

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION NO NAI 64 OF 1987

LILIAN WAIRIMU KINGA'NGIAPPELLANTS

VERSUS

PRESBYTERIAN CHURCH OF EAST AFRICA & ATTORNEY.....RESPONDENT

RULING

November 16, 1987, **Apaloo JA** delivered the following Ruling.

The intending applicant invites me to extend the time for her to lodge an appeal against a judgment delivered against her by the High Court on November 28, 1985. She said she lodged a Notice of Appeal on December 4, 1985, that is 6 days after the judgment. She was obliged to lodge the appeal within 60 days from that date. Making allowance for the Christmas judicial vacation, it is admitted that she is about 14 months out of time.

That on the face of it, is an unusually long time. But she said she has been ill since the delivery of judgment. To support this assertion, she annexed to her affidavit , a medical certificate signed by a Dr James Kamau who certified that “during the last seventeen months or so, Mrs Lilian Wairimu Kinyani has been bedridden with polyarthrits” etc. The certificate was dated the April 23, 1987 and, seventeen months before that would put the applicant’s illness to about December, 1985.

I cannot help feeling that a medical certificate which is so imprecise as to the date of a patient’s disability for which the certificate seeks to vouch, is, to put it mildly suspect. But the applicant took the unusual step of bringing the doctor to court and making him available for such questions as Counsel for the respondent may wish to put to him on the truth or reliability of the certificate.

But no advantage was taken of this offer. Counsel for the 1st respondent declined to question him and no appearance was made on behalf of the 2nd respondent. The medical certificate thus stands unchallenged. So I must accept, though not without some hesitation, that the applicant had been ill since the delivery of judgment.

Counsel for the 1st respondent asked me to put a strict interpretation on rule 58 of the Court of Appeal Rules, with regard to the service of Notice of Appeal. And this, he said, was to prevent intending applicants going to sleep for long periods. Although the 2nd respondent deposed that he was not served with the Notice of Appeal, he ha snot appeared to urge this ground of objection. I can only assume that the point is being abandoned.The 1st respondent who appeared by Counsel, has produced no affidavit evidence to support his complaint of non service.Counsel for the 1st respondent urged repeatedly for a strict interpretation and enforcement of rule 58. But that rule has no application to the present matter as it deals with criminal appeals. I think the rule which Counsel has in mind, is rule 76. That Counsel for the 1st respondent slipped on the appropriate rule, shows how easy it is to fall foul of procedure rules.these rules are meant to be obeyed but I am not prepared to make a fetish of them unless I am satisfied that justice will otherwise be miscarried.

It was also contended that the 1st respondent having since built on the suit land, it would be greatly inconvenienced if this application were granted.This submission is not without merit. The suit was commenced in 1980.And judgment was given five years later in 1985. To re-open this litigation in 1987,

cannot but cause some hardship and inconvenience to the respondents.

But that is not the criterion. Some inconvenience we all must bear as indeed we all suffer from the laws' delays. The test is the broad requirement of justice. I ask myself, would it be fair and reasonable to give this old lady enfeebled by age and crippled by arthritis one last opportunity of vindicating her alleged right to the ownership of the suit land? Although I have had my mind troubled by this somewhat long delay, I have come to the conclusion that in the special circumstances of this case, the ends of justice will be met by acceding to the application.

I therefore grant the extension sought and order that the applicant shall file the appeal on or before the December 31, next. The applicant will pay the 1st respondent's costs of this application. As the 2nd respondent has not appeared or been represented. I make no order for costs in his favour.

November 16, 1987

APALOO JA