



IN THE COURT OF APPEAL

AT NYERI

(CORAM: SICHALE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 58 OF 2017 (UR 39/2017)

BETWEEN

MURUNGI KIRIGIA.....APPELLANT

AND

CATHERINE KAWIRA MURIUNGI.....RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time from the Judgement and Orders of the High Court of Kenya at Meru (Kasango, J.) dated 9th July, 2009

in

Civil Case No. 134 of 2003)

RULING OF THE COURT

The applicant, **Murungi Kirigia** filed a Notice of Motion dated 2nd June, 2017 and sought the following prayers:-

“1. Spent.

2. *That the Honourable Court do issue a stay of execution of the judgment read on 9th July, 2009 and on any subsequent orders and/or decree extracted therefrom pending filing of the intended appeal and/or pending the hearing of this application inter-parties. (sic)*

3. *That the Honourable court do issue a stay of execution of the judgment read on 9th July, 2009 and on any subsequent orders and/or decree extracted therefrom pending the hearing and determination of the intended appeal.*

4. *That the Honourable court be pleased to grant the appellant leave to file appeal out of time.*

5. *That the appellant draft record of appeal hereto be deemed as properly filed and served upon payment of the requisite fees.*

6. *That costs for this application be provided for.”*

The motion was supported by the affidavit of the applicant sworn on 2nd June, 2017 in which he deponed that judgment (in which he seeks to appeal against) was delivered on 9th July, 2009; that the respondent is his biological daughter whose mother deserted her whilst she was one year old; that he educated the respondent; that he has six other children born out of his second marriage; that his eviction from the suit land has the effect of rendering him and other family members (numbering 17) as homeless and destitute and that had he been given an opportunity to testify during the trial, he would have shown that the respondent was not sired by his brother.

In a replying affidavit dated 6th July, 2017 the respondent deponed that the applicant's and the respondent's counsel were present when the judgment was delivered on 9th July, 2009; that the applicant thereafter filed an application dated 9th November, 2009 for setting aside the said judgment; that the said application was dismissed on 30th April, 2010; that on 6th May, 2010 the applicant filed a notice of appeal

against the ruling of 30th April, 2010; that there has been no record of appeal filed; that she has sold the parcel of land, the subject of this appeal third parties namely **Eric Kimathi Mwiandi, Cieto Kithure** and **Samuel Murithi**; that the applicant's application has been filed "**more than 7 years**" from the date of judgment; that on 17th June, 2016 the applicant filed an application for stay of execution at the High Court in Meru which was declined on 18th May, 2011; undeterred the applicant filed an application dated 8th June, 2011 before this court which again was dismissed on 2nd December, 2011; that the applicant is not her biological father as supported by his affidavit in Meru HCC No. 134 of 2003 in which he deponed that the respondent was his niece.

The motion came before me for hearing on 16th January, 2018. **Miss Mwai** learned counsel for the applicant prosecuted the motion whilst **Mr. Muchiri wa Gathoni**, learned counsel holding brief for **J. G. Gitonga** for the respondent opposed the motion.

In urging the motion **Miss Mwai** abandoned all other prayers save prayer 4 seeking extension of time. She contended that whereas the judgment in which the applicant intends to appeal against was delivered on 9th November, 2009; the same was after an ex-parte hearing as the applicant was not given an opportunity "**to tell his story**"; that the applicant thereafter applied for review and this was declined; he applied for stay of execution and this was also declined.

In opposing the motion, **Mr. Muchiri wa Gathoni** pointed out that the applicant filed a notice of appeal against the ruling of 30th April, 2010; that in his application for stay before this court, it was found that the suit land had changed hands; that it is not true that the respondent is the applicant's daughter as he had previously referred to the respondent as his "**niece**".

I have considered the motion, the affidavit in support and in opposition to the motion, the record and the law. In this Court's decision of **Trans National Bank of Kenya vs. Hasam Said Amdun CA No. Nai 133 of 2005**, Bosire J.A. cited the case of **Leo Sila Mutiso vs. Rose Helen Wangari Mwangi CA No. Nai. 255 of 1997** which laid down the principles that guide the court in an application under **rule 4** of this Courts Rules. This court stated:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted."

It is clear that in this motion the applicant seeks to challenge the judgment of **Kasango, J.** delivered on 9th July, 2009 principally on the basis that he was not heard. However, it is not in dispute that on 9th November, 2009 the applicant filed a motion seeking to set aside the ex-parte judgment. On 30th April, 2010 this motion was dismissed, thus provoking a Notice of Appeal dated 6th May 2010. There was also an application dated 16th June, 2010 in which the applicant sought stay of execution of the judgment of 9th July, 2009. On 18th May, 2011 the application for stay was dismissed. The applicant then moved this court on 8th June, 2011 seeking an order for stay. On 2nd December, 2011 this court declined to grant the applicant an order for stay. In the application before me, the applicant seeks leave to file an appeal out of time. It was not indicated to me that a Notice of Appeal had been filed in respect of the judgment of 9th July, 2009. It is therefore not in place of the applicant to file an appeal in the absence of a Notice of Appeal.

Besides given that the judgment of 9th July, 2009 was as a result of an ex-parte hearing and the application to set aside the ex-parte judgment having been dismissed on 30th April, 2010, and no appeal having been filed against the refusal to set aside, if the applicant was desirous of telling "**his story**" he would have pursued the refusal to set aside the ex-parte ruling by way of an appeal. In what way is the applicant faulting the judgment of 9th July, 2009? I also note that there is no draft Memorandum of Appeal that was annexed to show the intended grounds of appeal. Moreover, it would appear that the respondent is not the applicant's daughter as in his affidavit dated 15th July, 2014 in support of his application in Meru HCCC No. 134 of 2003 at paragraph 2 he deponed as follows: "**That the plaintiff/respondent is my niece (daughter to my late brother)**". He now deponed that the respondent is his biological daughter and he sired her. The conclusion I make is that the applicant is less than candid and undeserving of this Court's discretion. The delay is also inordinate.

For all the foregoing reasons, I dismiss the applicant's motion dated 2nd June, 2017 with costs to the respondent.

Dated and delivered at Nyeri this 7th day of February, 2018.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR