



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL 14 OF 81

CLEMENT WAMUNYAMA.....APPLICANT

AND

WAFULA NABIRIKI.....RESPONDENT

(Application for extension of time to file an intended appeal from the Judgment and decree of the High Court of Kenya at Kakamega (Gicheru, J) dated December 24, 1982 In Civil Appeal 14 of 1981)

JUDGMENT OF KNELLER, JA

Clement Wamunyama (Wamunyana) asks for the time in which to file his record of appeal to be extended by 60 days and Mr Dhanjal Nabiriki (Nabiriki) asks this Court to refuse to do so.

On December 24, 1982, Mr Justice Gicheru dismissed with costs Wamunyama's first appeal and on January 20, 1983, Wamunyama lodged his notice of appeal in the registry of the High Court at Kakamega. He applied on some unspecified date for a certified copy of the first appeal proceedings and judgment and did not obtain them until November 30, 1983. He filed his application for this leave on January 5, 1984, in the Kisumu Court of Appeal sub-registry.

As far as I can make out, the facts behind the application are these: Wamunyama's mother died and he had to slaughter a cow to mark that sad event. Nabiriki Wafula, the father of Nabiriki, give him a cow for this sacrifice and later died, post hoc and not, I think, propter hoc. Wamunyama repaid the debt by taking a cow to Mulati, the brother of Nabiriki Wafula, who did not pass it on to Nabiriki Wafula's son, Nabiriki.

This Nabiriki, the son of old Nabiriki Wafula, then sued Wamunyama for one cow or its value which he put at Shs 1,000. He filed his action in the Court of the Bungoma District Magistrate on July 18, 1978, and later obtained an ex parte judgment against Wamunyama in default of appearance. He applied for execution of his decree and the Bungoma court broker attached and sold eleven cattle belonging to Wamunyama. So Wamunyama applied to the Bungoma District Magistrate to set aside the ex parte judgment and was successful. He entered appearance and filed his defence. The suit went for trial and Nabiriki's claim was dismissed with costs.

Then, it was the turn of Wamunyama to sue. On April 16, 1980, he began an action in the court of the Kakamega Resident Magistrate for his eleven beasts which were sold for only Shs 1,518.10. Nabiriki's defence was that the action was not maintainable at law. The issue was taken as a preliminary objection when the trial began on March 24, 1981, and it was upheld and Wamunyama was non-suited.

Wamunyama appealed to the High Court in Kakamega and Mr Justice Gicheru dismissed his appeal.

Mr Dhanjal, for Nabiriki, argues that Nabiriki did not instruct the Court broker to seize Wamunyama's eleven or any cattle. The Court broker did not consult him about the matter. Wamunyama seems to suggest, it was Nabiriki who took this official to Wamunyama's cows and selected the ones the Court broker should seize. That would be a matter of fact.

Then Mr Dhanjal argued that Nabiriki was not liable if the Court broker acted outside the scope of his authority, but Mr Nakhone submitted that, although the Court broker as the agent of the Bungoma District Magistrate's court was protected, he acted in good faith, Nabiriki was not so protected. This was a matter of mixed law and fact. The law cited to Mr Justice Gicheru included section 6 Judicature Act (Cap 8), section 4(5) Government Proceedings Act (Cap 40) and *Davis & Shirliff Ltd v Attorney- General*, Court of Appeal 21 of 1978.

The learned judge dismissed Wamunyama's appeal with costs on December 24, 1982. The issues in a second appeal in the circumstances of the Wamunyama Nabiriki troubles, might be whether an action for damages for wrongful seizure and sale of eleven animals by a court broker in purported execution of a judgment debt is maintainable by a plaintiff judgment debtor against a defendant judgment creditor.

This could be brought within the provisions of section 72(1)(a) of the Civil Procedure Act (Cap 21) and it is not caught by the terms of section 79E of the same Act. Mr Dhanjal has correctly pointed out that, the notice of appeal was filed out of time, it was not served on the respondent or his advocate and even after the applicant received the certified copies of the judgment and proceedings, there was another 35 days delay in making this application.

The applicant claims that he was stricken with ill-health from time to time during this period and had he known it was required, medical chits would have been forthcoming to support this.

I asked Mr Dhanjal what prejudice the respondent would suffer if the application were granted and he said none, save that the Shs 1,518.10 had not been paid out to the respondent but he admitted the respondent had not asked for that to be done because he did not appear for the respondent in the subordinate court. He also wondered if the applicant could afford further agitation of his claim since the costs in the court at Kakamega had been taxed and not yet paid. He asked for security for the costs if this application were allowed.

Whether or not the applicant can pay the taxed costs in the subordinate and High Court and file an appeal, is for him to decide. Security for the costs of the appeal is something he must furnish in any event.

When the application was filed, rule 4 of the Court of Appeal Rules provided that, the applicant had to show sufficient reason for the Court to extend the time limited by any rule or any decision of this Court or of the High Court.

Since February 8, 1984, the Court, may on such terms as it thinks just, extend this time. Wamunyama has to persuade me that there is some merit in his appeal and that if I extend the time for him to institute it, undue prejudice will not be caused to Nabiriki and that the delay is not inordinate cf *Ladu Ltd v Sui*. The Times, November 24, 1983. See *Cleophus Wasike v Mucha Swala*, Civil Application NAI 50 of 1983. June 11, 1984 Nairobi.

This is a borderline case. Wamunyama appears to be a man of years and not rich. He has a burning grievance to ventilate for in return for the one cow, eleven of his kine were seized and sold by Nabiriki or at his behest when Wamunyama is sure Nabiriki had no claim against him for any cattle at all. No undue

prejudice will be caused to Nabiriki if this application is granted. He has delayed in all this, but not inordinately so.

On all this, then, in the exercise of my discretion, I now grant this application. The time for filing the notice of appeal in the registry of the High Court is extended to such time as will make the filing of it in time. A copy of that notice of appeal must be served by Wamunyama on the respondent's advocate, Mr Dhanjal, within 30 days from today. Then the record of appeal (including certified copies of the pleadings, proceedings, judgment, documentary exhibits in the court of the Bungoma District Magistrate, Kakamega Resident Magistrate and the High Court in Kakamega together with the memorandum of appeal for this court), must be lodged in this Court's subregistry in Kisumu with the appropriate security for costs within 90 days from today and a copy thereof served on Mr Dhanjal within 100 days from today. These time periods are lengthy, I know, but having regard to the age and health of the applicant and his ignorance of the necessary steps to be taken in launching his appeal, I deem it wise to give him an ample number of days in which to do all this and to find the money to do so. This amounts to considerable indulgence on this Court's part to Wamunyama so it is right, in my view, that he should pay Nabiriki the costs of this application in any event.

Orders accordingly

Dated and delivered at Kisumu this 17th day of July, 1984.

A A KNELLER

JUDGE OF APPEAL

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

DEPUTY REGISTRAR