



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, JA (IN CHAMBERS) CIVIL APPLICATION NO. 47 OF 2017**

**BETWEEN**

**MICHAEL NJUGUNA NJOROGE.....APPLICANT**

**VERSUS**

**RUTH WANJIKU KAMAU.....1ST RESPONDENT**

**CYRUS KOMO CHEGE.....2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR KIAMBU.....3<sup>RD</sup> RESPONDENT**

*(Application for leave to file a notice of appeal and the record of appeal from the order of the High Court of Kenya at Nairobi (Mugo, J.) dated 27<sup>th</sup> October, 2005*

*in*

*H.C.C.C. No. 912 of 1975)*

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**RULING**

[1] The applicant seeks leave under rule 4 of the Court of Appeal Rules to file a notice of appeal and a record of appeal out of time against the order of the High Court (**Mugo, J.**) made on 27<sup>th</sup> October, 2005.

[2] It is necessary to state at the outset that there was a previous appeal in this Court against the same order. This was **Civil Appeal No. 335 of 2014, Njoroge Njuguna v Ruth Wanjiku Kamau and Six others**. That appeal came for hearing on 22<sup>nd</sup> March 2017 when it was withdrawn under Rule 16(5) of the Court of Appeal Rules for the reason that it was filed in the name of a dead person contrary to the provisions of Rule 85(1) of the Court of Appeal Rules. The present application was filed on 16<sup>th</sup> March, 2017, within two weeks of the withdrawal of the appeal.

[3] The application is supported by the affidavit of the applicant who has annexed documents relating to the previous proceedings. The 1<sup>st</sup> respondent **Ruth Wanjiru Kamau (Ruth)** did not file a replying affidavit nor did her advocates on record, **M/s Kamau Kinga & Co. Advocates** attend the hearing although served with a hearing notice. The 2<sup>nd</sup> respondent opposes the application and has filed a replying affidavit. The 3<sup>rd</sup> respondent did not file a replying affidavit or attend the hearing. Although **Gichohi Njuguna** is not named as an interested party in the application, **Mr. Rakoro** appeared for him and supported the application.

[4] The intended appeal is against the order of Mugo, J. dated 27<sup>th</sup> October, 2005 which is in the following terms;

***“It seems to me that the orders made by Hon. Justice Visram, have not been complied with in that whereas exchange documents have been done in part, the issues have not been agreed upon. None of the plaintiffs have complied with this requirement. The result therefore is that the suits filed by the three plaintiffs stand dismissed as of today. I so order.”***

The learned Judge awarded the costs of the suit to Ruth and Cyrus Komu Chege. The applicant filed a notice of appeal dated 8<sup>th</sup> November 2005 through his advocates, **P. K. Noroge & Co. Advocates** and proceeded to file Civil Appeal No. 335 of 2014 in November, 2014 which was withdrawn on 2<sup>nd</sup> March, 2017.

[5] The history of the dispute underlying the intended appeal has been stated in the supporting affidavit. It is also reproduced in the ruling of this Court dated 3<sup>rd</sup> October, 2014, in Civil application No. NAI 326 of 2009 which is in the record of the application. That was an application for injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of the intended appeal from the order of Mugo, J. dated 27<sup>th</sup> October, 2005. The appeal was later filed being Civil Appeal No. 335 of 2014. The application was dismissed for the reason that the applicant had not demonstrated that the intended appeal would be rendered nugatory.

[6] The history of the dispute briefly shows as follows:

In the High Court Civil Suit No. 1632 of 1968 Njoroge Njuguna, the father of the applicant sued Kamau Kinuthia the husband of Ruth (1<sup>st</sup> respondent herein) to recover land title Githunguri/355 sold to him by Kamau Kinuthia in 1959. On 21<sup>st</sup> April 1969, **Chanan Singh, J.** entered judgment for Njoroge Njuguna (1969 decree). However, Kamau Kinuthia passed on and Ruth filed Succession Cause No. 27 of 1973 in the Githunguri District Magistrate's Court. Several persons claiming to be purchasers of the land made a claim in the succession cause but the court ruled that the purchasers should pursue their claims elsewhere.

In 1975, Njoroge Njuguna filed High Court Case No. 912 of 1975 against Ruth, the Land Registrar, Kiambu, Muchai Karu and Silas Komo Chege. He alleged that Ruth had fraudulently and in breach of the 1969 decree subdivided the land into Githunguri/Gathangari/218; Githunguri/Gathangari/219 and further sub-divided Githunguri/Gathangari/218 into parcels Nos. 1720 and 1721; that parcel numbers 1720 and 1721 were fraudulently transferred to Muchai Karu and Cyrus Komo Chege respectively. The relief sought was that Ruth do transfer Githunguri/Gathangari/355 to him and that the transfers of parcels 1720 and 1721 be nullified. Two other persons filed HCCC No. 791 of 1975 and 1702 of 1976. The amended complaint filed by Njoroge Njuguna and dated 29<sup>th</sup> September, 1994 indicates that the three suits were consolidated.

[7] Njoroge Njuguna died on 16<sup>th</sup> August, 1999 and a grant of letters of administration to his estate was granted to **Wangari Njoroge and Michael Njoroge (applicant)** on 14<sup>th</sup> February 2001. It was averred in the proceedings that on 12<sup>th</sup> July 2000 the applicant was substituted as a party in place of the deceased Njoroge Njuguna. The record shows that on 26<sup>th</sup> January 2001, the Court was informed that all the plaintiffs in the three suits had died and that there was no substitution except in the suit filed by the applicant's father. The applicants' counsel on that day conceded that the other suits had abated.

[8] The court has unfettered discretion to extend time on terms that it may think just. However, the discretion has to be exercised judicially the Court being guided by the principles developed by this Court in many authorities including in **Wasike v. Swala [1984] KLR 591**. An applicant should demonstrate *inter alia*, that the appeal or intended appeal has merit, that the extension of time would not cause undue prejudice to the respondents and that the delay has not been inordinate. In my view, the Court in deciding whether or not to exercise judicial discretion in favour of the applicant in this application should have regard to all the relevant surrounding circumstances.

[9] As regards the merits of the intended appeal, the applicant states that the withdrawn appeal had merit and has annexed the memorandum of appeal filed in the previous appeal. In the supporting affidavit, the 2<sup>nd</sup> respondent depones, amongst other things, that the intended appeal has been overtaken by events as the suit properly has been subdivided and sold to third parties.

However, the applicant's counsel submitted that no evidence has been produced to show that the property is in the hands of the third parties and that the applicant is still in possession. The applicant has himself shown in the record filed that the original Land Githunguri/Gathangari 355 does not exist and has been sub-divided and portions thereof transferred. Njoroge Njuguna in the amended complaint dated 29<sup>th</sup> September 1994 admits that fact. The applicant has also annexed copies of the relevant registers.

The respondents are Ruth, Cyrus Komo Chege and the Land Registrar Kiambu. The respondents in the consolidated complaint in **HCCC No 912 of 975, 781 of 1975 and 1702 of 1976** were Ruth, Land Registrar, Muchai Karu and Cyrus Komo Chege. Further, the amended complaint mentions sub-divisions Nos. 1218, 1219, 1720, 1721 and 1732. The copy of register for Githunguri/Gathangari/1219 shows that the title was closed on 10<sup>th</sup> March 2006 upon sub-division into parcels 3060 – 3064. The certificates of official search contained in the record shows other sub-divisions 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113. Subdivision Nos. 3061, 3062, 3063 are indicated to have been registered in the name of Paul Chege Kamau, Peter Njonge Kamau and Joseph Ngigi Wanjiku respectively in 2006. Those proprietors were not parties in the amended complaint or in the intended appeal. It is apparent from the foregoing that an appeal from the order of **Mugo, J.** which related to the amended complaint; the parties therein and the parcels of land mentioned therein is not capable of giving an effective relief to the applicant due to subsequent events.

[10] Although the delay in filing the application is only two weeks from the date the appeal was withdrawn, the decision that the applicant intends to appeal against was made more than 12 years ago. No reasonable explanation why the applicant, who was all along represented by a counsel, filed the appeal in the name of his deceased father and persisted for several years in maintaining an appeal which was defective. The withdrawn appeal was itself filed 9 years from the date of the impugned order. In dismissing the application for injunction pending appeal already referred to, the Court said in part;

***“We impress upon learned counsel for the applicant to have this matter laid to rest. It is almost a decade since the notice of appeal was filed and the appeal itself has yet to be filed. No plausible reasons were given for this lack of promptitude.”***

All in all, the cumulative delay in pursuing a right of appeal is unconscionable which disentitles the applicant to favourable exercise of discretion by the Court.

[11] The prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> respondent is manifest from the history of the dispute. The dispute has been weighing on the 1<sup>st</sup> and 2<sup>nd</sup> respondents for several years thus affecting their affairs.

[12] For the foregoing reasons, the application is hereby dismissed with costs to 2<sup>nd</sup> respondent. I make no orders as to costs for the 1<sup>st</sup> and 3<sup>rd</sup> respondents who did not appear in the application.

***DATED and delivered at Nairobi this 18<sup>th</sup> day of May, 2018.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**