



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: WAKI, J.A (IN CHAMBERS)**

**CIVIL APPLICATION NO. NYR. 7 OF 2015**

**BETWEEN**

**M'MUGAMBI THIRINGI.....APPLICANT**

**AND**

**FRASIAH WANGUI GICHERU .....RESPONDENT**

*(An application for extension of time within which to file and serve record of appeal from the judgment and decree of the High Court of Kenya at Meru*

*(Lesiit J.) dated 12<sup>th</sup> November, 2014*

**in**

**H. C. C. A. No 54 of 2009**

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**RULING**

1. The matter before me is an application under **Rule 4** of the **Court of Appeal Rules 2010** (the Rules) for an order to “*extend time within which the intended appellant shall file the record of appeal*”. That order is sought by **M’Mugambi Thiringi** (Thiringi) who was sued before the Meru Principal Magistrate’s Court (**W.K. Korir**) over the ownership of land parcel No. 2823 in Maua Land Adjudication Section measuring approximately 0.33 of an acre. The plaintiff in that case was **M’Birithia Githongo** (Githongo) who sought an injunction and eviction order which were granted. Thiringi appealed to the High Court (**Lesiit J.**) against those orders but his appeal was dismissed on 12<sup>th</sup> November 2014.

2. He expressed his intention to appeal further to this Court by filing a “Notice of Appeal” on 14<sup>th</sup> November 2014. As provided under **Rule 77(1)** of the Rules, the notice of appeal should have been served on Githongo within seven days but it was not, and no application has been made for extension of time to serve it. Thiringi would then have applied for copies of the proceedings in preparation for filing the appeal within sixty days as provided under **Rule 82**. In abundant caution, in the event the proceedings were delayed, Thiringi would also have copied the letter bespeaking copies of proceedings to Githongo or his Advocates, in which event time would stop running under the proviso to **Rule 82(1)**. But the letter bespeaking copies was not so copied and therefore **Rule 82 (2)** kicked in to deprive Thiringi of exclusion of the time taken by the registrar of the High Court to prepare copies of the proceedings.

3. In his affidavit in support of the motion, Thiringi deposed that the proceedings were not supplied until 3<sup>rd</sup> March 2015 and he has a certificate of delay to show for it. If the proviso to **Rule 82(1)** had been complied with, Thiringi would have filed the appeal by 2<sup>nd</sup> May 2015 without having to seek extension of time. But he did not. Instead he waited for another month or so before filing the motion now before me.

4. Learned counsel for him, **Mr. Moses Kirima**, submitted that Thiringi was away in Maua, was old and had no money, and therefore the delay in seeking extension of time to file the intended appeal was not inordinate; that the intended appeal would raise important issues of law relating to filing of the original suit without obtaining the consent of the Land Adjudication Officer; whether the Land Adjudication Act (Cap 284) and the Land Consolidation Act (Cap 283) were reconcilable; that the intended appeal involved land which was an emotive matter; and that granting the order sought would not cause prejudice to any party.

5. In response, learned counsel for Githongo, **Mr. Omari Nyambati** submitted that the intended appeal was an afterthought considering that the notice of appeal was not served on Githongo and no copy of the letter seeking proceedings was sent to his Advocates on record; that there was inordinate delay which had not been explained; that the issue of consent which was intended to be agitated in the intended appeal was fully considered before the two courts below which found as a fact that Consent was issued to Githongo before filing the suit; and that Githongo would suffer prejudice for having to wait longer to enjoy the fruits of his judgment which he lawfully obtained six years ago on 9<sup>th</sup> June 2009.

6. In a brief reply, Mr Kirima conceded that the consent of the Land Adjudication Officer in Maua was given before the suit was filed, but contended that it should have been filed together with the plaint as required under the Land Adjudication Act.

7. The discretion which I have to exercise in this matter is, of course, unfettered. However, this Court has, for a long time now, set the guidelines upon which the single judge would exercise that discretion judiciously. Among the factors I have to consider, which are not exhaustive are: the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – see ***Fakir Mohamed v Joseph Mugambi & 2 others, Civil Application Nai 332 of 2004*** (unreported). There is also a duty now 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.

8. The *Achilles heel* in Thiringi's application is the apparent disregard for compliance with the rules of procedure. No reason was advanced for failure to serve the notice of appeal on the respondents and there has been no attempt to rectify that omission. That alone casts the validity of the notice of appeal in doubt. Furthermore, there was no attempt to inform the respondent about the intention to pursue an appeal by copying to them the letter bespeaking copies of proceedings. The appeal, if any, ought to have been filed by 13<sup>th</sup> January 2015, which is 60 days after the filing of the notice of appeal. Up to the time of filing the motion before me on 2<sup>nd</sup> April 2015, there was a delay of more than two and a half months. There was a delay of one month alone in filing the application after receipt of copies of the proceedings. 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.

9. The delays in compliance with the rules are largely unexplained in this case. It is not enough to say, as Mr. Kirima did, that the applicant was old and had no money. That would be calling for sympathy from the Court which is not one of the factors the Court would consider. Courts do not act on whim, caprice or sympathy. In any event, there are clear provisions in this Court's Rules to cater for indigent litigants. Without any explanation for the delay, I would be deprived of any basis for the exercise of my discretion. As the Privy Council stated in the case of ***Ratnam v. Cumarasamy [1964] 3 All E R 933***

***"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the***

*time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation’.*

10. This court has also had occasion to address the issue of compliance with the rules of court in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others** [2013] eKLR, per Kiage JA thus:

*“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”*

That dictum was accepted and applied by the Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others** [2014] eKLR (Supreme Court).

11. I find and hold that the delay occasioned in this matter was inordinate and was unexplained.

12. As for the submission that the intended appeal will raise important issues of law, I make no firm comments on it as it is in the realm of the full Court to pronounce on any ground of appeal. Suffice it to observe that the issue of consent was fully argued before the two courts below and it was established that the consent was indeed granted. That fact is also conceded by Mr. Kirima, but in his view there was a narrower issue as to whether the consent should have been filed simultaneously with the plaint or be produced in evidence thereafter. It is common ground that the consent was issued on 15<sup>th</sup> March 1990 and the suit was filed on 21<sup>st</sup> March 1990. The two courts below found that the suit was properly filed and the consent was on record. I express my doubts that much argument would turn on that issue.

13. Finally, it is contended that the extension of time would not prejudice the respondent. For a suit that commenced in 1990 and is now on its 25<sup>th</sup> year in the judicial system, it is my view that any further extension of time without the strongest of reasons would violate the public policy that there must be an end to litigation. It matters not, as this court has previously stated, that the subject matter is land. At all events, the respondent laments, understandably so, that he obtained a judgment six years ago and has not enjoyed the fruits of that judgment due to the applicant’s indolence. I agree with the respondent that further delay would be prejudicial to him.

14. I have said enough to show that I am not inclined to grant the prayers sought in this application. The application is dismissed with costs.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of July, 2015.***

***P. WAKI***

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***JUDGE OF APPEAL***

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**