



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: NYARANGI, GACHUHI, JJA & MASIME AG JA)**

**CIVIL APPLICATION NO NAI 66 OF 1987**

**GITHINJI.....APPELLANTS**

**VERSUS**

**GAKORU.....RESPONDENT**

**JUDGMENT**

October 28, 1987, **Nyarangi, Gachuhi, JJA & Masime Ag JA** delivered the following judgment.

This is a reference from a single judge to the court under rule 54 to reverse the decision of the single judge in an application under rule 4 and rule 74(2) for an order that the notice of appeal lodged with the registrar on or about May 8, 1986 be deemed to have been properly lodged and within the time allowed.

In his supporting affidavit, the applicant deponed that he briefed Mr Ngibuini the advocate who was then acting for him to take steps to institute an appeal in this court but that it was not until March 1987 when he became aware that no essential step had been taken to file an appeal.

The single judge was not informed that at about the time the applicant instructed Mr Ngibuini to cause an appeal to be instituted. Mr Ngibuini was already facing criminal charges and that subsequently he was convicted and sentenced to long terms of imprisonment. This particular bench heard Mr Ngibuini's appeal No 48/86 and delivered the judgment on October , 1987. So that Mr Ngibuini was not in a position to effect the applicant's instructions nor to communicate with the applicant. That would explain the delay of almost 4 years. The applicant was reasonably entitled to leave the matter of the intended appeal to his advocate. On learning that nothing had been done about his instructions, he hurried to the court and sought to lodge a notice of appeal.

The point taken on behalf of the applicant seems to us valid and it is, we think, probable that the single judge may in the circumstances have exercised his discretion in favour of the applicant.

There remains the point that the subject matter of the dispute is land. The practice of this court is that as far as possible, appeals against decisions on land matters should be entertained by this court of final appeal. That way a final decision would be made and there would be no right to challenge that decision. Thereafter the parties to the land litigation would know for all time thereafter what their respective rights are *John Kuria v Wahito*, NAI 19/83.

In these circumstances, the question to be answered is whether, viewed as a whole, the court should exercise judicially, its unfettered discretion under rule 4. We have come to the conclusion that the application should be allowed.

It follows that the time for lodging the notice of appeal is extended such that the notice of appeal already lodged is deemed to have been lodged within time. The applicant who is represented by Mr Onyango Otieno shall comply with rule 76 within the next seven days and thereafter with rule 81.

The costs of the application shall be costs in the appeal.

Order accordingly.

**October 28, 1987**

**NYARANGI, GACHUHI, JJA & MASIME Ag JA**