REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Misc Civ Appli 102 of 2006

GERALD MWIRIGI M'MBUI……..……..APPLICANT

V E R S U S

M'MBUI MWIRICHIA……1ST RESPONDENT

DOUGLAS MEME……..…….……2ND RESPONDENT

R U L I N G

1. The Application dated 22.6.2006 seeks orders under s. 79 of the Civil Procedure Rules that the Applicant be granted leave to file an appeal out of time against the decision and judgment in CMCC 461/99 (Meru) which was made on 18.7.2002. It is clear from the grounds on the face of the Application and from the Supporting Affidavit sworn on 22.6.2002 by Gerald Mwirigi M'Mbui that the delay in filing the Appeal on time was allegedly caused by the Advocate previously acting for the Applicant. It is deponed that the said Advocate who is not named was instructed to appeal against the decision cited above but failed to do so. I gather also that the said advocate only appealed against a subsequent order in the same matter and I note from the annexure "**GMM4**" that the advocate was Elijah Ogoti practising as Elijah Ogoti and Company Advocates. That notwithstanding, the delay is for a period close to 5 years.

2. Mr. Nyamu Nyaga Advocate, now acting for the Applicant argues that the period of delay is not inordinate and the explanation is plausible. He relies on the oft-quoted case of Pithon Mwangi vs Thika Mugiria [1982 –1988] 1 KAR 172, to argue that the Applicant should not be punished for his advocates laxity. He also relies on the case of Daniel Kamonde vs Mary Kamonde C.A. 349/2004 where it was held that a delay of 2 ½ years in the particular circumstances of that case was not inordinate.

3. Both Mr.Kiogora and Mr. Mokua Advocates for the Respondents oppose the Application on grounds that the delay expressed above was unexplained and the reason given for it is in any event not plausible and further that there exists a remedy against the lax advocate. Mr. Kiogora relies on the decision in Kariuki Waithaka vs Holding Limited C. Appl. 67/2004 where it was held that a delay in filing an Appeal 3 ½ months after the fact was inordinate. Both also argue that there would be prejudice if the Application was allowed and the prejudice would be to their clients disadvantage.

4. I note that the original suit related to a claim by a son who is now the Applicant against his father, the 1st Respondent and in that suit the Applicant was seeking a certain parcel of land registered in his father's name. The claim was thrown out in a well considered judgment delivered on 18.7.2002. On 9.9.2003, a caution placed on the land by the Applicant was removed by order of court and on 16.6.2005 certain restrictions placed on the land were also removed. While the latter events were taking place, the Applicant did nothing about the dismissal of his suit ad only woke up on or about 22.6.2006 when he filed

the instant application.

5. My understanding is that delay in each case should be looked at in the specific context and circumstances of that case and whether or not the delay is inordinate will depend on the need to ensure that justice is done. Lakha J.A. said this of applications under Rule 4 of the Court of Appeal rules but which principles hold true, in my view, in an application under s.79 of the Civil Procedure Rules;-

"**In applying the criteria of justice several factors must be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party…..These factors are not to be treated as a passport to parties to ignore the limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them (in Major Joseph Igweta vs Mukira M'Ethare and Attorney General Civil Application No. Nai 8/2000).**

6. Applying the above principles to the instant Application and looking at the specific issues arising in this case, my mind is clear; the delay of close to 5 years is inexcusable. To say that it is excusable merely because blame is thrown to an advocate who has been himself thrown out of a brief would be to open a Pandoras box that would be too difficult to close. That a party has been let down by an advocate is a common catch-phrase that is in certain instances overly abused. If this was the reason for delay in this case, Elijah Ogoti Advocate would have been asked in some form to explain why he failed to heed instructions. No such document including a letter of protest or complaint or even enquiry has been brought before this court. Assuming that in fact the advocate went to sleep, where is the evidence that the Applicant has done anything to pursue enforcement of what he considered to be his ancestral right since judgment. He blames the Respondents for filing Applications in the lower court to enforce their rights but forgets to point fingers at his own lax and lackadaisical approach to his own case.

7. On all fronts, neither the period of delay nor the explanation or excuse for it are tenable and on the other hand to allow the Application would cause undue prejudice to Respondents who have throughout the relevant period been active and diligent. Indolence cannot and has never paid.

8. The Application dated 22.6.2006 belongs to the place of indolent litigants and is dismissed with costs to the Respondents.

9. Orders accordingly.

Dated, signed and delivered in open court at Meru this 7th day of February 2007

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Mwita holding brief for Nyamu Advocate for Applicant

Mr. Kiogora Advocate for the 1st Respondent

N/A for 2nd Respondent.

ISAAC LENAOLA

JUDGE