



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 8 OF 2015 (UR 7/2015)

BETWEEN

MAINA MURIUKI.....APPELLANT/APPLICANT

AND

HEZRON MURANGA MURIUKI & 8 OTHERS..... RESPONDENTS

(An Application for extension of time within which to file and serve a notice of appeal, memorandum of appeal and record of appeal out of time against the ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated 14th October 2011.

IN

HC SUCC. C. NO. 1141 OF 2009)

RULING OF THE COURT

By way of a Notice of Motion dated 8th April, 2011 and brought pursuant to Rule 4 of the Court of Appeal Rules (the Rules) the applicant seeks:-

- Leave to file and serve a notice of appeal, memorandum of appeal and record of appeal out of time; and
- Costs of the application.

The intended appeal emanates from the Ruling of Sergon, J. in

Succession Cause No. 1141 of 2009 the effect of which was to grant the applicant and the respondents herein equal portions of all that parcel of land known as **L.R. No. KONYU/GACHUKU/205** (hereinafter referred to as the suit land). The said parcel of land was the only asset of the Estate of **MURIUKI KAGO** alias **MURIUKI S/O KAGO** (hereinafter referred to as the deceased) who was the father to the applicant and the respondents.

At the outset, the applicant had taken out summons for confirmation

of grant dated 10th February, 2011 only for the first respondent to file an affidavit in protest on behalf of

his co-respondents. The point of divergence between the applicant and the respondents was the size of the portions of land into which the suit land was to be sub-divided for the respective beneficiaries. The applicant had proposed that he and one other sibling be allocated **0.8 acres** each of the suit land; with the other 11 siblings sharing the remaining **0.8 acres** jointly. The High Court ruled in favour of the respondents who had put forward a proposal to have the suit land divided equally among the 13 children of the deceased.

The Motion is based on three grounds set out on its face namely that the applicant is dissatisfied with the High Court's ruling; he was prevented from filing the memorandum and record of appeal within time by factors beyond his control; and that he has a strong appeal with high chances of success. It is also supported by the affidavit of the applicant sworn on 8th April 2015. In it he swears that he filed a notice of appeal and sought copies of proceedings promptly. He later instructed a firm of advocates to represent him and they successfully obtained a stay of execution on 17th August 2012. The same advocates requested for certified copies of the proceedings on 24th September 2012. He then swears as follows;

- **“that I will be most prejudiced if the stay orders are not issued in the event that my appeal succeeds.**
- **that I also verily believe that if the stay of execution of the decree is not issued my appeal will be rendered nugatory.**
- **that what is deponed herein above is true to the best of my knowledge, information and belief”**

The applicant then asserts that he filed his application for extension of time without any delay.

The respondents opposed the application by way of a replying affidavit sworn by **HEZRON MURANGA MURIUKI**. He asserted that the applicant did not seek proceedings until nearly 12 months later and that the applicant made no effort to follow up those proceedings for an excess of 30 months. He questioned the applicant's bona fides by stating that he was delaying the matter because he was enjoying a stay of execution and was not keen on pursuing the appeal. He complained that the dispute had dragged in court for more than 7 years causing him financial hardships and the litigation needed to come to an end.

Both parties, who are unrepresented, appeared before me and argued their respective cases on the Motion. The applicant contended that when he went to see the advocate on the progress of the appeal, he learnt that the advocate was going abroad for further studies. He attributed the delay to the advocate's failure to pursue the appeal timeously, which he came to know of **“after much time had passed”**. He beseeched me to allow his application, noting that he is illiterate and unschooled in the law.

In vehement opposition to the application, **HEZRON MURANGA MURIUKI** on behalf of himself and his fellow respondents asserted that his brother, the applicant, was merely buying time. He contended that had the applicant been keen on the pursuit of his matter he would have vigilantly followed up with his advocate, but did not. He argued that the applicant just lost interest and went to sleep and would in all likelihood continue to do so were he given more time. He concluded that he and the other respondents continue to suffer financially every time the applicant springs up some new surprise in this litigation, which ought to come to an end.

I have considered this matter carefully and anxiously. I have done so cognizant that I am, as a single judge acting on behalf of the Court, invested with a wide and unfettered discretion. It is a discretion I exercise with a view to meeting the ends of justice. I proceed not on whim caprice or personal inclination but on settled principles for the discretion is a judicial one, to be exercised judicially and judiciously.

Among the matters a single judge considers in exercising that discretion were well set out by Ringera Ag. JA (as he then was) in **GITHUAKA –VS- NDURIRI** [2004] 2 KLR 67 at p68, as including:

-“ the length of the delay in lodging the notice and record of appeal where applicable,

the delay in lodging the application for extension of time, as well as the explanation thereof;

- whether or not the intended appeal is arguable;

-the prejudice to the respondent if the application is granted;

- the public importance, if any ,of the matter; and

- generally the requirements of the interest of justice in the case”

A single judge also bears in mind that, was held by O’Kubasu JA in WAWERU & ANOTHER – VS- KIRORI [2003] KLR 448;

“4. The rules of the Court must prima facie be obeyed and in order to justify a court in extending the time during which some step in the procedure required to be taken there must be material on which the court can exercise its discretion.

5. Although the Court has unfettered discretion an applicant must explain to the satisfaction of the Court what led to the delay”

I am aware, of course, that the foregoing holdings are only indicative of our usual approach and are in no wise binding on me, but I am in full agreement with them and have no reason to depart.

Having considered the application before me, I come to the conclusion that it must fail. The ruling that the appellant seeks to appeal against was delivered on 14th October 2011. The applicant applied for extension of the time for filing and serving a notice, of memorandum and record of appeal on 16th April 2015 some three and a half years later. There is absolutely no reason given why proceedings were not pursued and obtained given that what transpired at the High Court was by all standards brief and the proceedings would have been short. The Rules require that the record be lodged within **sixty days** and I have no difficulty finding that the delay of well over **a thousand days** was inordinate.

I find that the applicant has offered only generalized, vague and half-hearted explanations for the delay with nothing specific or concrete as the basis for it. He has failed to persuade me that he is deserving of the Court’s discretion, much as I sympathize with his situation of being illiterate and unschooled in matters legal. That may move my heart but this discretion is to be exercised on the basis of clear principle as I have set out, but not out of sympathy. At any rate, the respondents, too, claim to be in the same predicament as far as letters go.

Having taken that, view I order the application dismissed. As this dispute involves sons of the same father and considering that the outcome of this application, has already favoured the respondents I order that the parties shall each bear their own costs.

Dated and delivered at Nyeri this 27th day of May, 2015

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR