



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. E003 OF 2020

BETWEEN

TIMOTHY SIMASI & RICHARD WANYONYI

(Suing as Administrators of the estate

of the late D.A Vaughan Philpott.....APPLICANTS

AND

REGISTRAR OF LANDS, MOMBASA.....1ST RESPONDENT

MUSHERURE SUZANNE KAINEMBAMBAZI

(sued as the executrix of the estate of the late

John Wycliffe Rutagyemwa Kazzora).....2ND RESPONDENT

(Being an application for leave to file a notice of appeal and appeal

out of time from the ruling of the Environment and Land Court of Kenya

at Mombasa (Munyao Sila, J.) dated 9th July, 2020 in ELC No. 188 of 2016)

RULING

1. The bone of contention between the parties was in relation to the ownership of Subdivision No. 1509 (Original No. 863/10) Section 1/Mainland North and Subdivision No. 1108 (Original No. 863/8) Section 1/Mainland North. The applicants contended that the same formed part of the Estate of the late *D.A Vaughan Philpott* and was fraudulently registered in favour of *John Wycliffe Rutagyemwa Kazzora* (deceased). Towards that end, they sought cancellation of the title to rectify the alleged anomaly.

2. However, the **Environment and Land Court** (ELC) did not agree and dismissed the same in a judgment dated 10th February,

2020 and delivered on 25th February, 2020. Unhappy with the judgement the applicants lodged a notice of appeal on 9th March, 2020.

3. In addition, by a motion dated 17th March, 2020 the applicants urged the ELC to issue an interim injunction restraining the respondents from selling, transferring, occupying, leasing or in any other way interfering with the suit properties pending the hearing and determination of the intended appeal against the judgment.

4. **Munyao Sila, J.** in a ruling dated 9th July, 2020 allowed the above motion on condition that the applicants would deposit the taxed costs within 30 days of taxation as security and failure of which, the injunctive order would lapse. Once again the applicants were aggrieved with the said ruling.

5. Nonetheless, whilst intent on challenging the impugned ruling, the applicants failed to file a notice of appeal to that effect within the requisite time frame hence the current motion before us. They seek extension of time to file the notice of appeal.

6. The explanation tendered by the applicants for the delay was that once the impugned ruling was delivered on 9th July, 2020 they instructed their then advocates on record to lodge an appeal which they failed to do so. What was more, during that period there were restrictions of movement in and out Nairobi, Mombasa and other specified countries hindering them from personally undertaking the necessary step since they were resident in Trans Nzoia; and that they could not reach their former advocates who they later learnt had closed their offices.

7. The applicants further argue that the delay was not inordinate; that the mistakes of their former advocates should not be visited upon them; that their intended appeal is not frivolous; and that the respondent would not suffer any prejudice should the extension be granted.

8. Pursuant to the Court's Covid-19 Practice Note, notice by this Court was given to the parties' counsel via an email dated 30th October, 2020 that the motion would be disposed off by way of written submissions without the appearance of counsel. Nonetheless, the respondents did not file any replying affidavits or written submissions.

9. It is instructive to note that though the applicants filed written submissions the same were in relation to extension of time to file a memorandum and record of appeal against the judgment delivered on 25th February, 2020. This issue was clearly not before me and that is all I wish to state. Be that as it may, I will consider the merits of the motion before me based on the material before me.

10. An application for extension of time under **Rule 4** of this Court's Rules, such as in this case, calls for the exercise of my unfettered discretionary power. Some of the factors I ought to consider include the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal. See **Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees [2020] eKLR**.

11. Pursuant to **Rule 75(2)** of this Court's Rules, the applicants should have filed the notice of appeal within 14 days of the delivery of the ruling on 9th July, 2020, that is, on or before 23rd July, 2020. Therefore, taking into account that the current application was filed on 27th September, 2020, the delay was for 66 days.

12. The applicants have attributed the delay to two main issues namely, the mistake of their former advocates and secondly, the Covid-19 pandemic.

13. Generally, as appreciated in **Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**, whether or not the mistake of an advocate should be visited on a party is dependent on the circumstances of each case. Assuming, I was to accept that the applicants' former advocates failed to file the notice of appeal despite instructions to do so, the applicants have not divulged at what point in time they learnt of the omission.

14. As for the cessation of movement in and out of specified counties, I take judicial notice that it was first issued by His Excellency, the President of this Country in April, 2020 and the same was lifted on 7th July, 2020. This was before the delivery of the impugned ruling on 9th July, 2020.

15. Consequently, I find that the explanation given by the applicants was unreasonable rendering the delay on their part inordinate.

16. Moreover, while it is not in my place, as a single Judge of the Court, to determine the merits of the intended appeal, I have my doubts on its arguability.

17. Based on the afore stated reasons, I decline to exercise my discretion in the applicants' favour. Accordingly, the motion dated 21st September, 2020 and filed on 27th September, 2020 is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

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

(signed)

DEPUTY REGISTRAR



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