



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appli 167 of 2008

MOKUA OTWORI Alias RICHARD MEROKA MONARIAPPLICANT

AND

MOSOTA OTWORI RESPONDENT

(Application for leave to file an application for restoration out of time in Civil

Application No. 6 of 2007 (Nai. 138 of 2007) from the judgment of the High Court of

Kenya at Kisii (Kaburu, J) dated 27th July, 2003

in

H.C.C.C. No. 278 of 1998)

R U L I N G

Once again **Mokua Otwor**i alias **Richard Meroka Monari**, the applicant herein, has returned before me by his notice of motion dated 30th June, 2008 and lodged in the Court on 1st July, 2008 and the prayer with which I must concern myself is Prayer No. 1 in the said motion which is to the effect that:

“..... the Applicant be granted leave to file an application for restoration of Kisumu Court of Appeal Civil Application No. 6 of 2007 (Nai. 158 of 2007) out of time”.

Prayer two is the visual one with regard to the costs of the motion.

From the history of the matter, it appears to me that the applicant and the respondent **Mosota Otwor**i are brothers or they are closely related. Since 1998, they have been involved in legal battle over a piece of land previously known as L.R. No. East Kitutu/Kebirichi/88. In *Civil Case No. 278 of 1998* filed in the High Court at Kisii, the respondent had claimed that though the land was registered in the name of the applicant, yet one half of the same was his and the applicant held it in trust for him (respondent). The respondent had therefore, asked the High Court for:

“(b) An order for transfer of half (½) share of L.R. No. East Kitutu/Kebirichi/88 in favour of the Plaintiff”.

Wambilyangah J. (as he then was), partly heard the dispute but left it uncompleted. By consent of the parties, the late Kaburu Bauni, J. took over the hearing and by his judgment dated 27th July, 2005, the learned Judge agreed with the respondent and gave the respondent judgment. It is agreed all round that the judgment has been fully executed and the applicant is registered as half owner of what was originally L.R. East Kitutu/Kebirichi/88; the respondent is registered as the owner of the other half. The applicant has always wanted to appeal though as I said in a previous ruling to which I will revert in due course, his attempts at appealing against the judgment have been marked by delays at various stages.

The present motion refers to Court of Appeal *Civil Application No. 6 of 2007*. This latter motion was brought after the dismissal of *Civil Application No. 158 of 2007*. *No. 158 of 2007* came up for hearing before me on 28th November, 2007. I dismissed it under **Rule 55 (1)** of the Court's Rules. Pursuant to that dismissal *No. 6 of 2007* was filed under **Rules 4** and **55 (3)** and **(4)** of the Rules. **Rule 4** is the usual one under which the Court has an unfettered discretion to extend time. **Rule 55 (3)** allows a party whose application has been dismissed under **Rule 55 (1)** for non – attendance to apply for the restoration of the dismissed application. **Rule 55 (4)** provides that an application for restoration must be made within thirty days from the date of dismissal or from the date the applying party came to know of the dismissal.

In dismissing *Civil Application No. 6 of 2007*, I had this to say:

“The applicant in this motion took some 18 days before filing his motion after he had come to know about the decision dismissing his earlier motion. The present motion is supported by the applicant's own affidavit which runs into some twenty three paragraphs. In none of those paragraphs does the applicant mention the period between 24th January, 2008 when he became aware of the order dismissing his application and 12th March, 2008 when he filed this application. This is a period of nearly three weeks. In other words in the applicant's supporting affidavit there is absolutely no explanation for the delay. It is only during the hearing of the motion that Mr. Mr. Nyachoti, upon question by the Court took refuge in the post-election violence in the country and that he had tried to file the application in Nairobi but was told to come and file it in Kisumu. These are serious allegations and taking into account the length of the delay involved in this matter, I would have thought, if the cause of the delay was known, it would have been put in the supporting affidavit. I am not satisfied there is any valid explanation offered for the delay of some 18 days and that being so, there is no basis upon which I can exercise my discretion in favour of the applicant. It would also appear that the history of litigation is littered with various periods of delay on the part of the applicant and bearing in mind that the Court is also entitled to consider the prejudice which may be caused to the respondent, it would not be fair, in all the circumstances of the case, to extend time for the applicant. The respondent told me that the disputed land has in fact been subdivided on the ground and to hold matters in abeyance by extending time to the applicant will not be right. That being my view of the matter, Prayer No. 2 in the motion dated 12th March, 2008 must fail with the result that the whole motion was filed out of time without leave and I now order that it be and is hereby struck out with the costs thereof to the respondent”.

In opposing the present motion M/s. Asati for the respondent submitted that the motion was improperly before me as I had previously ruled on the issue of extension of time to restore the applicant's motion dismissed for their absence. With respect, I entirely agree with M/s. Asati. It is clear from the passage I have already set out here that I had refused to extend time for the restoration of the previously dismissed motion. Why Mr. Nyachoti for the applicant thinks that I had merely struck out *Civil Application No. 6 of 2007* for technical reasons is beyond my comprehension and I leave it at that. It may well be that the views I expressed in *Civil Application No. 6 of 2007* might have been looked at differently if the matter had been referred to the full Court under the provisions of **Rule 54**. But that is no reason to return the matter to me for the second time. As far as I am concerned, the matter before me is *res judicata*. I have no jurisdiction to deal with it and I order that it be and is hereby struck out with the costs thereof to the respondent. Those shall be my orders.

Date and delivered at Kisumu this 16th day of January, 2009.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR