



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MURGOR, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 41 OF 2019

BETWEEN

SOSPETER NJUKI KAGUNDU.....1ST APPLICANT

RACHEL M. KAGUNDU.....2ND APPLICANT

NGURUNGU MUTHOKE.....3RD APPLICANT

AND

NICHOLAS NGUTHI KIVINDA.....1ST RESPONDENT

MUTUNYI KIVEO NGUTHI.....2ND RESPONDENT

STANLEY NJIRU KIURA.....3RD RESPONDENT

(An application for extension of time within which to file a Memorandum of Appeal and a Record of Appeal from the judgment of (Y.M. Angima, J.) delivered on 14th June, 2018

in

Embu ELC Case NO. 185 of 2014)

RULING

In the Notice of Motion dated 8th April, 2019, *the applicants, Sospeter Njuki Kagundu, Rachel M. Kagundu, Ngurungu Muthoke* have sought for time to be extended to file and serve the Memorandum and Record of appeal out of time, and for the Memorandum of appeal annexed herewith be deemed to have been properly filed within the prescribed time.

The motion which was premised on the grounds on its face and the affidavit of *Sospeter Njuki Kagundu* sworn on the 8th April, 2019, contended that the judgment was delivered by the Embu ELC on the 14th June, 2018 wherein the applicants were given upto 90 days to vacate *Land Parcels No. Ndere Mbita/26003182, 3185, 3186, 3187, 3188, 3189 and 10 (the suit premises)*; that immediately thereafter, the applicants applied for certified copies of the judgment and also filed a Notice of appeal. They also filed

an application seeking a stay of the eviction orders on 8th September, 2018.

That this Court issued a stay of execution of the trial court's orders on 30th February, 2019; that thereafter, the applicants were abandoned by their counsel and have had to instruct another counsel on 3rd September, 2018 to act on their behalf in the intended appeal. That their new counsel subsequently engaged in lengthy correspondence with their previous counsel so as to obtain the original case file which was never availed; the new counsel had therefore to reconstruct the record of appeal from other sources other than from the original case file which has taken time; that the record has now been compiled and the draft memorandum of appeal duly annexed to the record; that the delay in filing the appeal was because the applicants were abandoned by their advocate and it took time to reconstruct the file so as to prepare the record of appeal; that no prejudice will be occasioned to the respondents since they have never occupied or used the suit premises which has always been under the use and occupation of the applicants.

Having considered the application and submissions, under **Rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997.**

Concerning the delay, the judgment was delivered on 14th June 2018. The Notice of appeal was lodged on 27th June 2018, and this application is dated 8th April 2019 which has resulted in a delay of 11 months.

Has the delay been explained? The applicant contends that after the judgment was delivered, their advocates Messrs R. N. Mugo abandoned them, and they were forced to engage another counsel, namely F. N. Njanja Advocate to file the intended appeal on their behalf; that their previous counsel had refused to release their file to the applicant's counsel, thereby causing them to have to reconstruct their file again, which led to the delay in filing the Memorandum and Record of appeal. Annexed to the motion are several letters from the firm of F. N. Njanja Advocates addressed to Messrs R. N. Mugo spanning the period between 3rd September 2018 and 22nd January 2019 requesting for their file. In view of the explanation advanced, and the documentary evidence provided to support the explanation, I am satisfied that the delay has been properly explained.

Regarding the chances of success, at this juncture I am not able to ascertain this and would therefore leave the question for the determination of the bench that will hear the appeal.

Finally, I find that since the delay has not been inordinate, I do not envisage that the respondents will be subjected to any hardship were I to extend time for filing the intended appeal.

Accordingly, the Notice of Motion dated 8th April 2018 is merited and is allowed. I exercise my discretion to grant an extension of time to file and serve the Record and Memorandum of appeal which will lapse in **21 days** from the date of this Ruling. The costs of this application shall abide by the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR



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