REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISC CIVIL APPLICATION1024 OF 2004

MARY MUMBI NJOROGE SUBSTITUTED FOR JONATHAN NJOROGE MWANGI ..... APPLICANT

VERSUS

ELIZABETH WAMBUI MWAURA SUBSTITUTED FOR MWAURA KAHIGA, (DCD).....RESPONDENT

R U L I N G

This application was dated 30.7.2004 and was filed on 2.8.2004. It was filed by one Mary Mumbi Njoroge on behalf of one Jonathan Njoroge Mwangi, her deceased husband. The deceased husband was apparently a defendant in Naivasha SRM CC No. 59 of 1985. He defended but lost the case to the plaintiff in that case. It is not clear whether the date of judgment in that case was 10.3.1994 or 14.2.1994.

The records show and it was finally conceded that both parties in that case were properly represented by qualified and competent advocates. The court specifically mentioned this point because M/s Kiniti who prosecuted this application purported to assert to the court that the applicant was unrepresented in the lower court but could not defend the stand when Mr. Kayai confronted her with the fact that she M/s Kayai, was the same advocate appearing for the applicant in the lower court.

This application sought for an extension of the time within which to file an appeal against the ruling and orders made by the Senior Resident Magistrate on 14.1.1994. The applicant also seeks a stay of execution of those orders.

The record shows that after the ruling and orders were made in early 1994, the applicant herein sought and obtained a stay order to enable them appeal. The applicant depones that he requested his advocate to lodge an appeal but that the advocate declined unless she paid his fees.

By a Memorandum of Appeal dated 30.6.2004 the applicant purported to file an appeal but it was later withdrawn when he was advised that the appeal filed as No. 452 of 2004 was incompetent for being filed out of the prescribed time without leave of court.

By a Chamber Summons dated 30.6.2004, the same day the defective Memorandum of Appeal was filed,

the applicant sought to obtain enlargement of time to file the intended appeal. The application was apparently filed jointly or simultaneously with the Memorandum of Appeal aforementioned. It would appear to have been withdrawn together with the Memorandum of Appeal on 30.7.2004. Thereafter on 2.8.2004 this application-dated 30.7.2004 was filed by Rumba Kinuthia & Co. Advocates in which M/s Kiniti who prosecuted this application is an associate.

The grounds upon which this application is based are

(a) That the intended appeal has arguable issues,

(b) That there was an error or confusion as to the date when the ruling and orders to be appealed from were made,

(c) That applicant who was unrepresesented and ignorant of the law did not know that time to appeal was limited

(d) That the applicant was poor and lacked funds to appeal in good time and

(e) That it will be fair and just to grant the extension sought as it will not prejudice the respondent who is not in occupation of the piece of land the subject the dispute.

Neither advocate cited any legal authority either way and particular, M/s Kiniti who sought the indulgence of and a favourable exercise of discretion in her client's favour did not attempt to persuade this court on the principle's upon which the court should find in her clients favour.

I have nevertheless carefully considered both sides' arguments after perusing the records before me. There is no denial from the applicant that the ruling from which the application is brought was delivered on 14.1.1994, the date on the copy of ruling annexed to this application by one of the parties. It is neither denied that a stay was immediately obtained by the applicant herein to enable him or her file an appeal. What the records confirm, which was also not denied by the applicant, is that no attempt to file the intended appeal until about ten years later.

The respondent pointed out that the applicant happily slept on the granted stay orders and deliberately failed to file an appeal. The respondent also pointed out that what really shook the applicant herein from his/her sleep is the fact that on 27.7.2004 the respondent under an application dated 19.7.2004, set aside the stay granted to the applicant ten years before on 27.7.1994.

I have carefully perused the records. It is a fact that the applicant filed an incompetent appeal and application to extend time to appeal, on 30.6.2004. This was about three weeks earlier and before the stay application was filed. While it is possible that the applicant may have gotten wind that the respondent was about to file an application to set aside the long-standing stay orders, it is not so clear that this influenced the applicant to file the Memorandum of Appeal which he had already filed.

Whatever may have been the case, however, the Memorandum of Appeal and the application to get extension of time filed with it, was ten years too late. It is not easy for the applicant to convince this court that he was not relying on the stay orders he had obtained to sleep and do nothing for a whole ten years.

The applicant argued that the intended appeal has arguable issues. That may be so. However, the delay of ten years to seek leave to appeal out of time is too inordinate to be reasonably explained. The argument raised by M/s Kiniti that the delay was partly caused by the confusion as to whether the ruling intended to be appealed against was delivered on 10.3.1994 and not 14.1.1994 did not make much sense. How could the date above cause delay or prevent the applicant from filing the appeal in time or seek an extension of time to appeal promptly? How could either date prevent the applicant from filing a proper appeal or extension of the time application in good time? In my view, the confusion about the date of the delivery of the ruling in early 1994 had nothing to do with the applicant's inordinate delay of 10 years.

Secondly, the fact that the applicant was unrepresented or had no money, even if such assertion were to be accepted by this court as possible, will not explain the inordinate delay of 10 years.

To start with, it was at the end conceded and the record does so confirm, that the applicant was represented by a competent and qualified advocate who happens to be the same firm of advocates that presently represent him/her. It is certainly expected that the advocates must have explained to the applicant his/her right of appeal and that it was limited to 30 days. The sworn affidavits that the applicant was ignorant of his/her right to appeal and the nature thereof were, as the record shows, drafted by the applicants then and present advocates. If this court should believe the assertion that the applicant was not informed of his/her right to appeal, then the court has no reason not to conclude that the advocates were clearly and certainly professionally negligent to their clients. In such a case the applicant should be properly advised to seek recourse on or relief from the advocates upon their own admission that they had failed to inform the applicant of his or her rights of appeal.

The view this court would like to prefer however is that the applicant must have been properly advised of his right to appeal within 30 days after delivery of the offending ruling. This would hold the deponement in the applicant's supporting and further supporting affidavit on the issue misleading and accordingly unreliable. This court would also similarly hold that the applicant's delay was not due to lack of money. Indeed he had afforded to hire an advocate to represent him in the lower court and presently does so. Nor does it escape the attention of this court that substantive sums of money passed from the respondent herein to the applicant in relation to the purchase of the land in dispute, and some little money to be used to file the application for extension of time in good time, could not miss for a period of ten years. Accordingly this court rejects lack of funds as the reason for the inordinate delay to seek extension of time.

The final issue that this court would want to consider is whether taking all the circumstances of this case into account it would be fair and just to give the sought extension of time to enable the applicant to appeal. I have carefully and anxiously considered this matter. The records shows that the applicant's land now in dispute, was due for auctioning by a financial institution which had accepted it as security and advanced funds either to the applicant's family or a person of their choice. The respondent was approached or stepped in and salvaged the land from being auctioned by paying the outstanding loans. It is apparent that the respondent did so upon a contract, which would finally give him part of the salvaged land as his on the consideration of the funds advanced by him as purchase or part of the purchase price. Put differently, the applicant had sold part of the land to the respondent upon the latter salvaging the land from being sold.

It appears, however, that the applicant or his mother and father whose shoes he stepped into, tried to renege from the purchase contract several years after the land had been salvaged. The court understands the above course to have ended with the Naivasha Senior Resident Magistrate case number 59 of 1985 filed by the respondent herein to protect the sale transaction described above. Clearly the respondent succeeded to protect the sale, which in any case was in very advanced stage when the applicant's father who had sold the land to the respondent, died. After his death, the court observes that the transaction passed to the hands of the applicant's mother and later to the applicant himself. It is noted that it was the applicant and his mother before him who strongly tried to dishonour the contract of sale entered into with the respondent, but in vain.

This court also observes that the Naivasha Senior Resident Magistrate's ruling was that the Court's Executive Officer was to execute the lease drawn by the Land Registrar or Commissioner of Lands if the applicant's father and mother after him, and finally the applicant after his mother, refused to execute the same. The Executive Officer executed several relevant documents including application for consent. It appears that it the final lease that requires to be executed after such execution has been delayed by the applicant through the filed application and appeal which were later withdrawn, and also this application.

Taking the facts above into account this court cannot but observe that the applicant's hands have not been clean all through. Apart from the undue and inordinate delay, the applicant's conduct in relation to matters concerning the land in dispute, have been inequitable. He does not, therefore, in my view and

finding deserve a favourable exercise of an equitable relief such as an extension of time. Furthermore, the applicant who was given an equitable relief of stay of execution misused and abused it for a period of ten years until it was taken away from him in 2004. And yet in this application, he is again seeking another stay. He does not deserve any such favourable discretion from this court.

Finally, equity is even-handed. It protects and should protect in this case either party who deserve such protection. In this case the respondent obtained very reasonable and deserved orders in his favour. This was so because he had stepped in to salvage the applicant's land which otherwise would have been sold in an auction., He paid his money with a promise to get part of the land in a clear contractual transaction. He got protection from the lower court. While the applicant had the right to appeal, he instead slept in his rights beyond help. This court similarly needs to protect the respondent's rights by upholding the orders made by the lower court, which still stand and are valid.

For the above reasons, this court sees no merit in this application seeking extension of time to appeal. It hereby dismisses the application with costs to the respondents. Orders accordingly.

Dated and delivered at Nairobi this 8th day of November 2007.

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D A ONYANCHA

JUDGE