



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**HCCA 72 OF 2009**

**M'RUKARIA M'NKUBITU.....APPELLANT**

**VERSUS**

**JULIUS NTURIBI RUKARIA.....1ST RESPONDENT**

**MARY NCEKEI KIRIANKI.....2ND RESPONDENT**

**R U L I N G**

The application herein is dated 25th April, 2012. It states that it is premised on Order 51 rule 1, Order 37 Rule 6(2) of the Civil Procedure Rules, Section 1A, 1B of the Civil Procedure Act, Section 28 (3) of the Limitation of Actions Act and all enabling provisions of the law. It seeks orders:

1. **THAT the Hon. Court be pleased to grant leave to(sic) the filing of this appeal out of time and the appeal herein be deemed to have been filed within time.**
2. **THAT costs of this application be in cause.**

Mr. Elijah K. Ogoti, the advocate for the applicant in the grounds supporting this application says that failure to file the appeal within time was occasioned by his unintentional mistake in the computation of apposite time. In the grounds, he attributes this mistake to having being “jinxed”. This, according to him, explains why he withdrew appeal No. 108/2008 which he had filed in time. He reasoned that an advocate's mistake cannot be used to punish an innocent litigant.

During the hearing of the application, the applicant's advocate, repeated what was contained in the grounds supporting the application. He also argued that the application involved a procedural technical issue as intended by Article 159 (2) (e) of the constitution. I think that he meant Article 159 (2) (d) of the Constitution.

He argued that the applicant had a strong case as he was the father of the first respondent and the 2nd respondent was a daughter in law. He also submitted that the respondents did not have a right to challenge this application as it was an exparte application. This was inspite of the fact that the hearing date had been fixed with his consent and that one of the advocates for the respondents.

Mr. Ogoti felt that the application should be allowed because the applicant was bitter that the respondents wanted to take his land when he was alive whereas they know that it will be theirs after his

death.

Mr. Igweta for the respondents submitted that the application should not be allowed because the applicant/appellant was moving the Court in circles. He withdrew his appeal in 2009 and then three years down the line. In 2012 he filed this application. He asked the Court not to believe that it took 3 years for the applicant's advocate to realize that he had made a mistake. He accused the advocate of forum shopping.

He reiterated that the Court should not allow someone to file an appeal within time, to withdraw it and then to come back to Court after 3 years to seek extension of time. He termed the actions of the appellant as amounting to abuse of the process of Court.

I have looked at the averments herein and submissions of the parties. I agree with the respondents that you cannot withdraw an appeal and come back to Court three years later to seek extension of time. The applicant withdrew Appeal No.108/2008 in 2009. The present application is dated 25th April, 2012. Without necessarily agreeing with the respondents that this is an abuse of the court process, I find that this is not right. I, however, applaud Mr. Ogoti for absolving his client from any culpability in this debacle.

I do not agree with the applicant's oral submission that the withdrawal of appeal in 2009 and then seeking to have it reinstated is a procedural technicality as envisaged by Article 59 (2) (d) of the Constitution. The same Article at 2(e) laconically and unequivocally declares: "Justice shall not be delayed." Litigation must come to an end. I do not wish to comment on the claim by the respondents that the applicant is forum shopping.

In the circumstances, I dismiss the applicant's application dated 25 April, 2012  
and award costs to the respondents.

**Delivered, dated and Signed at Meru this 8th day of July, 2013. in the presence of :**

**Cc Mwonjaru/Daniel**

**Igweta h/b Kiautha Arithi for Respondents**

**Ogoti for applicant**

**P. M. NJOROGE**

**JUDGE**