



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller Ag JA)

CIVIL APPLICATION NO. NAI 10 OF 1982

BETWEEN

CHEGE WANJAU.....APPELLANT

AND

NJERI MURAYA.....RESPONDENT

ORDER

Chege Wanjau was the registered proprietor of 2.2 acres described as Fort Hall Loc 1/Mukarara/421 and 0.13 acres of Fort Hall Loc 1/Mukarara/ T 112 which were a rural and town plot respectively or so I think.

Muraya Wanjau was his elder brother and he married Njeri who when Muraya died, demanded one acre of the first plot (she occupied just over one and a half acres of it) and half the town one because, she claimed, Chege Wanjau held both premises on trust in equal shares for himself and Njeri Wanjau (and her children by Muraya his brother). He was the head of their families when Muraya died and he was registered as the absolute proprietor of what the brother inherited from their father Wanjau together with one acre Muraya and Njeri had been given as dowry for a daughter. When Chege Wanjau denied this she filed a plaint asking for the usual declarations and transfers.

A copy of the plaint and summons to enter appearance was duly served on Serah Njeri, his wife, an adult living with him at the time and authorised to accept service on his behalf. (The deputy registrar was very careful about this).

My search of the High Court file has not unearthed any memorandum of appearance or written statement of defence of Chege Wanjau.

Njeri Muraya's advocate had the suit set down for hearing on September 29, 1980 but it was adjourned from time to time until it was heard by Masime J on October 13.

Njeri Muraya and a neighbour, Kamau Kanguru testified and what she said was not quite what was averred in the plaint. Njeri Muraya maintained Chege Wanjau was landless before Muraya died but allowed to cultivate part of each plot and build a house on each and so did Muraya Wanjau who had been landless for a time but purchased one and been given one as dowry for their daughter. Kamau Kanguru spoke of the decision of the local chief and elders who met the parties and decided Njeri Muraya should abandon her claim to half the town plot and be given 0.2 of the rural one instead. I think this must be 0.2 more than she already claimed which was 1.1 acres or occupied which was 1.6 acres for if all she gained

by abandoning her claim to 0.5 acre if the town one was 0.2 of the rural one she came out of it badly.

Masime J gave judgment for Njeri Muraya on October 13, 1980 in the terms of the prayers in the plaint.

Unfortunately, it was not brought to Masime J's attention that on September 21, 1980 Chege Wanjau had by a summons in chambers under order IX rules 2 and 8 and order IXB rules 1, 3 and 8 of the Civil Procedure Rules asked for the hearing date for the formal proof to be set aside and a fresh summons to enter appearance and copy of the plaint to be served upon him because the previous ones had been handed to one Serah Njeri. He does not suggest she was not an adult or his wife or living with him or authorised to accept service on his behalf. He took his memorandum of appearance to Njeri Wanjau's advocate on April 16, 1980. It is clear, therefore, that Serah Njeri passed on the summons to enter appearance and a copy of the plaint to him. On May 5, 1980 he filed his defence but as I say I cannot find it. There was no affidavit in reply to this.

This chamber summons was served on Njeri Muraya's advocate and Chege Wanjau had set it down for hearing on October 21, 1980 but did not turn up to prosecute it so Masime J dismissed it with costs. This is the one he wanted Masime J to restore.

Njeri Muraya proceeded with her quest for the plots to be subdivided, marked out and separate titles issued for them to her and to Chege Wanjau and to this end she came back to the learned judge by motion on notice *ex parte* and obtained orders authorising the deputy registrar to sign, execute and have registered the documents necessary to accomplish all this because Chege Wanjau would not help her do so.

Then he briefed a Murang'a advocate who filed another summons in chambers of February 18, 1981 asking Masime J to reinstate the September 24, 1980 one which was to set aside the hearing date for formal proof of Njeri Wanjau's claim and so forth. It was then made clear in Chege Wanjau's supporting affidavit that his defence of May 5, 1980 was not filed because it was out of time. This flummoxed him and because he had no advocate he did not know what to do next. Somehow or another he must have discovered later the suit was set down for formal proof on September 29, 1980 but instead of turning up for it and asking for leave to enter appearance, file a written statement of defence and an adjourned hearing date he decided to apply by summons in chambers to have the date for formal proof set aside and the summons was set down for hearing on October 21, 1980 when it should have been put down for hearing on October 13, 1980 before the same judge before the formal proof and perhaps a thorough reading of the papers on the High Court file would have yielded up the necessity for this course. He explained why he did not attend on October 21. He was knocked down in Thika town the day before by a vehicle as he trudged along to catch a bus to be here in ample time for the hearing of this summons. He was taken to the hospital and the medical card supported all this. He added that he had a good defence to Njeri Muraya's claim but he did not indicate what it was.

Her advocate replied in an affidavit pointing out that no defence had been revealed, the summons was not headed with any appropriate section of any Act or regulation or order and rule and the delay in bringing the application was unreasonable so, in all, there was nothing on which Masime J could exercise his discretion in favour of Chege Wanjau.

During the argument before the judge order IXB rule 8 was cited as the appropriate authority for bringing such an application. It was pointed out to him the plots had been subdivided, the transfers effected and each had his new title to his or her portion of each plot. Chege Wanjau's advocate conceded that both premises had been held on trust by Chege Wanjau for himself and Njeri Wanjau and her children but the portions or proportions were not those claimed by her and in any event, the elders decided she should have only half the land which is just what Masime J had held in his judgment at the end of the formal proof, or so I believe.

Masime J dismissed this application with costs as well as on October 18, 1981 because it was not a proper case in which to exercise his inherent powers to reinstate Chege Wanjau's first summons (he doubted there was any power to do so, in any event) because sufficient cause had not been shown, the delay in

making it was unreasonable and finally, execution of the decree had reached a stage where it was all too complicated to unravel.

Chege Wanjau's advocate then brought this motion on notice of March 3, 1982 for the time in which to file a notice of appeal from Masime J's ruling of October 18, 1981 refusing to reinstate his first summons.

Nothing new has been added by the parties or their advocates today to all that I have set out so far.

The motion on notice should have been brought under rule 4 of the Court of Appeal Rules. We have no Civil Procedure Code (unlike India) but we have a Civil Procedure Act and section 3A of it although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court should not be cited where there is an appropriate section or order and rule to cover the relief sought. *Hassan Karim & Co Limited v Africa Import and Export Central Corporation Limited* [1960] EA 396 (T). Order XLIX rule 5 was also included in the motion drawn by Chege Wanjau's advocate but this is inappropriate because they entitle only the High Court and a subordinate court in the exercise of its civil jurisdiction (section 2 Civil Procedure Act) to enlarge a limited time fixed for doing any act or taking any proceeding under the Civil Procedure Rules.

Chege Wanjau had seven days from October 15, 1981 to file his notice of appeal so by the time he filed this motion which was on March 3, 1982 he was about one hundred and thirty days out of time. Sufficient reasons (and indeed no reason at all) has been shown by him as to why this court should extend the time limited by the Court of Appeal Rules for filing the notice of appeal and the discretion to extend time under rule 4 does not come into existence: *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR 61, 62 (CA). If that is incorrect, then, in my view, the prospects or otherwise of success in the appeal has not been clearly demonstrated in the affidavit(s) or submissions of Chege Wanjau and neither has the absence of prejudice or hardship to Njeri Muraya if the application is allowed.

Accordingly, this application is dismissed with costs.

Orders accordingly.

Chege Wanjau is told that he may apply informally to me now or by writing to the Registrar within seven days hereafter to have this decision varied, discharged or reversed by the full court. Rule 54 Court of Appeal Rules.

Dated and delivered at Nairobi this 14th day of June, 1982.

A.A KNELLER

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR