

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 188 OF 1996(70/96 UR)

BETWEEN

NELSON WAHOME KIRIUNGI.....APPLICANT

AND

NYAWIRA NDIUINI.....RESPONDENT

(Application for leave to file notice of appeal and an appeal out of time

in an appeal from-the rulings and findings at the High Court of Kenya at Nyeri

(Justice Tunoi and Lady Justice Angawa)

in

H.C.C.C. NO. 282 OF 1987)

RULING

This litigation has a very respectable history and in this ruling, I shall only touch on the parts of that history which is relevant and essential to my decision. The original suit in the superior court was filed in the Central Registry in Nairobi on 25th

July, 1986. Nyawira Ndiuini, the present respondent, was the plaintiff and he cited Kariuki Wambugu as the first defendant, Nelson Wahome Kiriungi as the second defendant and Nyeri County Council as the third defendant. The dispute centred on a piece of land known- as Plot No. Aguthi/Gatitu/66-7/37 which is situated in Nyeri District. The suit was subsequently transferred from Nairobi to the High Court at Nyeri and was there registered as Nyeri HCCC NO. 282 of 1987. The second defendant, Nelson Wahome Kiriungi is the present applicant in the application now before me. That application, by way of notice on motion and under certificate of urgency, was filed under Rules 4, 74(1) and 81 of the Court's Rules and seeks two orders from the Court, namely:-

That leave be aranted to file notice of appeal out of time;

That leave be granted to file an appeal out of time;

The application states at its head that it is proposed to appeal:-

“.....from the Rulings and Finds (sic) of Honourable MR. JUSTICE P.K. TUNOI and LADY JUSTICE M.A. ANGAWA in Nyeri High Court Civil Case NO. 282 of 1987.”

The affidavit in support of the application shows that on 21st September, 1994, the applicant lodged in this Court Civil Appeal No. 201 of 1994. To enable me understand the matters in dispute before me, I have called for and read that appeal. It was filed pursuant to a notice of appeal which was lodged on 30th

September, 1993 and according to that notice, what was to be appealed against was:-

"the decision/ruling of the Honourable Justice M.A. Angawa dated 17th September, 1993....."

Civil Appeal No. 201 of 1994 duly came up for hearing on 27th October, 1995 and on that day; the Court made the following order:

"The record of this file does not- contain any copy of the order appealed against. The memorandum of appeal is not signed. The appeal has been filed out of time. It is therefore incompetent and is struck out with no order as to costs."

This application is obviously brought to enable the applicant revive the appeal which was thus struck out on 27th October, 1995. That is made abundantly clear in the supporting affidavit sworn by the applicant. My discretion to enlarge time in the manner sought is unfettered, but even so the applicant must place before me material upon which I can exercise the discretion. Has the applicant placed before me material upon which I can exercise the discretion in his favour?

The applicant's appeal was struck out on 27th October, 1995. The record shows that neither the applicant, nor his counsel was present when the appeal came up for hearing. The application I am dealing with was not filed until 12th June, 1996. The period between 27th October, 1995 when the appeal was struck out and 12th June, 1996 when the present application was filed is some seven months. To get my discretion.. to be exercised in his favour, the applicant had to satisfactorily explain that delay. His explanation is that he was not made aware by his then counsel that his appeal was to come up for hearing on 27th October, 1995. Had he been made aware, he would have attended the hearing. That may well be so, but the applicant does not allege that his then counsel was not aware of the hearing date either. There is no provision in our rules for serving separate hearing notices on the advocate and on the party such advocate represents. Next the applicant says he discovered in November, 1995 that his appeal had been struck out. The date on which that discovery was made is not disclosed. I, however, leave that aside. What is important is that upon the discovery, the applicant says he went and saw his advocate. He instructed the advocate to file an application to have the appeal reinstated. He then left and nothing happened until 22nd April, 1996 when he was served with process in another case filed against him by the respondent. That was when he ran back to his, then advocate to find out what had happened about the instructions he had given in November.

In the affidavit and even in the submissions which Mr Mahan: for the applicant made before, the applicant says absolutely nothing about why his counsel did not attend court on 27th October, 1995 and why the same counsel did not carry out the instructions given to him in November. From the material before me, the impression one gets is that the applicant's advocate, for some unknown reason, simply refused to act in the matter and also refused to tell the applicant he was not going to act. For my part, I will repeat what I said in ADAM SHAIYA V JOHN MWANGI KARIUKI, CIVIL APPLICATION NO. NAI 49 OF 1995 (Unreported). The position there was similar to that obtaining here and there I said:-

".....Mr. Aswani in the end told me the mistake must be with his office and that that being so, I should not visit the sins of his office upon his client. That may be so but Mr. Aswani did not tell me what mistake was made in his office which resulted in the application being filed, some three months from the time the previous appeal was struck out.....I do not think that simple and pure inaction can qualify as a mistake on the part of counsel. A mistake on the part of counsel would. be something like thinking wrongly that an application had been filed while none had in fact been filed or thinking wrongly that one needed a certified copy of the order to enable one file the application....."

The conduct of the applicant's previous counsel appears to me to be a refusal to act or a simple and pure inaction. In my view that cannot amount to an excusable mistake on the part of counsel.

The applicant has not given me any material as to why that and matters are not helped by the fact that

after he gave instructions to his advocate in November 1995 the applicant did not again attempt to find out what was happening until after 22nd April, 1996 when he was served with documents in the new litigation. In these circumstances, I agree with Mr. Waweru for the respondent that the applicant has wholly failed-- satisfactorily account for the delay between November 1995 to 12th June, 1996. On that basis alone, I am entitled to refuse to exercise my discretion in favour of the applicant.

Apart from the foregoing, however, there is another basic issue of law upon which the application must also fail. As I pointed out earlier, the appeal which was struck out was stated in the notice of appeal to be from:-

"the decision/ruling of the Honourable Justice M.A. Angawa dated 17th September, 1993....."

The order made by Angawa, J on 17th September, 1993 arose from a notice of motion dated 28th May, 1993 but filed in court on 16th June, 1993. That notice of motion was brought under Order 44 Rule 1 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act, and the motion had asked the judge for two orders, namely:-

- (1) That the court be pleased to review/set aside the orders issued on 11th March, 1993 and all other subsequent orders.
- (2) That the court be pleased to order a stay of execution of any order issued thereto.

There was no dispute before me that the notice of motion set out above was one for review of the orders made on 11th March,-

1993. And what were the orders made on 11th March 1993? Mahan conceded before me that the orders made by unoi, then was) on 11th. March, 1993 were made pursuant to another application which asked the judge to review some orders he had made on 23rd November, 1992. Under Order 42 Rule (1)(aa) the applicant could have appealed to this Court against the orders made on 23rd November, 1992. But he did not file any notice of appeal against those orders and did not appeal. That was why he again asked Angawa, J by his motion. of 28th May,.. 19.93 to review the orders made on March,1993. As Mr. Waweru correctly pointed out to Angawa, J, the applicant was not entitled to apply to her to review the orders of Tunoi, J which had themselves been made pursuant to an application for review. Order 44 Rule emphatically provides:-

"NO application to review an order made on an application for a review of a decree or order, passed or made on a review shall be entertained."

If the applicant had no right to apply for a review to Angawa, J how can. he have a right to appeal from her refusal to undertake a further review?

So that even if I had been inclined to grant to the applicant the extensions he seeks, his intended appeal might in the end suffer the same fate as the previous one, this time on the ground that no appeal lies from the order made on 17th September, 1993.

This application must fail on this ground as well. I have, not out of disrespect to Mr.Mahan, not found it necessary to deal with the two cases he cited to me because they really do not have any bearing on the two issues upon which I have determined this application

These being my views on the issues raised, I refuse to exercise my discretion in favour of the applicant with the result that this application fails and I order that it be dismissed with costs thereof to the respondent.

Dated and delivered at Nairobi this 28th day of June, 1996

R.S.C

OMOLO

.....
JUDGE

OF

APPEAL

I certify that this is a
true copy of the original

DEPUY

REGISTRAR
