



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 500 OF 2014
(FORMERLY HCCA. NO. 24 OF 2007)

BENEDICTO ANGWEYE LUSICHIAPPELLANT/APPLICANT

VERSUS

ALFRED SHIMILA MANYONGE.....RESPONDENT

R U L I N G

1. Before me is an application dated 7/11/2013, brought by **Benedicto Angweye Lusichi**, (the applicant) seeking leave of the court to file an appeal out of time. The applicant also prays that upon leave being granted, Civil Appeal No. 24 of 2007 be reinstated to hearing. The application is supported by the affidavit of the applicant sworn on 7/11/2013 and the grounds on the face of the motion.
2. The applicant deposes that he was dissatisfied with the decision of the Provincial Appeals Committee made on 12/10/2006, and duly lodged an appeal to this court on 8/3/2007, being HCCA No. 24 of 2007. The appeal proceeded to full hearing but was struck out on 29/11/2012.
3. The applicant says that he is an innocent litigant, and that mistakes of his counsel should not be visited on him. He deposes that he has a good appeal with high chances of success, and therefore, pleads with the court to allow his application.
4. The respondent, **Alfred Shumila Manyonje**, has opposed the application and filed a replying affidavit sworn on 2/12/2012. The respondent in a nutshell says that the application is incompetent, that leave is sought to file an appeal when an appeal was fully heard and a decision delivered and that there are no valid grounds upon which the application can be granted. He, therefore, asks that the application be dismissed with costs.
5. Parties filed written submissions which the court has also considered in making this ruling. The applicant being a lay person, filed several documents which have not in any way been helpful to his application. They are not submissions in real sense, and I do not understand why the applicant opted to act in person, when he was dealing with a serious legal issue. If he was let down by one counsel, as he says, he could have appointed another to help him navigate the challenging route of litigation.
6. Mr. Momanyi, counsel for the respondent, has argued that the application is unfounded and that the same should be dismissed.
7. I have carefully considered this application and the materials placed before me. I have also considered the submissions filed by parties. The applicant seeks leave to appeal against a decision of the Provincial Appeals Committee that was made on 12/10/2006 a period of more than 8 years now. This is after this court (**Thuranira, J.**) found that the applicant's appeal in Civil Appeal No. 24 of 2007 was filed out of time and struck it out on 29/11/2012.
8. The applicant has prayed that he be granted leave to appeal out of time, and that once leave is granted, HCCA No. 24 of 2007 be reinstated to hearing. The plea that an appeal that has already

- been struck out be reinstated is however, untenable. **Thuranira, J.** heard the appeal and determined that it was filed out of time and struck it out with costs. That appeal is not available for reinstatement. At best, the applicant can only file a fresh appeal if he were to be granted leave.
9. The more important prayer in the Notice of Motion is the one seeking leave to appeal out of time. The applicant was the complainant in the Ikolomani Land Disputes Tribunal. After hearing the dispute, the Tribunal made a decision that Government Surveyors identify the boundary between parcel numbers 1004 and 1005. The applicant was apparently dissatisfied with that decision and lodged an appeal to the Provincial Appeals Committee, which on 12/10/2006, dismissed the appeal. The applicant then lodged yet again another appeal to this court which was also struck out after a full hearing, on the ground that it was filed out of time. That decision was made on 29/11/2012. The present application was filed on 7/11/2013, almost one (1) year after the appeal was struck out.
 10. The applicant has asked the court to exercise its discretion in his favour and grant him leave to file his appeal out of time. That discretion has to be exercised judiciously and in deserving cases. In exercising its discretion, the court has to consider the length of the delay, the explanation given for that delay and whether the intended appeal is arguable. The applicant's appeal was struck out on 29/11/2012, but the present application was filed on 7/11/2013, almost one (1) year after the appeal was struck out. No explanation has been given why it took so long to file the application in order to persuade the court to exercise its discretion in favour of the applicant. The delay in filing this application is inordinate and inexcusable.
 11. The decision, the genesis of these proceedings was made by the Ikolomani Land Disputes Tribunal which advised parties to seek Government Surveyors assistance in establishing the boundary between the two parcels of land. Although the applicant appealed, his appeal was dismissed by the Appeals Committee, which means the decision of the Land Disputes Tribunal still stands. I do not understand why the applicant did not want to have Government Surveyors determine the boundary of the two parcels. Although the court, (**Thuranira, J.**) found that the award was signed by more members than was expected, and even if that decision by the Appeals Committee was to be set aside on that ground, the soundness of the decision of the Ikolomani Land Disputes Tribunal cannot be doubted. This is because Surveyors are better placed to determine the actual boundary of the parcels of land, than anybody else.
 12. In the case of ***Gachau & Another –vs- Pioneer Holdings (A) Ltd. & Another [2008] KLR 315***, although considering an application for extension of time to file and serve record of appeal under the Court of Appeal rules, that court had the following to say;

“The powers of the court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, rule 4), were discretionary and unfettered. However, in exercising its discretion, the court would consider the length of the delay, the explanation or reasons given for it, (and) whether the intended appeal was arguable...”
 13. The applicant has not given any explanation for the delay in filing the application. He has also not shown how the decision of the Ikolomani Land Disputes Tribunal will prejudice him if surveyors went to the ground and determined the boundary of the two parcels of land, a decision he has always wanted to overturn.
 14. In the circumstances of this matter, I am not persuaded that I should exercise my discretion in favour of the applicant. Although the applicant has blamed his former advocate for filing his appeal out of time without leave of the court, he himself took almost one (1) year to file this application seeking leave to file appeal out of time.
 15. As a result, and for the above reasons, the applicant's application dated 7/11/2013 is hereby dismissed with costs to the respondent.

Dated and signed at Kakamega this 30th day of October, 2014

E. C. MWITA

JUDGE