



## **Mwalabu v Mwalabu**

**Court of Appeal, at Nairobi July 26, 1985 Platt Ag JA**

**Civil Application No NAI 31 of 1985**

**(Application from the High Court at Nairobi, Butler-Sloss J, Civil Case No 131 of 1982 OS)**

**July 26, 1985, Platt Ag JA delivered the following Ruling.**

The applicant moved the court pursuant to his notice of motion filed on May 6, 1985, seeking orders that time be extended for him to lodge his notice of appeal out of time. At the outset, Mr Gathuku criticized the heading of the application with reason: it was amended and the application is taken under rule 4 of the Court of Appeal Rules.

The application is unusual and further more took an unusual turn. It is not contested that Mr M, the applicant, was the unsuccessful respondent, in an application decided in favour of his wife under the Married Women's Property Act 1882, whereby the parties were adjudged to be joint owners of a plot of land. This decision was given on March 19, 1985. Mr M had 14 days under rule 74(2) of the Court of Appeal Rules to lodge his notice of appeal, that is until April 2, 1985. According to Mr M he had wished to be present when the judgment was delivered, but his advocate, Mr Kiraitu had been unable to contact him by telephone on March 18, 1985. Mr Kiraitu then informed him about the judgment on March 20, 1985, but by error put on the wrong address of an earlier employer. As a result, Mr M had certainly brought his new address to Mr Kiraitu's attention. But it makes no difference to the result of the application. On April 15, 1985, Mr M came to check on what had happened and was very aggrieved when he discovered that judgment had been given against him in his absence. He says he would have appealed at once had he been present in court.

Unfortunately Mr Mwalabu signed the affidavit which is dated March 16, 1985, which of course makes nonsense of the assertion that Mr M only came to know the situation on April 15, 1985.

The present application was filed on May 6, 1985. Assuming that computation of time should start from April 15, Mr M brought his application 22 days later. But Mr M suggested that the application was ready to be presented on April 18, 1985, and it was the clerk of the advocate who delayed the filing until May 6 as Mr Kiraitu concedes. On April 18, 1985 he was 16 days out of time if one counts the period of March 19 to April 2 as the period allowed by rule 74(2) of the Rules and then accepts preparation on April 18. But in fact the application is dated March 18, 1985 and the dates had to be explained. The delay is not really a very short delay.

None of this was lost on Mrs M who, in her affidavit filed on July 3, 1985, declared that this confusion of dates only proved the lack of good faith in the application.

She also protested that mistake of address did not relieve the applicant from acting within time.

Lastly, and perhaps most importantly she alleged that Mr Mwalabu and Mr Kiraitu had met on the evening of March 19, 1985 at about 5.15 pm as she observed herself. She described Mr M's clothing to prove her point. Moreover, she had heard that the applicant did not really wish to appeal. Unfortunately her informants Mr D M and Mr N did not swear affidavits as to their conversations with the applicant.

The applicant and Mr K protested indignantly. They had not met on March 19, 1985 at 5.15 pm. The applicant had never discussed the judgment with Messrs M and N. The confusion in dates was carelessness and not fraud. March 16 and 18 should be read as April 16 and 18.

When the application came on for hearing, the issue as to the dates could be explained from the documents on the record. But the issue whether Mr Mwalabu and Mr had met on the afternoon of March

19, 1985 could not be disposed of, without calling evidence therefore as Mr K stood to be a witness he could hardly hold the brief for Mr M. Secondly, an objection was taken in principle as to whether the affidavit of Mr K could be accepted without leave of the court. These issues were set down for hearing today.

It transpired that Mr G deemed work in the High Court at Kakamega of more urgency than this matter, and the advocate holding his brief indicated that Mr G would be satisfied to forgo cross-examining Mr Mwalabu and Mr Kiraitu and indeed, withdrew his objections to Mr K's affidavit. The result was that Mr G was satisfied to leave it to the court to resolve the issues on the affidavit evidence before the court.

That being the case, I find as follows. There is no doubt that the application was mistakenly dated. Of course, the affidavit and application could not possibly pre-date the judgment. But then what was the date? That is clarified by the annexure. "GMM 4" a letter dated April 18, 1985 attached to Mr M's affidavit. It requests the Deputy Registrar of the High Court to supply certified copies of the proceedings and judgment to enable the applicant to prepare the record of appeal. It follows that the application must have been made on April 18, 1985 and that the affidavit must have been sworn on April 16, 1985.

Secondly I find that there was no fraud in the application. I rely on Mr K, that he did not meet Mr Mwalabu on March 19, 1985 at 5.15 pm. It was probably a case of mistaken identity.

Thirdly I find that there was no intentional delay. Notice of date of judgment was given one day before judgment was delivered. That left very little time to contact Mr M. The wrong address is a misfortune which sometimes occurs, but Mr Kiraitu had tried to contact the applicant. The applicant luckily found that judgment had been given only 13 days after the notice period of 14 days had ended. The application was prepared within 4 days and then the clerk (now dismissed) delayed filing until May 6. It is this last delay which is the worst fault of all. But considering that the clerk has been dismissed and that the advocates concerned have made full disclosure of the organizational lapse in their chambers, I am prepared to excuse them.

As far as the nature of the appeal is concerned, it relates to the sharing of land between spouses. It is very much better that grievances on this sort of subject are aired and decided on the merits. No prejudice can have been caused by the delay. It is a proper case on its particular facts to extend the time under rule 4 of the Court of Appeal Rules. (See *Gatti v Shoosmith* [1939] 3 All ER 916, *Palata Investments Ltd and Anor v Burt and Sinfield Ltd and Others* [1985] Times May 28, 1985).

Accordingly I order that notice of appeal be lodged within 7 days of today's date, and that the costs of the application be awarded to the respondent in any event.