



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: OTIENO- ODEK, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. NYR. 33 OF 2013**

**BETWEEN**

**SAMUEL N. M. WANJAU .....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR – MURANGA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES KIMANI MWANGI ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file and serve memorandum of appeal and record of appeal from the ruling of the High Court at Nyeri (Makhandia, J.)*

*made on 27<sup>th</sup> September 2009*

*in*

*HCCC No. 272 of 1991)*

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**RULING**

1. By Notice of Motion dated 24<sup>th</sup> October, 2013, the applicant is seeking leave for extension of time to file and serve the memorandum of appeal and record of appeal against the ruling delivered by Hon. Justice Makhandia J. (as *he then was*) on 27<sup>th</sup> September 2009. The application is brought under **Rule 4** of the **Rules of this Court**. It is evident from the application that a period of over 4 years has elapsed since judgment by the High Court. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and filing the memo and record of appeal.
2. The decisive issue in this application is whether the applicant has given satisfactory explanation for the delay. The affidavit in support of the Notice of Motion is deposed to by Samuel N.M. Wanjau, the applicant herein. The grounds in support are that the delay in filing the memorandum and record of appeal was inadvertent and the said delay is not inordinate. The applicant states that the said appeal touches on land and the appeal has high chances of success.
3. At the hearing of this application, the applicant was represented by learned counsel **Christopher**

- Mwaura** while learned counsel **R.M. Kimani** represented the 3<sup>rd</sup> respondent.
4. Counsel for the applicant elaborated on the grounds in support of the application. It was submitted that in the affidavit in support, the applicant states that being dissatisfied by the ruling delivered by the Hon. Judge on 27<sup>th</sup> September, 2009, he filed a notice of appeal on 28<sup>th</sup> September, 2009 and he was issued with a certificate of delay on 7<sup>th</sup> May, 2010. A copy of the certificate of delay was annexed to the affidavit. The applicant deposes that he was unable to file the record of appeal after issue of the certificate of delay as he could not raise the money to pay for legal representation. In addition, that he is a retired civil servant and thus could not afford legal representation. That he is a lay person and does not understand the procedure for lodging an appeal before this court. It was submitted that the applicant is diabetic and has been in and out of hospital. That subsequent to the certificate of delay being issued, his wife and child have been in and out of hospital and this has caused him financial constraints. That it is in the interest of justice that extension be granted as the subject matter in the suit is **Land Parcel No. Loc/2/Kinyona/724** and he risks losing 1.3 acres of land that rightfully belongs to him.
  5. Counsel for the 3<sup>rd</sup> respondent opposed the application and a relied upon a replying affidavit deposed by the James Kimani Mwangi, the 3<sup>rd</sup> respondent herein. It was submitted that the application has no merit and the applicant has not explained the inordinate delay in bringing the application. Counsel emphasized that rather than file the memorandum and record of appeal in this case, the applicant resorted to filing an application for stay of execution in the year 2011 before the High Court and thus contributing to the inordinate delay in making an application for extension of time. The 3<sup>rd</sup> respondent submitted that on 14<sup>th</sup> February, 2011, the applicant applied for stay of execution of the judgment delivered on 19<sup>th</sup> September, 2009. That the High Court (**Sergon J.**) declined to grant stay by a ruling delivered on 29<sup>th</sup> July, 2011. That the applicant has not given a satisfactory explanation for the delay between 29<sup>th</sup> July, 2011 to 11<sup>th</sup> November, 2013, when the present application was filed at the Court of Appeal registry. Counsel for the respondent submitted that the applicant has no arguable appeal and there are no chances of the appeal succeeding. In support of this submission, counsel stated that the dispute between the parties relates to the boundary between the applicant's and respondent's parcels of land being **Loc. 2/Kinyona/459** and **Loc. 2/Kinyona/724** respectively. That the trial court (**Makhandia J.**) upon hearing the parties made a determination that the official and lawful boundary between the two parcels of land is a stream. That the Registry Index Map (RIM) has already been amended to reflect the stream as the boundary between the parcels and as such, the judgment and decree issued by the High Court on 27<sup>th</sup> September, 2009, has already been executed. That in view of execution of the decree, the present application has been brought after inordinate delay and has been overtaken by events. Counsel cited the maxim that equity frowns upon the indolent and assists the vigilant. That the present application is an afterthought after the stay of execution was rejected and the applicant has already paid all the costs of the suit and the ruling. Counsel submitted that the respondent stands to suffer prejudice has his original parcel of land **Loc. 2/Kinyona/459** has been sub-divided into two parcels with new registrations as **Loc. 2/Kinyona/3894** and **Loc. 2/Kinyona/3895**. The respondent annexed an official search to illustrate the sub-division of **Loc. 2/Kinyona/459**. Counsel for the respondent contended that the applicant had all along been represented by counsel before the High Court and further there was no proof that the applicant was incapacitated by his illness. That the medical receipts annexed to the affidavit in support of extension do not indicate that the applicant was indisposed and was admitted into hospital.
  6. I have considered the Notice of Motion filed in the present application and the grounds cited in support thereof. I have also taken into account the supporting and replying affidavits and submissions by both counsels. What is before me is in essence an application for extension of time under **rule 4** of this Court's Rules The requirements under rule 4 is captured in the case of **LEO SILA MUTISO v ROSE, C.A. NAI 255 OF 1997 (unreported)** as follows:-

***“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.”***

7. The other beacon concerning the exercise of a single judge’s discretion was given by this Court in the case of ***MONGIRA & ANOTHER v MAKORI & ANOTHER, [2005] 2 KLR 103 at pp 106-107*** where the Court again cited the case of ***LEO SILA MUTISO*** (supra) and went on to state:-

***“Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general,” Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”***

8. For the purposes of this application, I will consider whether the application has a chance of success. ***Order 42 rule 2*** clearly states that an appeal shall lie with leave of the court from any other order made under the Rules. Again, the applications for leave are usually made as stipulated in ***Order 42 rule 2(3)(4)*** of the Civil Procedure rules. Applying the foregoing to the circumstances before me in the application, a delay of over 4 years is inordinate unless satisfactory explanation is given. The certificate of delay was issued to the applicant on 7<sup>th</sup> May, 2010. No action was taken to seek extension of time until 11<sup>th</sup> November, 2013. Eight months after issue of the certificate of delay, the applicant filed an application for stay of execution on 14<sup>th</sup> February, 2011 before the High Court. In the application for stay, the applicant was represented by learned counsel Miss Keli. The applicant opted to seek stay of execution rather than lodge and serve the memorandum and record of appeal. The merit or demerit of the decision to seek stay is not for this Court to decide. However, the fundamental issue is that the applicant had filed a Notice of Appeal and he had legal representation when seeking stay orders with full knowledge that a Notice of Appeal had been filed and other steps had to be undertaken. The applicant in his supporting affidavit deposes that he had financial constraints. No affidavit of means was annexed to the affidavit; in contrast, the 3<sup>rd</sup> respondent deposed that the applicant had paid the costs of the judgment and ruling. The implication is that the applicant had the financial means to settle the costs of the suit. The applicant has not demonstrated that due to illness and diabetes, he was admitted into hospital or incapacitated to the extent that he could not take steps to file and serve the memorandum and record of appeal. It is my considered opinion that the applicant has not explained the inordinate delay of over 4 years.

9. As to the prospects of prejudice to the 3<sup>rd</sup> respondent, the replying affidavit indicates that the judgment and decree of the High Court has been executed. The 3<sup>rd</sup> respondent’s parcel of land has been sub-divided. The applicant in his submissions did not address this Court on the issue of prejudice or otherwise to the respondents. The supporting affidavit contains no deposition to show that the respondents will suffer no prejudice if extension is granted. I note that the judgment and ensuing decree of the High Court has been executed and it was upon the applicant to show that despite the execution of the decree, no prejudice will be suffered by the respondents. The applicant has failed to discharge this burden.

10. On the issue as to whether the appeal is arguable, I have perused the draft memorandum of appeal and the sentiments expressed by the learned Judge (***Sergon J.***) in the ruling delivered on 29<sup>th</sup> July, 2011 dismissing the application for stay of execution. I note the sentiments expressed while observing that this is a finding of fact made by Hon. Justice Makhandia (*as he then was*) and analyzed by Hon. Justice Sergon. The Hon. Justice Sergon expressed himself as follows:

***“The 3<sup>rd</sup> respondent’s counter-claim was allowed in that the Land Registrar was directed to amend the Registry Index Map (R.I.M) to save the 3<sup>rd</sup> respondent from losing 1.3 acres of land to the appellant. There was evidence that the amendment of the R.I.M. would not change the actual acreage on the ground. A careful look at the judgment will show that the applicant will loose no land”.***

11. I do note that Sections **3A** and **3B** of the Appellate Jurisdiction Act, through the overriding objective principles mandate this Court to act justly and fairly. The applicant and the respondent are both entitled to fair and expeditious hearing through the overriding objective principle. The overriding objective principle is not aimed at giving justice to one party at the expense of another. In totality, I am of the considered view that the applicant has not been able to explain the inordinate delay in making the application for extension of time. He has failed to demonstrate that the respondents shall not be prejudiced if extension is granted. The fact that the dispute relates to land is not a ground for extension of time. For the foregoing reasons, the application to extend time vide Notice of Motion dated 24<sup>th</sup> October, 2013, is hereby dismissed with costs.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of January, 2014.*

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**