



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 22 OF 2014

BETWEEN

FREDRICK MUTONYI GITONGA.....APPLICANT

AND

ISAIAH MUTONYI WAMBUGU.....1ST RESPONDENT

LUCY WANGUI MUTONYI.....2ND RESPONDENT

(Being an Application for leave to appeal out of time Rule 4

of Court of Appeal Rules

in

H.C.C.A. NO. 75 of 2010)

RULING

By his motion dated 17th July 2014, brought under Rule 4 of the Court of Appeal Rules, the applicant Fredrick Mutonyi Gitonga seeks extension of time within which to lodge a notice of appeal against the judgment of Ombwayo J, delivered on 11th October 2013 in Nyeri High Court Civil Appeal No. 75 of 2010. That motion was subsequently amended on 8th October 2014 following leave granted by Koome JA. but at its hearing the applicant abandoned the prayers introduced vide that amendment.

The sole relevant ground appearing on the face of the motion as amended is;

“2. THAT when the applicant went to the same High Court Registry on 14th, 18th and 25th October 2013, in view of filling the notice of appeal the court file was not available.”

In the motion as originally filed, and which was not deleted in the purported amended motion (it was omitted altogether) he had cited, *inter alia*, the following ‘reasons’;

“(a) That the Court file had been missing from 11th October 2013 the date of judgment to

10th April 2014 on the date the applicant applied for proceedings.

...

(e) That if this application is not allowed the applicant will loose (sic) his right to own the disputed land.”

In his supporting affidavit expressed as sworn on 17th July 2014, the applicant averred at paragraph 4 that the court file went missing from 11th October 2013 to 10th April 2014. He also stated that he had been in uninterrupted occupation of LR.No. Othaya/Kiahagu/755 for fourteen years and that the respondents were aware of litigation between one Rose Gathoni Wahome who sold the said land to them, and the applicant. And for those reasons, he prayed for leave to lodge an appeal out of time.

The respondents opposed the motion by an affidavit sworn on 22nd April 2015 by Isaiah Mutonyi Wambugu. The deponent swore *inter alia*, as follows;

“5. THAT it is not true that the court file in the superior court was missing from 11th October 2013 to 10th April 2014 as on 3rd November 2014 the applicant was able to file a notice of appeal dated 3rd November 2014.

7. THAT in any event, the attached incompetent notice of appeal was not served on the respondents as required.

8. THAT in any event, the attached application for proceedings was not served upon the respondents as required.

9. THAT the applicant has not attached any evidence to show he indeed visited the court registry to file notice of appeal or what action he took to have the file traced nor has he attached any written complaint about the allegedly missing file.”

The applicant did not respond to those averments. Nor did he deny the respondents further averments that grant of the application would prejudice them as they have a title to the land in question, and have been in possession thereof since 2005 and have built a country home thereon having bought it from Rose Gathoni Wahome who had bought it from the applicant. The applicant also did not controvert or even comment on the respondent’s sworn allegations that he, the applicant has never had uninterrupted occupation of the suit land but only used to sneak back into it to steal and to destroy, which earned him a conviction and sentence for malicious damage to property which he never appealed against.

When the application was heard before me I invited the applicant to respond to some of the respondents’ averments and he confirmed that he indeed never wrote any letter complaining that the court file was missing, which is the fulcrum of his application for extension of time. He asserted that he **“kept looking for the file seriously.”**

For the respondents, learned counsel Mr. Macharia reiterated that there was no material placed before this Court, beyond the applicant’s word, to show that he attempted to follow up the file, if at all it was missing. Counsel took issue with the applicant’s patent inaction by filing the notice of appeal on 3rd November 2014, more than a year after the decision was rendered, yet, on his own showing, the file was lost only until 10th April 2014. He contended that the applicant had not explained his inaction between April and November of 2014. The same indolence and inattention manifested, in counsel’s view, in the applicant’s omission to serve the said notice of appeal, as well as the request for proceedings, on the respondents. He finally submitted that the applicant had made no effort to demonstrate an arguable appeal and therefore urged me to dismiss the application.

An application under Rule 4 for extension of time for the doing of a thing the time whereof is limited by the Rules, is an appeal to the discretion of a single Judge. The discretion is large and unfettered and a

judge exercises it for the furtherance of the ends of justice. Wide and unfettered though it be, the discretion is not exercised in a whimsical or capricious fashion in accordance with a Judge's personal preferences. It is a judicial discretion exercised judicially and judiciously on the basis of reason and sound principle. Parties therefore need not grope in the dark, cross their fingers or tear at their hair to decipher what a Judge might consider in granting or disallowing an application. Those considerations are known. Indeed, they are quite trite.

In **MUTISO –VS- MWANGI** [1997] KLR 630 (CAK) they were stated thus;

“It is now 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 the 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.”

Bearing those principles in mind as a useful and acceptable guide, for my discretion remains unfettered, I find that the applicant is guilty of inordinate and unexplained delay. Even assuming that the file did indeed go missing between 11th October 2013 and 10th April 2014 as he swore in his affidavit, he has offered no explanation whatsoever for his failure to take any action for the following almost of seven months to 3rd November 2014 when he filed the notice of appeal. That period of time is patently long and without explanation I am devoid of material upon which I can favourably exercise my discretion. It is a rational process which must be based on something. There nothing is.

It does not help matters for the applicant that he has not placed before me a draft memorandum of appeal or in any other manner attempted to show that he has an arguable appeal with some chances of success. That is an important consideration as the Court should not act in vain by extending time for the filing of an appeal that has no prospects of success. The onus was on the applicant to place material before me to show that he is not just going through the paces. He failed to do so.

On the issue of prejudice, the respondents have stated on oath that they are purchasers from the person the appellant sold the suit land to. Their claim to have been in titled possession since 2005 was not refuted by the applicant. They have built a country home and I do not see that it serves the interests of justice for me to extend time so that an indolent party may have further opportunity to vex them with the uncertainties and anxieties of yet another round of litigation which has not been initiated in a timely and rule-compliant fashion.

I will add that as what the applicant seeks is an exercise of the Court's discretion, it behoves him to approach with utmost condour so as to have access to the well of Equity. When he makes bare allegations that the file got lost and he **'seriously looked for it'** yet has nothing to show that he did, he does not come across as being particularly truthful. And that does not help his case.

The totality of my consideration of this motion is that it lacks merit and must fail. I accordingly dismiss it with costs to the respondents.

Dated and delivered at Nyeri this 29th day of July, 2015.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR