



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 17 OF 2017

BETWEEN

JOHN MATHENGE GAITA (suing as the administrator of the estate of

Joyce Njeri Gaita and Joyce Muthoni Mukundi-Deceased.....APPLICANT

AND

BETH WAHITO WAMBUGU.....RESPONDENT

(Being an application to file and serve the record of appeal out of time/ for conservatory

orders/and or stay of execution against the decision of the Environment and Land

Court at Nyeri (L.N.Waithaka, J.) dated 27th May, 2015

in

Nyeri ELC Case No. 85 of 2013)

RULING OF THE COURT

This is a family land dispute involving the ownership and division of **L.R No. Muhito/Ruthanji/157**. On 27th May 2015, the High Court in determination of the dispute, found that the most suitable way to sub-divide it was in accordance with the decision of the elders made on 25th September 1993 where: the applicant's family was to acquire 2.2 acres and the respondent's family was to acquire 1.5 acres of the suit property, taking into account portions occupied by the families and the developments they have effected thereon.

The applicant was aggrieved and lodged the notice of appeal on 10th June, 2015 which was within the 14 days of delivery of the decision as is required by

Rule 75(2) of this Court's Rules. Procedurally, the applicant was required by **Rule 82(1)** to file his record of appeal within sixty days of lodging the notice of appeal however he failed to do so. **Rule 82(1)** provides that:

“(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in quadruplicate;**
- b. the record of appeal, in quadruplicate;**
- c. the prescribed fee; and**
- d. security for the costs of the appeal:**

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.” (My Emphasis)

Where a party fails to file and serve its record of appeal within time, **Rule 4** gives the Court the discretion to enlarge that time. It is a discretion exercised on behalf of the Court by a single judge. The discretion is wide and unfettered. See **Leo Sila Mutiso vs. Rose Wangari Mwangi** (1999) 2 EA 231.

This application which is omnibus in nature, is brought pursuant to **Rule 4** and **Rule 5(2)(b)** seeking the following prayers: that the applicant be granted leave to file and serve the record of appeal out of time and that there be conservatory orders on the suit property LR No. **Muhito/Ruthanji/157** pending the hearing and determination of the intended appeal on such terms as the court may think just. The power to determine an application for stay of execution is not within the jurisdiction of a single judge, in accordance to **Rule 5(2)(b)** of this Court's Rules. Therefore, what is properly before me is the prayer for enlargement of time within which to file the record of appeal.

Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay, the reason(s) for the delay, the possible prejudice; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. See **Leo Sila** (supra).

According to the applicant, on 24th July, 2015 he applied for the proceedings and judgment. He then collected the proceedings on 30th March, 2016 without a certified copy of the judgment; that it was not until September 2016 that he received a certified copy of the impugned judgment and; that later he lost contact with his advocates and was not able to give further instructions to his advocates. Hence, the delay in filing the record of appeal was due to delayed supply of copies of the proceedings by the court below and the fact that he lost contact with his advocate thereby frustrating his efforts to give further instructions.

The respondent in opposition of this application refuted the applicant's averments that a copy of the judgment availed in September 2016 because her advocates requested for a copy of the judgment on 29th May 2015, paid the requisite fees on 3rd June 2015 and received a certified copy on the said 3rd of June 2015. It was the respondent's submission that there was inordinate delay in applying for proceedings by the applicant and no explanation has been proffered for this delay. Further, that the letter by the applicant dated 7th July, 2015 requesting for proceedings was not copied to the respondent's advocates as is required by the rules. The respondent also submitted that the applicant has not provided any evidence in support of his averment that the typed proceedings were available on 30th March, 2016. For these reasons, the respondent urged me to find that this application lacks merit and ought to be dismissed.

By requiring the filing of the appeal within sixty days, **Rule 82** lays emphasis on efficiency in the conduct of litigation by limiting the period within which certain steps must be taken towards an appeal. If satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion under **Rule 4** may excuse the delay and admit the appeal out of time. It however must be emphasized that delay of even a single day, has to be accounted for otherwise there would be no purpose of having rules prescribing periods within which certain steps have to be taken. Additionally, there must be some material on which the court can exercise its discretion. If there is some acceptable explanation, the Court might still refuse to extend time, if the delay is substantial and inordinate or if to extend time is likely to cause significant prejudice to the respondent.

From the foregoing guidelines, and from my own computation, there was a delay of approximately 7 months from the lodging of the notice of appeal on 10th June 2015 to 30th March 2016 when the applicant received the typed proceedings and a further delay of approximately 6 months after the applicant received the proceedings and the judgment in September 2016. The applicant attributes this delay to the High Court in preparing the proceedings. However, this is a Court of record and the applicant has not exhibited a certificate of delay to show the period of delay that ought to be excluded which is endorsed as the time the court took in preparing of the proceedings. As it stands, without the certificate of delay being exhibited, there is no date certified and authenticated by the court as the correct one from which the date of filing the appeal should be computed. The applicant can therefore not benefit from the exclusion of time permitted by the proviso to **Rule 82(1)**.

The applicant further alleges that after collection of the proceedings, the judgment only became available in September 2016. On the other hand, the respondent has annexed her letter dated 29th May 2015 addressed to the deputy registrar requesting for a copy of the judgment. The said letter was received on 3rd June 2015 and on the same day the respondent paid the requisite fees and received a copy of the said judgment. Therefore, it cannot be that a copy of the judgment only became available in September 2016, which is over a year later after the respondent received a copy of the very same judgment.

Further, the request for proceedings by the applicant was made on 7th July 2015, outside the 30 day period stipulated under **Rule 82(1)**. A perusal of the said letter shows that it was not copied to the respondent though the said letter bears a stamp showing that the respondent's advocate received it on 29th July 2015. I am, for that reason satisfied that it was served upon the respondent and received.

Lastly, the applicant partly attributed the delay to losing contact with his erstwhile advocate. This explanation is not persuasive considering that the applicant received a copy of the judgment in September 2016. It took him approximately 6 months to file this application on 22nd February 2017. This delay has also not been explained.

From the foregoing it is evident that the applicant has failed to meet the requirements set out in **Leo Sila** (supra) as he has not justified the delay, which in my view was inordinate. He has equally not given plausible reasons for the delays. It is my considered view that there must be an end to litigation and the reopening of this matter after the such a long period of unexplained delay would be prejudicial to the respondent, considering the history of this dispute which began way back in 1993 by the elders as explained earlier.

The application lacks merit and is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR