



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Misc Civil Appli 16 of 2005

MPANGWANI WATER PROJECT

(Suing through the Chairman) APPLICANT

VERSUS

KIGARI FARMERS CO-OP. SOCIETY LTD 1ST APPLICANT

MITINE CO-OP. SOCIETY LTD 2ND APPLICANT

IGOJI FARMERS CO-OP. SOCIETY LTD 3RD APPLICANT

GAKUI FARMERS CO-OP. SOCIETY LTD 4TH APPLICANT

RWARENE CO-OP. SOCIETY LTD 5TH APPLICANT

THIKWI FARMERS CO-OP. SOCIETY LTD 6TH APPLICANT

KARINGENE CO-OP. SOCIETY LTD 7TH APPLICANT

(An application for enlargement of time to file appeal out of time in an intended appeal

from the judgment of Nkubu SRMCC No. 84 of 2001 (Hon. Nduku Njuki, SRM) dated

5.11.2004

RULING OF THE COURT

What is before me is an application by way of Notice of Motion dated 21.1.2005 and filed in court on the same day in which the applicant is seeks the following orders:-

1. That the honourable court do certify this application as urgent and it be heard exparte in the first instance.
2. That the honourable court be pleased to enlarge the time for filing appeal and the annexed memorandum of appeal be deemed as properly filed.
3. That costs be provided for.

The application which was filed under certificate of urgency is premised on the grounds that:-

1. Judgment was delivered against the applicant on the 5th No. 2004 and the certified copies of proceedings and judgment were obtained on the 20th December 2004.
2. The delay was not of the making of the applicant as the court has also issued a certificate thereto.
3. The intended appeal has high chances of success as the trial court did not address its mind on all the issues presented before it.
4. The applicant has been greatly prejudiced by the judgment and an appeal is a necessity for justice to be seen to be done.

The application is also supported by an affidavit made and sworn by one JOSPHAT GITARI MWONGERA, the chairman of the applicant in which he has explained the reasons for the delay in filing the appeal and that as a result of the delay, the applicant has obtained a certificate of delay as deponed to in the further affidavit made and sworn by Florence Gitonga, counsel for the applicant. The certificate of delay is dated 1.1.2005.

The application is opposed on the grounds that:-

1. (a) It cites and relies on the wrong provisions of the law.
(b) It deliberately failed to cite and comply with the mandatory provisions of section 79G of the Civil Procedure Act, Chapter 21 Laws of Kenya.
(c) It does not indicate when the proceedings were applied for.
(d) There are no annexures of the proceedings or indeed the alleged certificate of delay to show when the same were supplied.
2. The same is otherwise misconceived and an abuse of the court process.
3. The same should be dismissed with costs.

The facts giving rise to this application are that the applicant initially sued the 1st respondent seeking orders for a permanent injunction against the 1st respondent, their agents, assignees, servants or employees for interfering with the plaintiff's lawful tapping of water from Mutonga water furrow originating from Mutonga River, special damages at Kshs. 14,000/=, costs and interest at court rates. The defendant (1st respondent) was accused of frustrating the plaintiff (applicant) from tapping water from the furrow, even after obtaining the necessary consent to do so. The 2nd to 7th respondents applied to be enjoined in the suit before the hearing commenced.

After hearing the suit interpartes, the learned senior resident magistrate dismissed the suit on the grounds that the respondents could not claim monopoly over a natural resource and further on the ground that the respondents had spent much time (and money) on maintaining the furrow and were using the water for their priorities which included coffee factories, schools, cattle dips, markets, etc.

Judgment was delivered on 5.11.2004. Though there is no evidence as to when typed proceedings and judgment were applied for, the typed judgment was finally obtained on 20.12.2004. The Certificate of Delay was issued on 10.1.2005 and the application was filed on 21.1.2005. Though the judgment was certified on 20.12.2004, the Certificate of Delay was issued on 10.1.2005, probably in an attempt by the applicant to preempt the respondent's grounds of opposition to the application.

The orders sought by the applicant herein are discretionary in nature and in granting the same the court would be exercising its discretion which discretion although unfettered must be exercised on reason not caprice. The Court of Appeal has dealt with the issue of extension of time for filing appeal in many

decisions. In Mansur Jiwani (sued wrongly as T/A Computer City) versus Ovidian Advertising and Design Limited – Civil Application No. NAI 369 of 2000 (unreported). The court quoted its earlier decision Leo Sila Mutiso V. Rose Hellen Wangari Mwangi Civil Application No. NAI 251 of 1997 (unreported), the Court of Appeal expressed itself thus on the applicable principles on whether or not to grant an application for extension of time:-

‘It is now well 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.’

Has the applicant fulfilled the requirements for this kind of application? It is clear from the record that judgment was delivered on 5.11.2004. Certified copies of judgment were provided on 20.12.2004. The application for extension of time was filed on 21.1.2005. The explanation that has been given for the delay is that the proceedings and judgment were not ready or available within the time within which appeal ought to have been filed. After considering the pleadings and on perusal of the judgment, I am persuaded that the applicant is entitled to an extension of time. As was held in KIRAMBURI V. GITHINJI (1986) KLR 405 (an authority cited to me by Mr. Mwanzia for the respondents).

“As a general rule, an applicant for an extension of time should support his application with a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it in order to enable the court to determine whether or not a refusal of the application would appear to cause injustice. This is a salutary rule with which an advocate is advised to comply as failure to do so may well lead to the dismissal of his application.”

In the KIRAMBURI case (supra) the Court of Appeal also dealt with the issue of whether or not it is mandatory for an application to include the Memorandum of Appeal.

Mr. Mwanzia for the respondents has faulted the applicant’s application on this ground.

In the case of Mehrunnissa V. Mohammed Parvez (No. 2) (1979) KLR 234, a case that was applied in Kiramburi V. Githinji (supra), the court was moved to exercise its discretion in favour of granting the application despite the fact that the applicant had given no information about the ruling appealed from or the grounds of appeal and in doing so, the court expressly referred to Bhatt V. Tejwant Singh & Another (1962) EA 497.

In this present case, I am inclined to take the same view, but more importantly because the applicant has provided information on the case in the lower court by availing a copy of the judgment which I have had the opportunity to peruse. The applicant has also provided a Certificate of Delay, showing that the typed judgment annexed to the application was certified on 20.12.2004, which was some 15 days after the expiry of the time allowed for filing of the appeal. A reading of the judgment by the learned senior resident magistrate points to the conclusion that the intended appeal is not devoid of merit.

I now turn to the other issues of contention raised by Mr. Mwanzia for the respondents, the first of which is that the applicant relies on the wrong provisions of the law. The application was said to be brought under section 79G of the Civil Procedure Act, as well as sections 3 and 3A and Order 49 Rule 5 and Order 50 Rule 1 of the Civil Procedure Rules. I have considered all those provisions but found myself unable to agree with Mr. Mwanzia’s contentions. In any event, I am persuaded that any defects in the form of the application are curable under Order 50 Rule 12 and also Order 6 Rule 12 of the Civil Procedure Rules. Order 50 rule 12 in particular provides as follows:-

“12. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no

application shall be refused merely by reason of a failure to comply with this rule.”

In the result, the applicant's application dated 21.1.05 is allowed. The applicant is allowed to file his appeal out of time. The applicant is granted leave to file and serve the record of appeal within 21 days from today. Costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Meru this 17th day of May 2005.

RUTH N. SITATI

JUDGE

17.5.2005