



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 128 OF 1994

**GEORGE OKIMARU IRARU (as legal representative of the Estate of
HABEL IRARU OKIMARU)PLAINTIFF**

VERSUS

**MARGARET WELIME WANJALA (as legal representative of the Estate of
DAVID WANJALA WELIME)DEFENDANT**

R U L I N G

Before me is the Applicant's Notice of Motion dated 8th July 2019 seeking leave to file a Notice of Intention to file an appeal from the ruling delivered herein on 29th May 2017.

The application is brought under the provisions of **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act** as well as the Inherent Powers of this Honourable Court.

The application is premised on the grounds set out therein and is also supported by the affidavit of the applicant dated 5th July 2019.

The gist of the application is that the Applicant's failure to file a Notice of Appeal against the ruling delivered herein on 29th May 2017 was due to his sorry financial situation and that the intended appeal is not vexatious nor frivolous but one with a chance of success and it is therefore just and fair that the orders sought be granted.

In his 41-paragraph supporting affidavit, the Applicant who is the son of the late **HABEL IRARU OKIMARU** (deceased) has given a lengthy narrative of the dispute herein which relates to the ownership of the land parcel **NO KAMUKUYWA SETTLEMENT SCHEME/NAITIRI/138** (the suit land). That dispute commenced on 30th December 1994 when this suit was filed by the Applicant's father **HABEL IRARU OKIMARU** against the Respondent's husband **DAVID WANJALA WELIME** both of who are now deceased. The suit was dismissed with costs by the late **MUKUNYA J** on 29th May 2017 under the provisions of **Order 17(2) of the Civil Procedure Rules** thus precipitating this application. The record shows that a draft Memorandum of Appeal was filed but it is not clear what became of it. In his supporting affidavit, the Applicant paints the picture of the Respondent's deceased husband as a person who was determined at all costs to evict the Applicant's deceased father from the suit land including using the criminal process to have the Applicant and his siblings charged and convicted for arson thus rendering them squatters. The Applicant similarly depones to how his late brother who had obtained a grant of Letters of Administration to prosecute this suit on behalf of his father, himself succumbed to illness on 7th June 2015 and his application to be substituted in place of his deceased brother was dismissed. The Applicant has also deponed to other matters which I need not refer to in this ruling as they are not relevant for purposes of this application.

Although the application is not opposed, I found it prudent to consider it on its own merits.

It is clear to me that this Court has jurisdiction under **Section 7 of the Appellate Jurisdiction Act** to extend the time for giving Notice of Intention to appeal from a Judgment of the High Court (which must now of course also include the Environment and Land Court and other Courts of equal status since 2010). If there was any doubt about this Court's jurisdiction to extend time to lodge a Notice of Appeal, that was settled by the Court of Appeal in the case of **KENYA AIRPORTS AUTHORITY & ANOTHER .V. TIMOTHY DUVI MUTUNGI C.A CIVIL APPLICATION NO 165 OF 2013 [2014 eKLR]**.

The test that this Court will look at in an application such as this one is the same that the Court of Appeal applies in an application under Rule 4 of the Court of Appeal rules. This was set out in the case of **FAKIR MOHAMMED .V. JOSEPH MUGAMBI & OTHERS C.A CIVIL APPLICATION NO 332 OF 2004** as follows: -

“The exercise of this Court’s discretion under Rule 4 has followed a well – beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant. The period of delay, the reasons for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance, - are all relevant but not exhaustive factors.”

Therefore, in an application such as this one where the Court has a discretion whether or not to grant leave, it should always be remembered that such a remedy is not a right. It must therefore be exercised judicially and on a case by case basis only after the party seeking it provides sufficient evidence to persuade the Court to exercise such discretion in his favour.

It is not in dispute that the ruling sought to be appealed was delivered by the late **MUKUNYA J** on 29th May 2017. This application was filed on 8th July 2019 some two (2) years later. A delay of two (2) years is clearly in-ordinate. The record shows that the Applicant was present in Court on 29th May 2017 when the suit was dismissed. He concedes to that and adds that he immediately applied for proceedings on 31st May 2017 which he took to his advocate **MR WERE** who demanded Kshs. 100,000/= but he could not raise it and it was not until recently that he learnt that **MR OCHARO** handles matters pro bono. As was held by the Court of Appeal in **BI – MACH ENGINEERS LTD .V. JAMES KAHORO MWANGI 2011 eKLR: -**

“The filing of a Notice of Appeal is a simple and mechanical task”

The Applicant who was present in Court on 29th May 2017 has not explained why he did not immediately file a Notice of Appeal. He did not have to wait for the proceedings. He then says that he approached an advocate called **MR WERE** who demanded Kshs. 100,000/= but they could not raise it. It is not stated what other efforts, if any, were made after the Applicant and his family were un-able to raise the Kshs. 100,000/= demanded by **MR WERE**. This points to dilatory conduct on the part of the Applicant. The remedy sought is a discretionary one and equity frowns upon the indolent. It is clear from the record that the suit had previously also been dismissed on 28th March 2017.

I have also looked at the draft Memorandum of Appeal (annexture GO1 – 19) and I am not convinced that there are chances of success. Among the grounds of appeal raised are that the trial Judge erred in law and fact by failing to take into account **“relevant pieces of evidence”** to the prejudice of the Appellant which was against **“the principles of fairness and equity”** and also ran counter to the **“Constitutional Principles.”** The suit having been dismissed earlier on 17th March 2017 for want of prosecution, what other **“relevant pieces of evidence”** or **“Constitutional principles.”** Were left for the trial Court to consider? And even before 28th March 2017, this suit had also previously been dismissed on 21st July 2009. The issues that gave rise to this suit occurred in 1986 when the Applicant’s deceased father sought a declaration that the Respondent’s deceased husband had trespassed on the suit land. That was over thirty (30) years ago. Clearly, it would not be in the interest of the fair administration of justice to allow this application which does not even disclose any matter of public importance.

Ultimately therefore, the Applicant’s Notice of Motion dated 8th July 2019 is devoid of any merit. It is dismissed with no order as to costs.

Boaz N. Olao.

J U D G E

23rd January 2020.

Ruling dated, delivered and signed in Open Court this 23rd day of 2020 at Bungoma.

Ms Ratemo for the Applicant present

Mr Bulimo for Respondent absent

Applicant present

Joy/Okwaro – Court Assistant

Boaz N. Olao.

J U D G E

23rd January 2020.