



IN THE COURT OF APPEAL AT NYERI

(CORAM: ONYANGO OTIENO, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 304 OF 2010

BETWEEN

JOSEPH KIRWEYA KAHWAI & 5 OTHERS APPLICANTS

AND

CHARLES KIRWEYA KAHWAI & 5 OTHERS RESPONDENTS

(Being an application for leave to file an Appeal and Notice of Appeal out of time against the Order of the High Court of Kenya at Nyeri (Makhandia, J) dated 24th November, 2009

In

H.C. Misc. Appln. No. 19 of 1997)

RULING

I have before me a notice of Motion dated 18th November, 2010 but filed on 6th December, 2010 in which the applicants Joseph Kirweya Kahwai and five others are seeking orders against Charles Kirweya Kahwai and five others as follows:-

“1. That the Honourable Court be pleased to grant leave in which the respondents (sic) may file this appeal and notice of Appeal out of time from order of Justice M.S.A. Makadia (sic) delivered on 24th November, 2009.

2. That the costs of the application do abide the outcome of the intended appeal.”

The grounds set out in support of the application are:-

“(a) The surveyor report dated 11th June, 2001 was read by court on 24th November, 2009.

(b) The applicants became aware that the matter was concluded on 24th November, 2009 when they engaged an advocate on 23rd June, 2010.

(c) The applicants instructed the advocate to review the Orders but unfortunately the application was dismissed on 23rd July, 2010.

(d) The delay is (sic) filing this application is not inordinate.

(e) The appeal has high chances of success.”

There is an affidavit in support of the application sworn by the second applicant, Githinji Kahwai, which on the main, merely highlights the grounds set out in support of the application I have reproduced hereinabove. Together with that affidavit, are annexures which are the extracted order of court given on 24th November, 2009, Notice of Appointment of advocates, extracted order of 23rd July, 2010. Memorandum of Appeal (I presume it is a draft Memorandum of Appeal) and Notice of Appeal.

The application is opposed and in a replying affidavit sworn by the first respondent, Charles Kirweya Kahwai, the respondents state that the application is bad in law, incurably defective, belated and, an afterthought and should be dismissed with costs. Their grounds for seeking rejection of the application are set out in paragraph 5 of that affidavit. They are that:-

“(i) In all grounds put forward none of them states why the applicant did not set in motion the process of instituting his appeal in accordance with the Rules of the Court and the superior court.

- (ii) *There is unexplained and unacceptable reasons for such inordinate delay.*
- (iii) *The applicant has in bad faith deliberately and conveniently failed to include in his application sufficient material in the application to enable the court exercise its discretion.*
- (iv) *The application contravenes the mandatory provisions of Rule 13 (5) of the court of Appeal Rules and thus is incompetent.*
- (v) *That the applicant has not explained why he has not included in his application copies of the proceedings of the superior court to enable the court to exercise its discretion.”*

In his address to the court, Mr. Kariuki, the learned counsel for the applicants, urged me to note that the applicants never slumbered for as soon as the offending ruling of the superior court was delivered, they sought review of the same order and when that review application was refused, they moved to this Court by way of this application. He stated further that the intended appeal has good chance of success and that as the dispute is between members of a family they should be given a chance to put forward their grievances to avoid any further and future feuds. Mr. Wahome, the learned counsel for the respondents, on the other hand saw no merit in the application. In his submissions, the delay period was inordinate when one considers it from 24th November, 2009 when the ruling was delivered to the date of filing the application or from the 23rd July, 2010 when the review application was refused to the date of filing this application. In the first instance, the delay period was over one year whereas in the second instance, it was four and a half months. This delay period, whichever it is, has not been explained according to Mr. Wahome. Further, there is no material annexed to enable the Court form an informed view and exercise its discretion as to whether the intended appeal would be arguable as documents such as proceedings and ruling of the court both in respect of the ruling of 24th November, 2009 and the one of 23rd July, 2010 were not annexed to the application. Thus, Mr. Wahome contended there is no material the Court would look at so as to exercise its discretion as required by law. To that effect, Mr. Wahome referred me to the ruling of Shah, J.A., (as he then was) in the case of Dr. W.G. Machage t/a Pastor Machage Memorial Hospital vs. Charles Mageto t/a D’Akianga Stationers, C.A Civil Application No. Nai. 28 of 2001 (NRB) unreported and contended that without those annexures, the court had no alternative but to dismiss the application.

The application is brought pursuant to **Rule 4** of this Courts Rules. The guiding principles in respect of such an application are now well settled in the many decisions of this Court. These are that the applicant has to demonstrate the period of delay; has to give an explanation for that delay; has to show that the appeal, if one has been filed or the intended appeal where one has not been filed is arguable (but without going into the merits of the intended appeal) and that the respondents would not suffer prejudice if the court granted the extension sought. The list is not exhaustive as indeed it cannot be, it being that the court has unfettered discretion on the matter. That discretion, however, must not be exercised capriciously or upon the whims of the court. It must be exercised judiciously. This Court’s decision in the case of Paul M. Waweru & 2 Others (2003) KLR 361, sums it all. The Court stated:-

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under **rule 4** of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 251 of 1995, this Court stated:-

“It is now 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 takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly, (possibly) the chances of the appeal succeeding, if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

In the Notice of Motion before me, the ruling the applicants seek to appeal from was delivered on 24th November, 2009. The applicants were not satisfied but instead of appealing to the Court against it, they applied for review of it in the High Court. That review application was refused on 23rd July, 2010. It is not stated when they filed application for review as copies of that application were not annexed to the application, but whenever it was filed, I am prepared to give the benefit of doubt to the applicants and assume it was timeously filed. I will thus take the time for purposes of the intended appeal to have started running from the date the review application was rejected which was on 23rd July, 2010 as this is the date from which they had to decide on whether to appeal to this Court or not. They came to this Court by way of this application on 6th December, 2010. That is after about 135 days or about 4 ½ months. That is the delay period which has to be explained or for which a reason needed to be given. What is the reason given for that delay? None. No effort has been made from the record before me to give any reason for that delay period of 135 days or 4 ½ months. What about the possibility of the success of the intended appeal. Without going into the merits, I find it difficult to consider this aspect as the record before me lacks the ruling that it is intended to appeal from. There are no pleadings and/or proceedings and all that is annexed are extracted orders and a copy of what I think is a draft memorandum of appeal. I can make neither head nor tail of what are in issue in the entire saga. As to the issue of prejudice to the respondent, I was not addressed on it and so I cannot address it informatively.

From the above, it is clear that I cannot grant the application as I have no material upon which to exercise my discretion. Mr. Kariuki talks of the subject matter being a land dispute between members of the same family and need for peace. He raises that in reply to Mr. Wahome, but did not raise it in the applicant’s supporting affidavit nor in his address in chief. In my view, much as there is need for peace in the family, the same must come from both sides and no party should be allowed to advance this argument to frustrate the other side nor should the law be deliberately ignored in pursuit of that need for peace when one party is not interested in abiding by the law. I think, like in the case of Shah v. Mbogo & Another (1967) EA 116 the Court should only use such discretion to avoid injustice to a party who has made efforts to meet the legal requirements but not to assist a party who has slept on his rights or who seeks to delay the cause of justice like the applicants have done in this application. In my view, even with the application of **sections 3A** and **3B**, I can’t see how the applicants can be helped. In the result, the application lacks merit, it is dismissed with costs to the respondents.

Dated and Delivered at Nyeri this 1st day of December, 2011.

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.