

REBECCA KALUNGU KILIKU.....1ST APPLICANT

MARY NDWALE MUNUVE.....2ND APPLICANT

MBINDU MICHAEL.....3RD APPLICANT

SCOLASTICA MULA.....4TH APPLICANT

KINYAMBU KEESI.....5TH APPLICANT

AND

SIMEON MWATU.....1ST RESPONDENT

TABITHA MWATU.....2ND RESPONDENT

(Being an application for extension of time to file and serve notice of appeal from the decision of the Environment and Land Court at Makueni (C.G. Mbogo, J.) delivered on 29th April 2020 in ELC Case No. 201 of 2017)

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RULING

1. In their application dated 5th August 2020, the five applicants have moved the Court for an order that the time limited by the Rules for filing and service of notice of appeal be extended; and that the applicants be given leave to file and serve notice of appeal upon the respondents, Simeon Mwatu and Tabitha Mwatu. They intend to appeal against the judgment of the Environment and Land Court at Makueni delivered on 29th April 2020.

2. In an affidavit in support, Rebecca Kalungu Kiliku, the 1st applicant deposes that the applicants are dissatisfied with the judgment of the lower court; that at the conclusion of the hearing of the case before the trial court, judgment was supposed to be delivered on notice; that the only notice of delivery of judgment that was given was by letter from the respondent's advocates dated 13th December 2019 indicating that judgment would be delivered on 20th March 2020 but when the applicant's advocates appeared in court on 20th March 2020 the judgment was was not ready; that their previous advocates *"did not receive any information as pertaining the judgment from the respondent advocates notifying them of the judgment";* that their advocates then prepared and filed a notice of appeal together with a letter applying for certified copies of the proceedings and judgment; that the failure to file the

notice of appeal was occasioned by *"the overwhelming emotional distress"* due to *"the gravity of the judgment"* and due to the current Covid-19 pandemic.

3. In opposition to the application, Tabitha Mwatu, the 2nd respondent deposes in her replying affidavit that the 1st respondent, Simeon, died on 4th November 2018 and was substituted with Stephen Kimatu Mwatu; that on 20th March 2020 when judgment was scheduled to be delivered the Judge was not sitting because the Chief Justice had issued a directive scaling down court operations due to Covid-19 pandemic; that on 27th April 2020 the court notified the parties by email that the judgment would be delivered on 29th of April 2020; and that the claim that the applicants were not aware of the date of delivery of judgment is therefore incorrect.

4. The 2nd respondent deposes further that the applicants had no intention of challenging the judgment of the lower court but were only jolted into action when they received a letter dated 17 July 2020 from the Districts Survey office notifying them of the intended sub division of plot numbers 390 and 917 to give effect to the judgment; that the present application is an afterthought and intended to further drug this matter which has been going on since 1974; that the delay in filing the present application is inordinate; that the contention by the applicants that they were not aware of the judgment is contradicted by their other contention that the delay in presenting the application was caused by overwhelming emotional distress occasioned by the judgment; that the time for filing the notice of appeal lapsed on 12 May 2020 and the present application was not filed until 5th August 2020 and no sufficient reasons have been given for the delay involved; that allowing the application will cause the respondents great prejudice as they have already engaged the services of surveyor for purposes of subdividing the property and in any event their intended appeal is not arguable.

5. I have considered the application and the submissions by Ndeda & Company Advocates for the appellant and the submissions Andrew Makundi & Company Advocates for the respondents. With respect, the submissions by Ndeda & Company Advocates do not appear to relate to the matter at hand. They relate to a supposed application to set aside the judgment of the lower court and delve at length on supposed errors made by the learned Judge in the impugned judgment.

6. Counsel for the respondents on the other hand submit that the delay involved in this matter is not excusable; that the reasons for failure to file the notice of appeal in time are not substantiated; and no basis has been laid for the Court to exercise its discretion under Rule 4 in favour of the applicants. In that regard, reference was made to the decision of the ***Court in County Government of Mombasa vs. Kooba Kenya Limited [2019] eKLR***.

7. In ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR Waki, J.A*** stated that:

"The exercise of this Court's discretion under Rule 4… 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 the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of 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 Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

8. More recently, in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** the Supreme Court of Kenya stated that extension of time is not a right of a party but an equitable remedy available to a

deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include public interest; whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay.

9. In effect, although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion must be exercised judicially, and each case must be considered on its own facts. In this case, it is common ground that judgment was delivered on 29th April 2020. Although the applicants say that they or their advocates did not have notice of delivery, it is not stated, nor is it clear when the applicants or their advocates became aware of the judgment. It was incumbent upon the applicants, who have the burden to justify the exercise of the Court's discretion in their favour, to state clearly when they became aware of the judgment and to explain why the present application was not filed until 5th August 2020. In the absence of such explanation, I am inclined to accept the respondents' version of events that parties were notified by the court by email sent on 27th April 2020 that judgment would be delivered on 29th April 2020 and that the applicants were stirred into action upon receiving the letter dated 17th July 2020 from the District Survey Office. As pronounced by the Supreme Court of Kenya *"the party seeking extension of time has the burden to lay a basis to the satisfaction of the court"*. The applicant has not laid a basis to my satisfaction, why I should exercise the Court's discretion in their favour.

10. Accordingly, the application dated 5th August 2020 fails and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of May, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR