



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 80 of 2004**

**IN THE MATTER OF THE ESTATE OF JAMES MURIUKI MURIITHI (DECEASED)**

**AND**

**IN THE MATTER OF SUCCESSION CAUSE NO.278 OF 1994 – KERUGOYA**

**BETWEEN**

**CHRISTOPHER MURIITHI NGUGU ..... APPLICANT**

**VERSUS**

**ELIUD NGUGU EVANS ..... RESPONDENT**

**R U L I N G**

By chamber summons dated 22.12.04 and filed the same day, the applicant sought the following orders:-

1. That this honourable court be pleased to grant leave to the objector/applicant to lodge and file his appeal out of time as against the judgment dated 22.09.03 in Succession Cause No.278 of 1994.
2. That this honourable court be pleased to grant leave to the objector/applicant to appeal against the judgment in the Succession Cause therein.
3. That costs of this application be provided for.

The grounds upon which the application is based are:-

- a) That the objector/applicant has a meritorious appeal with overwhelming chances of success.
- b) That the objector/applicant has always been eager to pursue the appeal herein to the end.
- c) That the delay in lodging the appeal herein, which is not inordinate has been occasioned by the laxity of the applicant's previous counsel on record, and the said laxity should not be visited upon the applicant.
- d) That the subject matter herein is a parcel of land, which the objector/applicant has heavily invested in, and has a high sentimental value to the same.

The application is supported by the applicant's affidavit sworn on 22.12.04 and is stated to be brought

under rules 49, 67 and 73 of the Probate and Administration Rules and section 3A of the Civil Procedure Act (Cap. 21).

Hearing of the application came up before me on 19.06.06 whereat the applicant was represented by learned counsel, Mr. K. Mwangi while the respondent was represented by learned counsel, Mr. M. Muraguri.

The applicant's case may be summarized as under. The judgment he seeks to appeal against was delivered on 22.09.03. It is his case that the subject land is jointly registered in his name and that of the deceased; that the title document does not show respective shareholding and that, therefore, the parties hold equal shares in the whole land. Applicant said his application regarding the land was objected to consequent upon which he applied for injunction and that he got such injunction. He referred this court to a copy of ruling which he said granted him the injunction.

Applicant told this court that judgment in the subject Kerugoya Succession Cause No.278 of 1994 was delivered on 22.09.03. He applied for proceedings in that case and paid the requisite deposit on 01.10.03. He said he could either file appeal within 30 days from 22.09.03 when judgment was delivered in that case or within 30 days from the date he was notified that the proceedings he had applied for were ready. It was his case that there is no evidence of notification of when the proceedings he applied for on 01.10.03 were ready but that 'they are ready now'. Applicant blamed his previous advocate for not filing appeal in time and that he (applicant) learnt of his former advocate's omission in mid – December, 2004 and filed the present application on 22.12.04. He said the land is registered under the Registered Land Act (Cap.300).

According to the applicant, the titles of the holders are inseparable; that this is a family land dispute; that the court has discretion and in exercising the discretion, the court should be guided by the ultimate end of justice. He relied on the following court decisions to support his case:-

- a) Court of Appeal Civil Application No. NAI 100 of 2004, Henry Njau Kingoro -vs- John K. Mugui & Samuel Kinuthia Njoroge wherein the court (Gachuhi, J A - as he then was) made the broad point that a litigant should not be penalized due to the mistakes or delay of his counsel. I note from the Judge's notes in that case that there was a change of advocates and that due to numerous papers in the file, there was confusion in the matter but that the applicant there kept on following the advocates for the purpose of filing the intended appeal.
- b) Court of Appeal Civil Application No. NAI. 152 of 1998 (57/98UR), Catherine Karl -vs- Guenter Otto Karl wherein the court (Lakha, J A - as he then was) made the broad point that justice of the case was a paramount consideration and that it is a principle of the administration of justice that disputes should be decided on merits in so far as this is possible, unless there is fraud, overreaching or delay or such grounds are present as may disentitle the applicant to the unfettered exercise of the court's discretion.
- c) Court of Appeal Civil Application No. NAI. 424 of 2001, Ruth Wanjiru Meta -vs- Penina Nyambura Kimani wherein the court (Shah, JA - as he then was) made the broad point that when the dispute is between members of a family concerning inherited land the court ought to bring the litigation to an end after full ventilation of grievances.
- d) Court of Appeal Civil Application No. NAI. 256 of 2001, Nura Awadh Bawazir -vs- Christopher Stephen Akilano Akiwumi and Giuliana Denti Stella wherein the court (Tunoi, J A) held that the omission to lodge the appeal within the prescribed time fell entirely on the part of counsel who freely accepted full responsibility; that the applicant was blameless; and that the applicant and her subsequent counsel were not guilty of laches after the mistake or omission was discovered.

Applicant's counsel in the present case urged this court to exercise its discretion in the applicant's favour and allow the application.

On the other hand, respondent's counsel opposed the application. While acknowledging that the court has discretion, he urged that it should be exercised judiciously. He referred to respondent's replying affidavit sworn on 24.02.05 and said he relied on it.

Respondent's counsel pointed out that while the applicant applied for proceedings on 01.10.03, he did not show to this court what steps he took to pursue the issue of obtaining the proceedings prior to filing the present application. Respondent's counsel referred to the lower court judgment bearing the delivery date of 22.09.03 and pointed out that the applicant had not shown when he received it and that he applicant had not produced any certificate of delay. Respondent's counsel referred this court to Janson - vs- Samwiri [1972] EA ---- herein the High Court of Uganda (Fuad, J) rejected a similar application on the basis that the applicant, who had to explain the entire period, had not so explained. Respondent's counsel in the present case submitted that there is nothing in the present case to show that he took any further step in this matter after instructing his former counsel to apply for proceedings or that he instructed the said counsel to appeal.

It was respondent's counsel's further contention that the title holders of the subject land were allocated specified shares, contrary to applicant's contention that each party was entitled to a share of the whole. Respondent's counsel referred to a photocopy of what he described as the register of the land in question and said that the parties had specified divided shares which are distinct and that the surviving registered owner does not take the shares of the departed colleague. Respondent's counsel also faulted the application for its failure to annex a draft memorandum of appeal, which he submitted makes it impossible for the court to know the grounds of appeal.

Respondent's counsel also pointed out that the lower court judgment sought to be appealed against is neither signed nor certified. He added that the lower court case was filed in 1994 but was not decided until 2003 – some 9 years later; that the judgment has been executed fully and the parties live in their respective portions enjoying the fruits of the judgment; that litigation must come to an end; and that reopening the case this late will prejudice the respondent mentally.

Respondent's counsel urged rejection of the application.

In reply, applicant's counsel pointed out that the annexure to the respondent's replying affidavit sworn on 25.02.05 said to be a photocopy of extract of title for the subject land, being handwritten, cannot be used to controvert the printed title document relied on by the applicant and which document has not been challenged on grounds of forgery. He submitted that if the title document and the alleged extract of title (copy of green card) give different information, that is the more reason why there should be an appeal. He relied on the explanation given in the applicant's affidavit for the delay.

Applicant's counsel said the applicant could not have annexed a certificate of delay as no notification of readiness of the proceedings was issued and, therefore, no application could be made by the applicant for a certificate of delay. Regarding non-filing of a draft memorandum of appeal, applicant's counsel said he did not attach one as the issue or ground of appeal is explicit from the grounds and supporting affidavit. He conceded that the copy of lower court judgment is neither signed nor certified but added that respondent's counsel agrees with the judgment regarding division of the land into three portions. On the question of prejudice, applicant's counsel submitted that the court has power to order reversion to the position prior to the judgment, even if respondents have occupied respective portions. He said respondents have not acquired title. Regarding Samwiri's case, applicant's counsel pointed out that the applicant discovered his previous counsel had not filed appeal in mid-December, 2004 and filed the present application on 22.12.04.

Applicant's counsel reiterated his earlier submissions, pointed out that this is a sensitive land matter and urged the court to grant the application.

I have given due consideration to the arguments and counter – arguments of the parties.

The photocopy of lower court judgment annexed to the application under consideration is neither signed

nor certified. It is not clear how the applicant acquired it or when. The applicant referred this court to an interlocutory ruling bearing the date of 28.11.94 relating to some injunction. The copy ruling displayed before this court starts at page 2. It bears no case number and it is neither signed nor are parties thereto shown thereon. Other than the applicant's own contention that the ruling relates to him and the respondent, the ruling itself, which should be self – explanatory, does not establish that fact. What was the difficulty in including the page that gives the title of the case, the case number and the parties?

In the course of hearing of this application, I was referred to various court decisions. The general message is that the justice of a case is a paramount consideration to guide the exercise of the court's discretion. The principle is sound but its application would be influenced by the facts in each case. I find merit in the observations cited in the Ugandan case of Janson -vs- Swamiri from Ratnam –vs- Cumaramy [1964] 3 All ER 933, at 935, where the Privy Council stated:

**‘The rules of court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.’**

The delay in Swamiri's case was 5 months but the court dismissed the application for leave to file appeal out of time, with costs.

In the present case the delay involved is 15 months. Blanket accusations have been made that the applicant's previous counsel was to blame for not filing appeal within the prescribed time. The respondent's rejoinder includes paragraphs 12 and 13 in his replying affidavit sworn on 24.02.05 which are in the following terms.

**‘12. That there is nothing to show what steps the applicant did from 1.10.03 to obtain the proceedings and cannot blame his Advocate as there is also nothing to show that he paid his Advocate appeal legal fees and blaming his previous Advocate wholesale in a sweeping statement that his previous Advocate had laxity is in bad taste without supporting facts.**

**13. That Advocates should not suffer as scapegoats to enable litigants get excuses from the court without proof with sufficient facts.’**

There has been no substantive affidavit answer by the applicant to these searching depositions by the respondent and I am left in serious doubt about the applicant's vigilance in pursuing his intended appeal between the time he applied for the lower court proceedings on 01.10.03 and 22.12.04 when he filed the present application. There isn't even a draft memorandum of appeal filed. The subject proceedings have not been availed to this court either. I am not persuaded of the applicants diligence and I hold that no satisfactory explanation has been given by the applicant for the 15 months delay in filing appeal. Accordingly, the chamber summons dated 22.12.04 and filed the same day applying for leave to file appeal out of time is hereby dismissed. I note that this is a land dispute within the family. In the circumstances of the case, I order that each party bears his own costs.

Orders accordingly.

**Delivered at Nairobi this 17<sup>th</sup> day of July, 2006.**

**B.P. KUBO**

JUDGE