



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, J.J.A)

CIVIL APPLICATION NO. 7 OF 2015

BETWEEN

M'MUGAMBI THIRINGI.....APPLICANT

AND

M'BIRITHIA GITHONGO.....RESPONDENT

*(Being an application for extension of time within which to file and serve record of appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 12<sup>th</sup> November, 2014*

*in*

*HCCA NO. 54 OF 2009)*

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RULING OF THE COURT

This is a ruling in respect of a reference made to the full bench arising out of Waki, JA's ruling made on 1<sup>st</sup> July, 2015 sitting as a single judge.

A brief background to the reference is that **M'MUGAMBI THIRINGI**, the applicant herein filed a motion dated 31<sup>st</sup> March, 2015 pursuant to rule 4 of this Court's Rules. The applicant sought the following orders:-

- “1. That this honourable Court be pleased to extend the time within which the intended appellant shall file the record of appeal.**
- 2. That this honourable Court be pleased to grant leave to the intended appellant to file the record of appeal within a period of thirty days and to serve that record of appeal within seven days of such filing.**
- 3. That the costs of this application be costs in the cause.”**

**M'BIRITHIA GITHONGO** was named as the respondent. As indicated above, the motion was heard by Waki, JA., who in a ruling dated 1<sup>st</sup> July, 2015 dismissed the motion. Thereafter vide a Notice dated 6<sup>th</sup> July, 2015 the applicant intimated his intention of having the full bench of this court hear and determine the matter.

On 10<sup>th</sup> October, 2017 the matter came before us for plenary hearing. Mr. Mwangi learned counsel for the applicant urged us to find that the learned Judge failed to consider that the applicant followed all the procedures necessary before the institution of an appeal. These included:-

- (i) A request for judgment
- (ii) Filing of a memorandum of appeal
- (iii) Application for a certificate of delay.

He further contended that the Notice of Appeal could not have been filed without instructions of the applicant who was unwell. Lastly, counsel maintained that the Memorandum of Appeal raises weighty issues.

Mr. Nyambati learned counsel for the respondent in opposing the motion supported the ruling of Waki, JA. and urged us to dismiss the reference.

In his ruling, the learned Judge found that the applicant had not advanced any reasons for failure to serve the Notice of Appeal on the respondent; that no letter was served upon the respondent bespeaking the proceedings and that the appeal ought to have been filed by 13<sup>th</sup> January, 2015 which is 60 days from the date of filing of the Notice of Appeal. The learned Judge further found that the applicant's non-compliance with the ruling was "**largely unexplained.**" He also made a finding that the applicant's plea that he was old and had no money was immaterial.

We have considered the oral submissions made before us, the record and the law. It is not disputed that the applicant got into several pitfalls in his quest to file an appeal. The Notice of Appeal dated 13<sup>th</sup> November, 2014 was not served upon the respondent. The letter dated 13<sup>th</sup> November, 2014 bespeaking the proceedings was not copied to the respondent, thus the applicant had to file an appeal within 60 days of the Notice of Appeal. These 60 days lapsed on 13<sup>th</sup> January, 2015. It is also crucial to point out that the motion that was determined by Waki, JA was filed on 31<sup>st</sup> March, 2015. The learned Judge considered the applicant's failings and summed up his position as follows:-

**"Whether all these omissions were deliberate, negligent or inadvertent, they speak to an applicant who cared little about protection of his rights. As the principle of equity may be rephrased, equity will only aid the vigilant, not the indolent."**

We are in agreement with the learned Judge's summation that the applicant's failings were "**largely not explained**". We further associate our sentiments with those of Waki, JA., to the effect that old age and being indigent is not one of the considerations to be taken into account in the Court's exercise of its discretion in an application for enlargement of time. It is also instructive to note, and as pointed out by the learned Judge, the suit was commenced in 1990 and it has been in the judicial system for over 27 years. Surely, litigation must come to an end and the respondent must be left to enjoy the fruits of his judgment which was delivered on 9<sup>th</sup> September, 2009, now over 8 years.

The reference is dismissed with costs.

*Dated and delivered at Nyeri this 8<sup>th</sup> day of November, 2017.*

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**