



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL (APPLICATION) NO. 6 OF 2018

BETWEEN

RESTITUTAR MICERE THATHI.....APPELLANT

(As Personal Representative of the Estate of

Thathi Francis Muruaria)

AND

WANGARI WAITHANJE.....1ST RESPONDENT

GATAVI WAITHANJE.....2ND RESPONDENT

JACOB KARIUKI.....3RD RESPONDENT

(An application for extension of time to file and serve Record of Appeal

from the Judgment and Decree of the Environment and Land Court

at Embu (B. N. Olao, J) dated 21st April, 2017

in

ELCC No. 244 of 2014 (O.S)

RULING

This is essentially an application under **Rule 4** of the **Court of Appeal Rules** (the Rules) seeking the following orders:-

(1) That time of service of notice of appeal and letter bespeaking proceedings be extended.

(2) Notice of Appeal and the letter bespeaking proceedings dated 28th April, 2017 and served on 29th August, 2017 be deemed as duly served within time.

(3) Time of filing and service of Record of Appeal be extended.

(4) The Record of Appeal dated 12th January, 2018, filed on 15th January, 2018 and served on 16th January, 2018 be deemed as filed and served within time.

(5) Costs of this application be provided for.

The application is filed within the main appeal which was filed on 15th January, 2018 and served on the respondents.

The appeal arose from the decision of the Environment and Land Court (**Olao, J.**) sitting in Embu, made on 21st April, 2017. The three respondents had sought through an originating summons, that they be declared as the rightful owners of land parcel No. **KAGAARI/WERU/1256 (the disputed land)** measuring seven (7) acres, which they had occupied for a period in excess of 12 years and claimed to have acquired from the registered owner, **Thathi Francis Muruariua (the deceased)** by way of adverse possession. After hearing the parties and considering the submissions of counsel, the trial court found for the respondents and declared that the title of the deceased had been extinguished.

Aggrieved by that decision, the deceased through his Advocates on record, **M/s Onyoni Opini & Gachumba**, filed a notice of appeal within time on 4th May, 2017. They also, in accordance with the rules, applied for copies of proceedings and judgment on 28th April, 2017 and copied the letter bespeaking the copies to the respondents' advocates, **M/s Joe Kathangu & Company**. However, the notice of appeal and the letter bespeaking copies were not served on the respondents' counsel until 29th August, 2017. Ordinarily, the record of appeal should have been filed by 4th July, 2017 which is sixty days after the filing of the notice appeal, but it was not. The copies of proceedings were not ready for collection for a period of 159 days and there is a certificate of delay certified by the deputy registrar on 14th November, 2017, to show for it. They were collected on 10th October, 2017 and the appeal was filed three months later on 15th January, 2018. It became necessary therefore to explain the delay in serving the notice of appeal (about 108 days) and the delay in filing the record of appeal (about 60 days) from the date of certificate of delay, hence the application before me.

The explanation is contained in the affidavit of counsel for the deceased **Mr. Mwaniki Gachumba**. He confesses that as soon as the two documents were filed in court, they were misplaced in the advocates' offices and were not discovered until 29th August, 2017 when they were served. The respondents' advocates accepted service and filed their notice of address for service on 8th September, 2017. Upon collection of the typed proceedings and judgment, explains counsel, disaster struck when the deceased fell ill and was hospitalized, ultimately succumbing to the illness on 31st October, 2017. Counsel then awaited other instructions and embarked on pursuing a grant of representation which was made to the applicant herein on 18th December, 2017. He further swears that at the same time, he was served with an election petition which had Constitutional timelines and he had to relocate to Embu until it was finalized in February 2018. In oral submissions, counsel urged that the delay caused was not inordinate, dilatory or intentional. It would not cause any prejudice, injustice or hardship to the respondents who were still in possession of the disputed land and the respondents will have an opportunity of ventilating their case in the appeal already filed. Furthermore, he contended, the appeal raises substantial issues of law and fact as to whether the originating summons was *res judicata* and whether, as pleaded and shown in evidence by the deceased, there was any adverse possession by the respondents. In his view, it was in the interests of justice to allow the applicant to pursue this emotional land matter to the highest court levels.

On the other hand, the respondents' counsel, Mr. Kathangu, in his affidavit in reply opposed the application on the basis that it was an afterthought; that the delay was inordinate and not excusable; that there was no evidence that the deceased had fallen sick and could not give instructions; that the excuse that the notice of appeal and the letter bespeaking copies were misplaced was not plausible; that there were no supporting documents from court to show that the application for proceedings was made in time; and that allowing the application would prejudice the respondents. In oral submissions by **Mr. Kirimi Guantai** who held brief for Kathangu, added that the excuse about attending to an election petition before a subordinate court was contrary to the hierarchy of courts; and that there must be an end to litigation.

Whether or not the orders sought will issue lies in my unfettered discretion. It cannot, however, be exercised on whim or sympathy, but on principles long settled through previous court decisions. I considered several authorities in **Fakir Mohammed vs Joseph Mugambi & 2 Others Civil Application Nai. 332/04 (Nyr. 32/04) (UR)** and stated:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI 8/2000 (UR) and Murai vs Wainaina (No. 4) [1982] KLR 38.”

I am also aware that there is a duty imposed on the Court under **sections 3A and 3B** of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

As stated earlier, the first period of delay which ought to be explained is the service of the notice of appeal and the letter bespeaking copies. There is no dispute that the notice of appeal was filed in time and that the letter bespeaking copies was also filed in time. The confession that the delay in service was due to misplacement of the documents in the advocates' offices was met with skepticism by the respondents, but it seems to me that counsel was merely being candid about the ineptitude of his office. It is an acknowledgement of human fallibility and, as a court of equity, I am impressed by such candour. There is no attempt by counsel to prevaricate, and I find the explanation plausible and satisfactory.

When the copies were found, they were served on the respondents forthwith and the respondents did not receive the documents under protest. To their credit, they unreservedly accepted service and filed a notice of address for service. They were henceforth aware that the appellant was intent on filing an appeal, otherwise they would have applied to have the delayed notice of appeal struck out. In my view, no prejudice was caused by such delay.

As for the second period of delay which needed explanation, much of it was caused by the registry in preparation of the proceedings. It took 159 days to do so and the certificate of delay is not challenged by the respondents. The other delay was caused by the illness and subsequent death of the deceased. According to the applicant's counsel, it was not possible to obtain instructions on the appeal during that period and I believe him. It seems callous of the respondents to assert that a person on his deathbed should still have given instructions on court

proceedings. When the deceased was properly substituted by his personal representative on 18th December 2017, it did not take long before the record of appeal was filed on 15th January, 2018. It must also be remembered that the Christmas vacation is excluded in the computation of time. **Order 50, Rule 4** of the **Civil Procedure Rules** provides thus:

“50 (4) Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) or the amending, delivering or filing of any pleading or the doing of any other act.

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

Rule 3 of the Rules also provides that;

“Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions -

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;

(b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”

Shorn of those periods which I find properly explained, the appeal cannot be considered to have been filed out of time, and I so find.

Finally, on whether granting the orders sought will cause prejudice to the respondents, I do not think it will. They are in possession of the disputed land and the applicant has done nothing to change that position. All she wants is an opportunity to exercise the right of appeal which the deceased was intending to do. As I reasoned in the case of **Seventh Day Adventist Church East Africa Ltd & 2 Others vs Masosa Construction Company [2006] EKLK:**

“At all events, and the main reason for favourable consideration of this application, the respondent has already recovered all the decretal sum and costs attendant to the litigation so far. The right of appeal is a strong right. It is only rivalled by the right to enjoy the fruits of judgment, and a proper balance has to be struck between the two. The respondent has enjoyed his right in full. I see no prejudice if an opportunity was given to the applicants to enjoy theirs too, even if, as they state, it is on a matter of principle. I have looked at the grounds of appeal put forward by the applicants and I cannot say the appeal is frivolous. If it ultimately succeeds the applicants will have been vindicated. If not, they have shown that they can bear the costs of the litigation.”

I would adopt the same reasoning in this matter, with the result that the application is granted as prayed. The notice of appeal and the record of appeal shall be deemed to have been properly filed and served, and the appeal shall proceed to hearing.

The costs of the application shall abide the result of the main appeal.

Order accordingly.

Dated and delivered at Nyeri this 11th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR