



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi JA)

CIVIL APPLICATION NO NAI 168 OF 1995

Between

AMIR A. BOYAPPELLANT

AND

LAND ADJUDICATION DIRECTOR.....1ST RESPONDENT

DISTRICT LAND REGISTRAR.....2ND RESPONDENT

(Application for extension of time to lodge memorandum and record of appeal out of time in an intended appeal from a ruling/order of the High Court of Kenya at Mombasa (Justice ICC Wambilyangah) dated 23rd November, 1992 in HC Misc C No 131 of 1991)

RULING

This is an application under rule 4 of the Rules of this Court for extension of time within which to file a record of appeal out of time. The application is supported by an affidavit sworn by the applicant himself on 17th July, 1995.

The applicant had filed a record of appeal against the ruling of the superior court (Wambilyangah J) delivered on 23rd November, 1992, being Civil Appeal No 82 of 1993. When the appeal came up for hearing on 20th January, 1995, it was struck out as being incompetent for having failed to include a certified copy of the order appealed against as provided by rule 85(1)(h). This application, if allowed, will enable the applicant to file afresh his record of appeal.

The applicant, in support of the application, deponed in paragraphs 13 and 17 of this affidavit thus:

“13. That the subject of the intended appeal is my land which was fraudulently subdivided into Parcel Number Kwale/Gulu/Kinondo/718, 719, 720, 721, 722, 723 and 727, from the original known as Kwale/Gulu/ Kinongo/677 by the Chief Land Registrar without my knowledge, authority, permission or consent.

17. That the respondents have threatened to evict me from the land and change my titles and unless the honourable Court grant me a stay of execution my intended appeal would be rendered otiose. Annexed herewith and marked is a copy of the Kenya Gazette.”

At the outset the prayer for stay of execution is not within my powers to deal with as this is within the jurisdiction of the full bench. Counsel for the applicant never pursued this claim for stay or of what would

happen if extension of time prayed for is not granted. He merely stated that the applicant has chances of success since the subject matter is land he is disputing to have sold.

Mr Otieno Wedi for the directly affected persons vehemently opposed the application and stated that although the Court has discretion under rule 4, such discretion should not aid a litigant who fails to lodge proper papers and seek orders for review or to cause injustice to the successful party. The applicant maintained in his affidavit paragraphs 11 and 15 that the omission to file certified copy of the order is *bona fide* and was occasioned by the misinterpretation of rule 85 by his advocate. His advocate did not file an affidavit to that effect. Counsel urged that the major consideration is whether the appeal has a chance of success. According to Mr Otieno Wedi, the applicant has no chance of success in the light of the matter disclosed at the hearing of the Notice of Motion filed by the directly affected persons resulting to the ruling now intended to be appealed against.

The Senior Principal State Counsel, Mr Gacivi, who appeared for the Director of Land Adjudication and District Land Registrar also opposed the application and related that the Minister's order which the applicant alleges to have not been implemented, was in fact implemented in 1976 resulting in the registration of the applicant and two others as proprietors of Kwale/Gulu/Kinongo/677 as entry number one in the Land Register. He further submitted that the applicant was charged before Kwale District Court for giving false information relating to this parcel of land to an Inspector of Police. He was convicted and fined but never appealed against the said conviction. In the light of this conviction, that appeal has no chance of success.

In a nutshell, the position as submitted by counsel for the respondents, the applicant and two others were adjudicated to be registered as co-proprietors of Kwale/Gulu/Kinongo/677. Two other interested people objected to the adjudication order and appealed to the Minister as provided for by the Law. The decision of the Minister was that he confirmed the adjudication decision dismissing the appeal. The applicant with two others were so registered as co-proprietors of the disputed land on 16th August, 1976. The order of the Minister was complied with by the 1st and 2nd respondents.

Thereafter the co-registered proprietors including the applicant sub-divided the land and sold the sub-divisions to directly affected persons. The transfers were executed by the applicant with his two co-owners. The directly affected persons became registered proprietors of their individual plots in 1977.

The applicant must have had other thoughts after these transactions were completed because he gave false information to an Inspector of Police which information landed him into Court on a criminal charge in which he was convicted as earlier stated. He is bound by that conviction.

That being not all, he filed an application in the High Court being Misc Application No 131 of 1991 praying for the order of *mandamus* claiming that the 1st and 2nd Respondents have not implemented the order of the Minister as directed in 1976. In this application he obtained an *ex-parte* order compelling the 1st and 2nd respondents to register him as the absolute owner of the sub-divisions. The *ex-parte* order was complied with. In his application, he never joined his co-owners or the directly affected persons as parties to the application. The directly affected persons learned that the applicant has caused himself to be registered as the owner of their plots without their knowledge or being made parties to their application or being heard before the order affecting their titles was made. In that respect, they filed their Notice of Motion seeking an order for setting aside the *ex-parte* order. During the hearing of the motion, the other co-owners gave evidence that they, including the applicant, sub-divided the land and sold the sub-division to the directly affected persons. They shared the proceeds of the sale between them. The applicant has never at any time filed a suit against the directly affected persons claiming the land or alleging fraud against them since 1977.

In his ruling, Wambilyangah J referred to "*Brinks Mat Ltd vs Elcombe* (1988) 3 Ad ER 188 (cited in the case of the "*Owners of M V The "Lilian S" vs Caltex Oil (K) Ltd* Civil Appeal No 50 of 1989) and "*R V Kensington Income Tax Commissioners vs Princess Edmond De Polignac* (1917) 1 KB 485 which laid the principle that:

“a person who makes an *ex-parte* application to the Court that is to say in the absence of the person who will be affected by that which the Court is asked to do, - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his own knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.”

Wambilyangah J accepted that the principle applied to this case and accordingly allowed the application made by the directly affected persons as prayed. He further set aside the order of *mandamus* issued on 22nd October, 1991 and ordered the directly affected persons to be re-registered as owners of their respective plots. He also held that the application for orders of *mandamus* was clearly misconceived and was a gross abuse of the process of the Court which he dismissed under order VI rule 13 of the Civil Procedure Rules.

In an application for extension of time, it is unnecessary to state in detail the facts of the case, but in the present application, it is necessary to do so since counsel for the directly affected persons and Senior Principal State Counsel submitted that even if extension is granted, it will be a waste of time and money as the appeal has no prospect of success. In the case of

Pollok House Ltd vs Nairobi Wholesalers Ltd (No 2) [1972] EA 172, which was an application for extension of time to file record of appeal, Sir Charles Newbold P stated at page 174 letter G:

“At any rate, as we have held in the past“where indulgence of this kind is sought, even if the delay be excusable the applicant still has to show that no injustice would be caused to the successful litigant. As I said in another case, injustice would be caused if the successful litigant were to be put to the burden of defending an appeal and thus increasing his costs where the appeal had no prospect whatsoever of success.”

Already the respondents and the directly affected persons have undergone traumatic process and expense in getting the *ex-parte* order set aside and rectification of the register. The applicant has been requested to return the titles issued to him for cancellation but has refused which refusal has caused the Kwale District Land Registrar to publish Gazette Notice No 5386 on 2nd September, 1994 to the effect that the directly affected persons named in the notice will be re-registered as owners of their respective

plots. The re-registration as ordered by the court must have been completed by now.

To allow the application will be an exercise in futility as the intended appeal has already been overtaken by events and it has no prospect of success. In the circumstances, I am unable to exercise my discretion under rule 4. This application is therefore dismissed with costs. That is the order of the Court.

dated and delivered at Mombasa this 28th day of July, 1995

J.M GACHUHI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR