

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPLICATION NO 145 OF 1987 (KMU 27/87)

CHEPKOECHAPPELLANT

VERSUS

KITUR[.....RESPONDENT

RULING

This has been a lengthy case concerning the disputed ownership to 2.2 acres of land at Nandi/Chepkumia/59. The case came before the learned resident magistrate at Kapsabet, from whose court the matter had been referred to the arbitration of the local district officer and a panel of elders. The applicant, and present intended appellant, had unsuccessfully sought to set aside the arbitration award, and appealed from the magistrate's decision of September 5, 1985, to the High Court in Eldoret, by a petition filed in that court on September 17, 1985.

The appeal came up before VV Patel J on February 24, 1986 who made a consent order setting aside the magistrate's judgment, and ordering the applicant to transfer 1.5 acres from the disputed land to the respondent, the respondent to have the benefit of the cultivation thereon and, in return, to pay Kshs 11,000 to the appellant in instalments as therein provided. The consent order was signed by both the parties, so it is obvious that any attempt to set aside or have it reviewed, as occurred before Aganyanya J, eleven months later, might run into difficulties.

The application for review under Order XLIV of the Civil Procedure Rules was sought by notice of motion filed on October 9, 1986, and heard by Aganyanya J on January 27, 1987. It was refused by him after hearing full argument and giving full reasons on February 3, 1987.

It is from this refusal that this applicant now seeks to appeal if he can get the appropriate extensions of time. The grounds on which he relies are contained in his supporting affidavit of August 28, 1987. He says he was in hospital from December, 1986, onwards, and, although he was let out in order to argue this application before Aganyanya J on January 27, 1987, he was kept in on February 3, when the ruling was delivered. He underwent continuing treatment from then until about August 7, according to the medical cards exhibited to his affidavit. The symptoms shown by these exhibits are quite dramatic, for example on December 2, 1986, he was suffering from shivering, joint pains, difficulty in breathing and passing blood stained urine. On April 10, 1987, he had convulsions and loss of consciousness, which later seem to have been diagnosed as epilepsy.

Accordingly, says the applicant, he could not file his appeal due to being under medical care and anyway, he was ignorant of the perusal of the review application. In addition the applicant sought production of two witnesses for cross-examination, and that the respondent should cease planting tea on the land in question.

The application was vigorously opposed by the respondent, Joel, who, inter alia, alleged that the applicant was present to hear Aganyanya J deliver his ruling on February 3 this year, that no notice of appeal had been filed and that the applicant had not even tried to show that he had any chances of success in the main appeal.

Whether or not the applicant was present in court on February 3, he certainly knew when the ruling was

to be delivered for Aganyanya J announced this in court on January 27, when the applicant clearly was present. It may be that he was quite seriously ill, but I find it hard to believe that he could not have filed even a notice of appeal, which is simple document, not requiring any legal expertise, and no other documents are required at that stage; See Musoke JA in Njagi v Munyiri [1975] EA at page 180.

In my view this appellant has singularly failed to show that I should exercise my admittedly unfettered judicial discretion in his favour by granting the necessary extension of time. While the supervening medical condition may have been genuine, the reasons given certainly do not cover the six and half month's period of delay with any degree of precision.

For these reasons, I refuse this application to extend the time for filing the notice of appeal, assuming that that is the application, and there is no other application before me. Accordingly this application is dismissed with costs which I assess at Kshs 250.

Applicant advised of his rights under rule 54(1).

December 3, 1987

HANCOX JA