

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu DCJ & VP, Ibrahim, Ojwang, Wanjala & Lenaola SCJJ)

APPLICATION NO. 31 OF 2018

BETWEEN

ROBERT MUHAMBI KATANA & 15 OTHERS.....APPLICANTS

AND

MOMBASA TEACHERS CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LIMITED.....RESPONDENT

(Being an application for stay of execution and extension of time to file a Notice of Appeal and record of appeal out of time against the decision of Court of Appeal (Visram, Karanja and Koome, JJA) sitting at Mombasa, in Civil Appeal No.53 of 2017, delivered on 14th of June, 2018)

RULING OF THE COURT

[1] The applicants, through their Notice of Motion filed under certificate of urgency seek the following orders that:

- a) The application be certified urgent and initial service be dispensed with in the first instance.*
- b) The court be pleased to order a stay of the execution of the Order issued by the Court of Appeal on 2/10/2018, ordering the Applicants and other 200 families to be evicted through for and demolitions (sic), pending the hearing and determination of this application*
- c) The Honorable court be pleased to extend time for filing the Notice of Appeal.*
- d) The applicant be at liberty to file the Record of Appeal within 30 days of the Order in prayer (C) above (sic).*
- e) Costs.*

[2] The application is brought under section 24(1) of the Supreme Court Act and rule 53 of the Supreme Court Rules. It is premised on the grounds that the appeal involves the interpretation and application of the constitution as envisaged under Article 163(4)(a); that the respondent is threatening to execute the Court of Appeal order by eviction through violence making the applicants apprehensive; that the applicants have been in possession and undertaking farming on the suit property since 1960; that the court should exercise its discretion and extend time for filing the notice of appeal mainly because they had instructed their previous Advocates, Marende Birir & Company to file the Notice of Appeal and only realized on 2nd October 2018 that the same had not been filed when they were served with the Court of Appeal order and that the overriding objective of Court will not be achieved if the orders sought are not granted. The application is supported by the affidavit of the 1st applicant, ROBERT MUHAMBI KATANA on his own behalf and on behalf of the other applicants.

[3] The applicants reiterate the above arguments through their written submissions and submit that this Court has jurisdiction to extend time and that they meet the applicable principles set out in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* SC Application No.16 of 2014 [2014]eKLR. They argue that the delay in filing the Notice of Appeal and the Appeal of approximately 4 months and 3 months respectively is not inordinate but excusable. In any event, they submit, the Court of Appeal order was not issued until 2nd October 2018. Further, they argue that this application was filed promptly and no party will suffer prejudice and public interest tilts in favour of allowing the application in order to settle the law in order to create a binding precedent on the law of adverse possession.

[3] The application is opposed by the respondent by way of a replying affidavit sworn by its Chairman, JONAH MAKAU MUTUKU. He depones that no reasonable grounds for the unreasonable delay have been advanced and that the prayer for stay

is baseless in the absence of a pending petition. He further states that the applicants' claim was purely a land dispute on the basis of adverse possession and any constitutional aspect is an afterthought which cannot be raised at this stage not having been raised in the pleadings, at the High Court or Court of Appeal. Accordingly, the application does not meet the jurisdiction threshold under Article 163(4) of the Constitution and is merely aimed at denying the respondent and its members from enjoying their rights as registered proprietors furthering fruits of the Court of Appeal judgment.

[4] The above position on jurisdiction is buttressed in the written submissions citing the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others* SC Application No. 16 of 2015 [2015]eKLR. On grant of stay, the respondent argues that the application is premature and incompetent considering that the applicants have not sought leave to file an appeal which should come first before seeking stay. They also submit that an application for stay ought to have been made first at the Court of Appeal which was seized of the matter and that the application should be dismissed with costs.

[5] The application was certified urgent at the first instance when it was placed before a single judge of this court. The first prayer of the application is therefore spent leaving the following issues for determination - whether an order of stay of execution should be granted and whether the court should extend time for filing the notice of appeal.

[6] At the onset, we note that the matter commenced by way of an originating summons before the High Court which was consolidated with a civil case. The High Court framed the question for determination as whether the applicants had proved a case for adverse possession against the respondent and found in favour of the applicant. On appeal, the respondents successfully challenged the High Court judgment, to the grievance of the applicants who seek to appeal.

[7] Whereas the applicants seek to invoke article 163(4)(a) of the Constitution that the intended appeal is as of right, the applicants are not supported by the pleadings or the judgment. There is no evidence of any constitutional question having been raised and determined, or the same raising through the court hierarchy. Even if the applicants' case is that the matter took a constitutional trajectory to warrant our jurisdiction as we held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* Petition No.2B of 2014 [2014]eKLR the applicants have not demonstrated the same, having not cited any constitutional provision that is applicable either in the application or the draft petition. We agree with the respondent in this respect.

[8] Rule 31 of the Supreme Court Rules mandates any person who intends to appeal to file a notice of appeal within 14 days from the date of judgment. In this matter, judgment having been entered on 14th June 2018, the appellant ought to have filed its notice by 3rd July 2018. The applicants argue that they had engaged their previous lawyers. From the evidence annexed by way of receipt for fees paid, the same is issued by Marende Necheza & Company Advocates and not Marende Birir & Company as stated in the supporting affidavit. Moreover, the same is dated 23rd July 2018, which was 14 days after the date by which the Notice of Appeal was due and does not specify that the fees paid relate to the present matter. It was only on 22nd October 2014 that the application was filed through the firm of Karina & Associates Advocates now on record for the applicants. We are not in a position to discern what really happened between the applicants and their advocates. It is nevertheless apparent that the applicants were jolted into action by being served with the Court of Appeal order issued on 2nd October 2018.

[9] The filing of a notice of appeal is not dependent upon any other event and could be filed as a matter of course regardless of our appellate jurisdiction sought to be invoked. Whereas we are willing to indulge the applicants that they have acted promptly and their reason for delay, we are still not satisfied that the intended

appeal raises constitutional questions as contended. The issue seems to be largely related to the applicability of the doctrine of adverse possession as against the registered proprietor of a parcel of land and how the same was applied to the facts of this matter. The doctrine of adverse possession is a fairly developed doctrine and the applicants have not made any spirited attempt to have the same declared unconstitutional as we expected of them.

[10] For this reason, we see no practical purpose to be served if we were to grant the applicant leave to file an appeal out of time. There must be some prospects that the intended appeal is sustainable on the jurisdiction invoked, which is lacking of the applicants herein. Having found as above, we do not find it necessary to consider the prayer for stay of execution as no appeal lies before us the basis upon which the application for leave would suffice.

[11] We therefore decline the application in its entirety with no order as to costs. Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th day of November 2019.

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P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE
SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME
COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME
COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME
COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA