



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Nyarangi JA)

CIVIL APPLICATION NO. 136 OF 1989

PAULINE WANJIKU KINUNGI.....APPLICANT

VERSUS

KIHUNGI.....RESPONDENT

RULING

(In an intended appeal from the judgment of the High Court at Nakuru, Tunoi J dated 25th January 1988 in Civil Suit No 90 of 1986)

September 28, 1989 **Nyarangi JA** delivered the following Ruling.

In this matter, by a Notice of Motion under rule 4 of the rules of this Court, the Applicant Pauline Wanjiku Kinungi claims an order granting her leave to lodge a Notice of Appeal out of time.

The judgment of the Superior Court which is the subject-matter of the application was delivered on January 25, 1988. The description of the nature of the dispute is important. The Superior Court was seized of succession case No 90 of 1986 in the matter of the estate of John Kihungi Kamau (deceased).

In the supporting affidavit, the applicant contends that she instructed two advocates, one after the other, to lodge a notice of appeal within the time allowed by the Rules but that both advocates let her down.

On 26th September, 1989 the applicant sought to appear by agent.

However, I ordered that by rule 22(1), a party to any proceedings before this Court may appear in person or by an Advocate and not by an agent.

The applicant appeared in person today.

Counsel for the respondent submits that the applicant did not brief any Advocate to lodge a notice of appeal, that, she instructed Mr Odhiambo for a different purpose and that Mr Vohra was approached too late.

It is not disputed, it being common ground, that the parties are the two wives of John Kihungi Kamau (deceased). As far as I can tell, the applicant is the younger wife. I was informed by Mr Kagucia that the parties are joint administrators of the family property and that family land is the subject-matter of this particular dispute.

It has now become a basic concept of land disputes that unless there has been such delay as would make it clearly unreasonable and unjust to reopen the matter, an intending appellant should be allowed to institute an appeal so that this Court is afforded an opportunity to hear and determine once and for all any dispute arising from land. When, as here, it is family land, the added advantage is that upon determination by this Court, peace and harmony in the family affected is restored. Land is a sensitive issue in our country.

So I ask myself if a decision made in 27th January, 1988 could be said to be too old to re-open.

The annexure PWKI is dated 27th January, 1988 and by that letter, the appellant instructed her advocate:

“to file an appeal for and on behalf of myself”

On 24th April, 1988, the applicant registered her worry that as on 29th March, 1988, when she called in the chambers of her advocate, nothing had been done

“towards filing the said appeal ...”

On 26th May, 1989, she paid her new advocate towards

“an intended appeal in the matter of the estate of John Kihungi Kamau (deceased).”

I do not find the three annexures are ambiguous. The intention of the applicant was to lodge a notice of appeal. I am at pains to disclaim the view expressed by Mr Kagucia on behalf of the respondent that the application is an after-thought. I find it difficult to see any ground for the reply by the respondent that this application is an abuse of the due process of the law.

It is, as it seems to me, in the highest degree unlikely that a situation would arise in which the respondent and her children would be denied justice. The respondent and the applicant are joint administrators of the disputed land.

In these circumstances the only matter which calls for consideration is whether the delay in bringing the notice of motion is inordinate, inexcusable and remains unexplained. While not disregarding the delay, I do not think it is inordinate. I accept the explanation for the delay.

I have attempted to exercise the unfettered discretion judicially.

In the view which I take of the matter as a whole, I allow the application, grant leave as prayed for and order the applicant to lodge a notice of appeal within the next 7 days and thereafter comply with rules 76 and 81 and all the other relevant rules. The costs of this application shall be costs in the intended appeal.

Rule 54(1) (c) explained.

Dated and delivered at Nakuru this 28th day of September , 1989.

J.O NYARANGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR