



REPUBLIC OF KENYA

High Court at Embu

Miscellaneous Civil Application 183 of 2011

FRANCIS GICHOBİ MBUTE.....1ST APPLICANT

JOSEPH NJERU MBUTE 2ND APPLICANT

VERSUS

RUSUA WAKABARI KIBUCHI

(Suing as guardian and next friend of

STEPHEN NJOKA KIBUCHI RESPONDENT

RULING

This is the Notice of Motion dated 12/10/2011 and filed the same day. It is brought under Order 50 rule 6 Civil Procedure Rules for;

- 1) An order granting Leave to the Applicants to file an appeal out of time in respect of a Ruling delivered on 27/7/2010 in Wanguru Misc. Succession Cause No.31/91.**
- 2) That the draft Memorandum of appeal to be deemed as duly filed upon payment of filing fees.**

The main ground is that the Applicants only came to know the Orders of the lower Court when they were stopped from cultivating the rice holding in August 2011. The application is supported by the affidavit of the 1st Applicant – Francis Gichobi Mbute. In it he explains all the reasons making him believe they have an arguable appeal.

A perusal of the proceedings shows that the Ruling complained of was read out in open Court on 27/7/2010 in the presence of Francis Gichobi, Joseph Njeru and Rusia Wakabari. The Applicants herein are (1) FRANCIS GICHOBİ MBUTE and (2) JOSEPH NJERU. It is therefore an open lie when they claim they were not aware of the Orders of the Court until they were stopped from cultivating the rice holding.

This application was filed on 12/10/2011. This is a delay of over one year. And to try to justify it the Applicants have used a lie. That is not acceptable even if the Respondent has not filed papers to oppose it. The orders are not automatic.

In the case of ***KITALE ELGON CO-OPERATIVE UNION LIMITED -VS- SETH NYAWARE OMAMO & ANOTHER CIVIL APPLICATION NO. NAIROBI 58/99 [1999] LLR 371 6(CAK)*** the of Court of Appeal held that a delay of three (3) months without an explanation is inordinate.

In TRADE BANK LTD (in liquidation) -VS- L.Z. ENGINEERING CONSTRUCTION COMPANY LTD & OTHERS, CIVIL APPLICATION NO. NAIROBI 282/98 [1998] LLR 846 (CAK)
the Court of Appeal held that the following are the factors to be considered in an application for extension of time

i.Length of delay

ii.Reason for the delay

iii. Possibility/chances of success

iv.Prejudice

This was also the case in ***JOYCE MUTHONI NJAGI -VS- ELIZABETH M. NYAGA & ANOTHER – CIVIL APPLICATION NO. NAIROBI 168/1997 [1997] LLR 1184 CAK.***

In the current application its clear that the length of delay is inordinate. And the reason for the delay is not genuine.

I will only grant the Leave sought because of the grounds raised in the appeal which form part of factor number (iii) in the considerations for extension of time. The applicants are allowed 14 days to file the appeal. The Ruling being challenged was made by the Principal Magistrate's Court Wang'uru which now falls under Kerugoya High Court. And that's where the Appeal if any should be filed.

DATED DELIVERED AND SIGNED AT EMBU THIS 2ND DAY OF MAY 2013

**H.I. ONG'UDI
J U D G E**