



1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court Case*

#### *LAND*

- 3.1 *LR Loc Kangare 2825*
- 3.2 *Encroachment*
- 3.3 *0.04 acres*
- 3.4 *Permanent injunction to restrain defendant*
- 3.5 *Declaration plaintiff owner of property*
- 3.6 *Judgment of subordinate court dated*

*18<sup>th</sup> May 2004*

- a) *Suit agriculture land*
  - b) *Touces on boundary dispute*
  - c) *No jurisdiction to determine matter*
  - d) *Suit dismissed*
- 3.7 *Appeal – delayed due to proceedings*
  - 3.8 *Leave to file appeal out of time application*

*Dated 8<sup>th</sup> July 2005*

- 3.9 *Application heard and determined by*

*Nambuye J 14<sup>th</sup> February 2008*

- 3.10 *Leave to file appeal out of time granted*

*To be filed within 14 days*

- 3.11 *Appeal filed on 27<sup>th</sup> February 2008 but memo of appeal not endorsed with words “pursuant to leave granted by court*

*On 14<sup>th</sup> February 2008*

3.12 Under Section 79B Hon. Judge in charge of civil appeals asks registrar upon admission whether leave to appeal was granted

30<sup>th</sup> June 2008

3.13 No leave indicated to Hon. Judge. Appeal summarily dismissed

4<sup>th</sup> July 2008

4. Application 13<sup>th</sup> July 2010

4.1 removal of orders summarily dismissing appeal

4.2 letter notifying parties appeal summarily dismissed was never Served upon advocate

4.3 leave was granted to appeal Nambuye J on 14<sup>th</sup> July 2008

5. In reply:

i) Direction was used by Hon. Judge

ii) Orders

6. Held:

a) Review genuine orders on face of the record

b) Delay explained

c) Application granted

d) Orders substituted by admission

7. Case Law:

8. Advocates:

i) Waiguru M instructed by the firm of Wanganjo Gichuki & Co Advocates for the respondent

ii) T W Murage instructed by the firm of Kimandu Gichohi & Co Advocates for the

applicant

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 114 OF 2008**

**STEPHEN MAINA KARANJA.....APPELLANT/ORIGINAL PLAINTIFF**

**VERSUS**

MAINA NJOROGE

JULIUS NJUGUNA.....RESPONDENTS/ORIGINAL DEFENDANTS

*(Being an appeal from the Judgement of Miss Lucy Nyambura - Senior Resident Magistrate,  
Kigumo in RMCC No. 96 of 2003 delivered on 18<sup>th</sup> May 2004)*

RULING

**Application for Review of Court Order Dated 13<sup>th</sup> July 2010**

I. INTRODUCTION

1. The applicant/original plaintiff had filed suit in the subordinate court at Nairobi on a land matter. The land referred being LOC Kangare 2325. The appellant alleged that the respondent original defendant one and two Maina Njoroge and Julius Njuguna had encroached into his land. He prayed there be a permanent injunction to restrain the two from encroaching and to further declare him as the lawful owner of the land.

2. The Hon. Magistrate dismissed the suit on grounds that she had no jurisdiction to hear the matter. The application applied for proceedings with the intention to file appeal. Unfortunately, the proceedings required delayed and time to file appeal had lapsed.

3. An application was then filed by the applicant in this Miscellaneous application 870/04 whereby Nambuye J on hearing the applicant granted orders of leave to file appeal out of time. That the appeal be filed within 14 days of the date of the ruling being 14<sup>th</sup> February 2008.

4. The said application was duly filed on the 27<sup>th</sup> February 2008.

5. When the appeal was placed before the Hon. Judge in charge of civil appeal Okwengu J, she made notes to the registrar stating:

***“The appeal was filed out of time. Please tag the order for leave if any.”***

Signed.

30<sup>th</sup> June 2008

6. The registrar in charge of appeals appears not to have complied or no order was reflected that leave had been granted to file appeal out of time.

7. The Hon. Judge dismissed the appeal summarily on 14<sup>th</sup> July 2008.

8. On 14<sup>th</sup> July 2010 (by an application dated 13<sup>th</sup> July 2010) exactly two years later upon the dismissal of the appeal. The appellant filed an application to review the orders of the Hon. Judge under order XLIV rules 1 and 2.

## II APPLICATION 13<sup>TH</sup> JULY 2010

9. In this application, the appellant annexed a ruling of the Hon. Judge stating that indeed leave to appeal out of time had been granted. This court did ask the advocate whether he complied with the rules requiring the endorsement of the said orders upon the memorandum of appeal. This should have read:

***“Pursuant of leave granted by Hon. Nambuye J on 14<sup>th</sup> February 2008.”***

10. The advocate stated that he failed to do so.

11. The delay of 2 years was inordinate. This, explained the appellant, that he had not received the notice notifying him of the dismissal.

12. In reply, the respondents stated the dismissal may not have been due to the appeal being filed out of time but by the Hon. Judge’s direction. I would not agree with this. If it was so, the remarks upon the file would have been cancelled before orders of the applicant being rejected.

13. As to the delay of 2 years, I would agree this was inordinate. If the respondent was also served he would have long began taxation proceedings.

## III FINDINGS

14. I would find that there indeed was a genuine reason on the record. This error to some extent was contributed by the appellant for failing to endorse the orders of leave so granted, on the memorandum of appeal as required by law.

15. I would allow this application and set aside orders of this court dated 14<sup>th</sup> July 2008 dismissing this appeal having been filed out of time under Order XLIX, Order VII r 10 Civil Procedure Rules now Order 18 Civil Procedure Rules dealing with the file of a former judge no longer in the station and accordingly reviewing the issue.

16. I allow the orders to now read that the appeal is hereby admitted pursuant to leave being granted to file appeal out of time.

17. There will be costs to the respondent/respondents original defendants.

**Dated this 28<sup>th</sup> Day of September 2011 at Nairobi**

**M. A. ANG’AWA**

**JUDGE**

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*Advocates* :

- i) *Waiguru M instructed by the firm of Wanganjo Gichuki & Co Advocates for the respondent*
- ii) *T W Murage instructed by the firm of Kimandu gichohi & Co Advocates for the applicant*