

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. NO. 156 OF 1999

MBALA NYAA AND 2 OTHERS.....APPLICANTS

VERSUS

MBUVI MBALA & ANOTHER.....RESPONDENTS

RULING

The applicants have served the court under order XLIX Rule 5, Civil Procedure Rules and sections 79G and 3A Civil Procedure Act seeking orders that the applicants be granted leave of this court to file their appeal out of time and that costs of this application abide by result of the appeal. The main ground upon which the application is brought is that the delay to file the appeal has been occasioned by lack of proceedings in a Kitui PMCC 30 of 1969 between 1st respondent Mbuvi Mbala and elder brother of the applicants who allegedly conducted the case on their behalf and one Munyoki Kyei. The said file no. 30/1969 has never been traced and they are still trying to trace it. The application was also supported by the affidavit of Jones Mbiti the advocate for the applicants who adds that the said proceedings and judgement in the said case were never produced in the lower court case but only a hearing notice marked JMM/M23/95/3. Todate the proceedings have not been traced. Another affidavit was filed by 1st applicant Mbale Nyaa. Counsel for respondents filed grounds of opposition and a replying affidavit. He contends that reasons given for the delay in filing the appeal are in immaterial, irrelevant and that the application is bad in law, incompetent and there has been inordinate delay in filing the application.

The applicant wishes to appeal against the lower court's judgement in Kitui PMCC 23/95. The Judgement in that case was delivered on 23.2.1999. The typed proceedings were signed by the trial magistrate on 24.3.1999. It was not until 31.8.1999 that this application was filed in court. There was a delay of 5 months from the time the applicant received the lower court proceedings. The delay of 5 months from March to August has not been explained. The delay was inordinate and the court will not normally assist parties who are not diligent. I find the delay of 5 months to be inordinate in the circumstances for a party who was truly dissatisfied with the courts order and especially that the applicant intimates that the case is serious since it involves a lot on land which is in issue.

The main ground relied upon by counsel is that they were looking for proceedings in Kitui PMCC 30/69. The hearing in the lower court proceeded without the said file. The applicants have sought adjournment to try and trace the said file. Though counsel claims that they have been looking for the said file, he has not adduced any evidence to show that he has been looking for the said file PMCC 30/1969. The court has no idea how the file was being sought. The court would have expected some communication to be on the file to that effect. There is none. Once the application was filed in court on 22.8.1999, it was first set down for hearing on 15.10.1999. It was stood over generally. Another hearing date was taken for 11.5.2000 and there was no appearance on that day. It was stood over generally. The matter resurfaced on 30.3.2003 – 3 years later when the applicant took another date for hearing. Respondent allege that the applicant only moved the court in May 2003 after they filed an application to evict the applicants. This delay in prosecuting the application is not explained. It cannot be based on proceedings in PMCC (Kitui) 30/1969 for reasons I have considered above. Todate the said has not been found anyway and it that is their main ground of appeal as alleged then there would have been evidence of vigilance in seeking the said file.

There was inordinate delay in filing this application and there has been inordinate delay in prosecuting this application and for reasons considered above I do find that the delay not explained.

The remedy sought is discretionary. The applicants counsel cited the case of James Ombare Ockotch

versus EABS and others CA 2/96 in which the court considered the value of the property involved and persuades this court to allow the application on the basis that the land involved herein is a lot i.e. 200 acres. I do agree that if the appeal has merit the appellants have a lot at stake and on that basis alone I will allow the applicants application to have the time with in which the appeal should be filed enlarged. It is will however be conditional.

That the said appeal should be filed within a months time and the record of appeal be served on respondent within the said period. The file should be placed before the Judge for admission within the same period. Applicants will pay costs of this application.

Mention after a month.

Dated, read and delivered at Machakos this 26th day of Fenruary, 2004.

R. WENDOH

JUDGE