



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 114 OF 1998

SEBASTIAN NJAGE

**MARIAPLAINTIFF/
APPLICANT**

VERSUS

**MRS. NAU MUNGANIA MUNYINYI (*Legal Representative of the estate of Mungania
Munyinyi*).....DEFENDANT/APPLICANT**

RULING

Judgment was delivered in this matter on 11th June 2009. It was to the effect that parcel number *Muthambi/Erega/298* was to be rectified by cancellation of the name of Mungania Munyinyi and replacing it with the name of Elias Kaburu Wanjagi. Further, that parcel number *Muthambi/Eregi/267* was to be rectified by cancelling of the name of the registered owner and the same was to be replaced by the name Nau Mungania Munyinyi the defendant herein. After that judgment was read, the advocate for the plaintiff Mr. C. Kariuki and the advocate for the defendant Mr. M. Kariuki appeared before court on 23rd July 2009 and recorded the following consent:-

“By consent, all inhibitions and restrictions on parcel No. Muthambi/Erega/298 and 267 be and are hereby revoked. Further the Deputy Registrar of this court is empowered to sign all relevant documents to facilitate transfer of parcel No. Muthambi/Erega/298 to Elias Kaburu Wanjagi and Muthambi/Erega/267 to Nau Mungania Munyinyi alias Agnes Nau Mungania Munyinyi. There shall be no orders as to costs.”

With that background set out, I shall consider the first of the two applications that were argued before me. It is the application dated 28th October 2009 filed by Nau. She seeks that the court do extend the time for her to file a Notice of Appeal and Record of Appeal against this court’s judgment delivered on 11th June 2009. The application is brought under section 7 of the Appellate Jurisdiction Act Cap 9. That section provides as follows:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

The ground upon which Nau seeks the orders is that she was unaware when judgment was to be delivered since it had been adjourned previously. That finally an order was made that it would be delivered on notice. That although her learned counsel wrote to her a letter to inform her of the date of the delivery of the judgment, she did not receive the said letter. That she learnt that judgment was delivered on 11th June 2009 when she visited her advocate in August 2009. She then deponed referring to what her advocate told her when he informed her of the delivery of the judgment as follows:-

“That on that date he told me to go to find some money to file appeal.”

She further deponed that in the month of September, she was travelling to her advocate office with Kshs. 10,000/= which was however stolen in the bus she was travelling in. She returned to her home to get some more money. When she went back to her advocate’s office, on a date she did not disclose, her advocate Mr. M. Kariuki sent her to Mr. Kioga Advocate for Mr. Kioga to take over the conduct of the case. Nau annexed an affidavit sworn by Manasses Kuria Karoki her then advocate. Mr. M. Kariuki in that affidavit gave the background of how the judgment was not delivered on 17th December 2008, 19th January and 12th May 2009. On the latter day, a notice was given that judgment would be on notice. Mr. M. Kariuki deponed that he informed Nau that she would be notified when the notice of the delivery of the judgment would be given. Notice was given to him for the delivery of the judgment on 14th May 2009. Yet again he said that judgment was not delivered on that day. Mr. M. Kariuki deponed that he wrote to Nau requesting her not to attend court on 14th May 2009. Subsequently, Mr. M. Kariuki came across a notice at the court precincts of the delivery of this judgment on 11th June 2009. He wrote to Nau to inform her of that date by a letter dated 8th June 2009. That letter was addressed to Box No. 77 Marima. Nau did not attend court on 11th June 2009 and on that date judgment was delivered in his presence. He deponed that Nau attended his officer in August 2009 and by then the time for filing an appeal had long passed. The application was opposed by Elias Kaburu Wanjagi who deponed in his replying affidavit that Nau and her advocate met him at the High Court registry two weeks after the judgment was delivered where he noted that they were seeking a copy of the judgment. Elias also faulted Nau’s advocate for failing to use modern methods of communication such as mobile phone to inform Nau of the date of judgment. He further submitted that the delay of filing the Notice of Appeal was inordinate. Rule 75 (1) and (2) of the Court of Appeal rules 2010 provides as follows:-

“75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the register of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

This rule shows Nau was late in filing her Notice of Appeal. Nau should have filed her Notice of Appeal by 25th June 2009. In an application filed in the Court of Appeal under rule 4 of the Court of Appeal rules 2010, the Court of Appeal in the case **M’Ibiri M’Mbogori & Ano. Vs. National Bank of Kenya Limited & others** Civil Application No. Nai 187 of 2008 (NYR 22/08). The Court had this to say about delay in filing a Notice of Appeal out of time:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court will take into account in deciding whether to or not to grant an extension of time are first the length of the delay, the reasons for the delay, possibly the chances of the appeal succeeding if the application is granted and lastly the degree of prejudice to the respondent if the application is not granted.....In the Kenya Posts Authority vs. Silas Obengele Civil Application No. 297 of 2004 (Unreported) the court put it thus:-

Mr. Orao Obura next attacked the single judge's decision on the ground that there was a period of inordinate delay which remained unexplained, the learned judge was entitled to exercise his discretion in the manner he did. We agree it is now settled that whenever there is a delay, even for one day there must be some explanation for it, otherwise an extension may not be granted. (Emphasis provided).

This principle was followed in the case of Reliance Bank Limited (in Liquidation) Civil Application No. 118 of 2007 (UR 78/2007) where Omolo, J.A. stated:-

“Then there is a delay of 64 days to which I have referred and in my view, that delay remains unexplained and as have stated any amount of delay, even if it be one day, ought to be explained in some way. (Emphasis supplied).

This remains the legal position and even where, as is in the present case, there is a delay of 38 days, which I stated is long in the circumstances, an explanation ought to have been given for it.”

Nau in her explanation of the delay in filing the Notice of Appeal stated two things. Firstly, that she got to know of the judgment in August and secondly, that her money was stolen. The first reason was supported by Mr. M. Kariuki to some extent. Mr. Kariuki stated in his affidavit that Nau got to know of the judgment in August 2009. He however did not confirm that he requested Nau to provide money to enable him file the appeal. He also did not explain why if an appeal was contemplated by Nau he entered into a consent on 23rd July 2009 which is reproduced above and which empowered the parties to carry out registration of the properties as ordered in the judgment of this court. As a result of that consent, Elias became the registered owner of parcel number *Muthambi/Erega/298* on 23rd September 2009 (I believe the correct year is 2010). Moreover, Elias filed a bill of cost which when it came before the taxing master of this court for taxation on 13th January 2009 Nau was represented by counsel. The ruling of the taxation was delivered on 2nd December 2009. On 28th January 2010 the matter was before the Deputy Registrar of this court for the purpose of entertaining a Notice to show cause why Nau should not be arrested for failing to pay the costs to Elias. The second reason given by Nau for failing to file a Notice of Appeal in time was that she needed money to file an appeal. As said before, Mr. M. Kariuki in his affidavit in support for Nau's application did not confirm that he asked for that money. He also did not confirm that he referred Nau to the firm of M/S M.M. Kioga advocates to file her appeal. In view of the matters stated above, I find that the application dated 28th October 2009 is without merit and it fails. It fails because there is no sufficient explanation why Nau failed to file the Notice of Appeal within the prescribed period. The second application is filed by Elias and is dated 15th February 2010. By that application, he seeks for the order of Nau to give vacant possession of the parcel No. *Muthambi/Erega/298*. In default, he seeks that Nau be committed to civil jail. The application is opposed by Nau who deposed that she intends to appeal against the judgment dated 11th June 2009 which appeal she stated had high chances of success. She further deposed that she and her sons had extensively developed that parcel of land. To that end, she annexed photographs of their houses and the land under cultivation. I have considered the application. Even if it is accepted that Nau got information about the judgment in this case in August 2009 since that time she has not sought stay of execution of the judgment. The position right now is that Elias is the registered owner of parcel number 298. This as it will be recalled followed the consent order recorded between the counsels representing the parties dated 23rd July 2009. That being so, and because

there is no stay of execution, the application will be allowed. I grant the following orders:-

1. *The application dated 28th October 2009 is dismissed with costs to Elias Kaburu Wanjagi.*
2. *The court does hereby order Agnes Nau Munyinyi wife of Mungania her servants, agents or anyone claiming through her to give vacant possession of parcel No. Muthambi/Erega/298 to Elias Kaburu Wanjagi within 60 days from this date hereof. In default, an order is hereby issued for the eviction of Agnes Nau Munyinyi wife of Mungania, her servants, agents or anyone claiming through her.*
3. *Costs of the Notice of Motion dated 15th February 2010 are awarded to Elias Kaburu Wanjagi to be paid by Agnes Nau Munyinyi wife of Mungania.*

Dated, signed and delivered at Meru this 18th day of May 2011.

MARY KASANGO
JUDGE