



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: ASIKE-MAKHANDIA**

**CIVIL APPLICATION NO. E050 OF 2021**

**BETWEEN**

**ABEL ONGERA OMWEGA.....1<sup>ST</sup> APPLICANT**

**ALIAS JAMES KERONDI OMWEGA.....2<sup>ND</sup> APPLICANT**

**AND**

**LOICE KEMUNTO MOGIRE (Sued on behalf of the estate of**

**David Omwega(deceased).....RESPONDENT**

*(Being an application for extension of time to file notice of appeal*

*and record of appeal out of time from the orders of the High Court at Kisii*

*(D. K. Musinga,J (as he then was) dated 30<sup>th</sup> May 2008) in HCCC NO. 40 OF 2006)*

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**RULING OF THE COURT**

The dispute before the High court was commenced by a suit filed by the respondent on behalf of the estate of the late **David Mogire Omwega**. She sought for the following prayer against the applicant; that the court to grant her an order of permanent injunction to restrain the applicant or his servants from trespassing upon parcel number **Bassi/Bosansa/1561** (the suit property). She claimed that the deceased was the registered proprietor of the suit property but in the year 1999, the applicant forcefully entered onto the suit property and disturbed her quiet and peaceful possession. The applicant did not file any response to the claim despite service of summons. The suit proceeded therefore proceeded by way formal proof, upon entry of interlocutory judgment.

The Court in its judgment delivered on the 30<sup>th</sup> May, 2008 observed that the respondent had proved her claim on a balance of probabilities that (**David Mogire Omwega**) deceased was the registered proprietor of the suit property and accordingly granted the respondent the prayers sought in the plaint.

The respondent later on moved the court vide an application dated 15<sup>th</sup> June 2017 seeking for the court to grant her with security by the office Officer Commanding Police Station(OCS), **Nyangusu** police station to provide her and **wi Betico Auctioneers** adequate

security so as to evict the applicant from the suit property and also cut or clear all trees and crops on the suit property and where necessary arrest anyone who may obstruct the lawful eviction. The application was granted by the court, by a ruling delivered on the 25<sup>th</sup> June, 2020. It was at this stage that the applicant became aware of the judgment of this court delivered way back in 2008 by **Musinga, J** (as he then was)

The applicant was aggrieved by the said judgment and decree and has intimated his desire to lodge an appeal to this court against the same. However, he is unable to do so since file the timelines set by the rules of this court for so doing have expired, hence the instant motion dated 8<sup>th</sup> March, 2021 filed under rule 4 of this Court's rules.

I have been asked to grant leave to the applicant to file and serve notice of appeal out of time and the record of appeal as well. The grounds in support of the motion are that: the court delivered its judgment on 30<sup>th</sup> May, 2008 ex-parte; that the applicant was unrepresented; that the proceedings are yet to be typed due to the current covid-19 pandemic and its in the interest of justice that leave be granted.

In support of the motion is an affidavit sworn by the 1<sup>st</sup> applicant who largely reiterated and expounded on the grounds in support of the motion aforesaid. In addition she deposed that he had been issued with eviction notice on 30<sup>th</sup> June 2020 and that the auctioneers had been given full security to evict him and his family; that the suit property was ancestral and the deceased had taken advantage being the eldest son to **Mzee Omwega** now deceased to register the entire suit property in his name; that the deceased **Mzee Omwega** had four brothers **Gwaya Omwega, Thomas Omwega, Isaac Ondieki** and him; that there was reconciliation in the family and the clan had agreed that the applicant should retain land given to him by the parents; that he was never served with any court documents; that the suit property was 5 acres and the respondent was only entitled to a fifth; that his intended appeal raised legal issues with high chances of success; that he would be greatly prejudiced if execution was allowed to proceed and it would be in the interest of justice that I exercise my discretion in his favour.

Opposing the motion one, **Loice Kemunto Mogire** swore a response dated 25<sup>th</sup> May, 2021 deposing that the motion was an after thought since judgment was delivered on the 30<sup>th</sup> May, 2008 and execution had already been carried out on the 1<sup>st</sup> December, 2020; that the applicant and the brothers had their parcels of land registered in their names; that she was the administratrix to the estate of the deceased **Mzee Omwega** and that she had been granted an order of permanent injunction against the applicant from trespassing onto the suit property that the respective boundaries to the parcels of known as land; **Bassi/Bosansa/1564** registered in the applicants name, **1562, 1563, 1564** and **417** was carried out without fraud; that the applicant has not demonstrated the intended appeal was arguable with high chances of success; that she will greatly suffer irreparable damage since execution had already taken place and finally that the applicant did not deserve the order prayed.

None of the parties filed their written submissions despite a hearing notice and a reminder to that effect having been served on them on 25<sup>th</sup> May, 2021.

I have considered the application the grounds in support, the rival affidavits as well as the law. The motion is premised on rule 4 of this court's rules which provides as follows,

***“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***(emphasis provided)

It is trite that extension of time is not automatic. Whether or not to grant extension of time, the court takes into account various factors. This court in ***Paul Wanjohi Mathenge v Duncan Gichane Mathenge*** [2013] eKLR while referring to other authorities, observed as follows:

***“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”***

Further in ***Abdul Azizi Ngoma v Mungai Mathayo & Another*** [1976] eKLR, this Court held as follows:

***“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”( emphasis provided)***

The applicant urged that he came to know of the existence of a suit upon service of the execution orders on the 30<sup>th</sup> June, 2020. This fact was disputed by the respondent who argued that the applicant was aware of the suit when it was filed in the high court. There are various service orders as proof of service of the court summons, the various hearing dates of the suit and finally of the notice of judgment notice. It is for this reason that the court was satisfied that the applicant had been served and it went ahead to deliver judgment on the 30<sup>th</sup> May, 2008.

In addition, the applicant confirms that he was issued with an execution notice on the 30<sup>th</sup> June, 2020. The respondent admits that execution was indeed effected on the 1<sup>st</sup> December, 2020. The applicant only moved the court way after execution had taken place. This motion was filed on the 8<sup>th</sup> March, 2021, yet execution notice had been served upon him way back in June, 2020. If at all the applicant was unaware of the suit and its judgment, a prudent litigant whose property is at stake, once he was served with the execution order, he could have moved the court immediately for appropriate reliefs. But he preferred to wait for execution to take place then come before this court to seek for its indulgence. The applicant has taken over twelve years to remember that he would prefer an appeal against the judgment delivered on 30<sup>th</sup> May, 2008. It is at this point that he even seeks for typed proceedings to enable him prepare a record, but due to covid-19 pandemic he is yet to be provided with, further aggravating the delay.

This reasons for the delay are obviously an afterthought by the applicant, after realizing that time had lapsed and as correctly deposed by the respondent execution having already taken place. This was after eleven years hiatus. Even if I exercise my discretion and grant the said order, the suit property subject of the intended appeal is no longer in his possession after execution took place. The respondent had been lenient enough not to execute judgment and decree immediately but gave the applicant time to vacate the suit property onto which he had trespassed to no avail

The remedy of extension of time is discretionary and an applicant needs to explain the reason for the delay truthfully and candidly. The applicant has fallen too far short of this expectation. A party who seeks exercise of this court discretion must put all his cards on the table. The applicant having deliberately embarked on a journey of deceit and falsehood is undeserving of my exercise of discretion in his favour. It is for this reason that the application must fail. It is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**



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