



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 316 OF 2012

BETWEEN

JUSTUS KINIU MUINDI1ST APPLICANT

RICHARD MWENDWA MUINDI2ND APPLICANT

JANET MARTHA SAVA3RD APPLICANT

GRACE TEMEA KALUYU4TH APPLICANT

JEDIDAH NDUNGI NGOMA5TH APPLICANT

AND

THE SENIOR RESIDENT MAGISTRATE, KITUI1ST RESPONDENT

KITUI DISTRICT LAND DISPUTE TRIBUNAL 2ND RESPONDENT

SAMMY MWOVA MUINDI3RD RESPONDENT

(An application for leave to file notice of appeal out of time from the ruling and orders of the High Court of Kenya at Machakos (Makhandia, J.) dated 15th May, 2012

in

H.C.C.MISC. CIVIL APPL. NO. 185 OF 2008)

RULING

The notice of motion dated 20th December, 2012 seeks an order under **Rule 4** of the Rules of this Court 2010, for extension of time to file a notice of appeal to challenge the Ruling of the High Court, Makhandia, J (as he then was) delivered in Machakos on 15th May, 2012. The main reason given for the delay in the affidavit supporting the motion and in submissions of learned counsel for the applicants, Ms Kiniti, is that the Ruling of the court was delivered without the knowledge of the applicants or their counsel as no notice of such delivery was served on them. They explain that on the 16th March, 2012, the

learned Judge, in the presence of all parties fixed the matter for Ruling on 20th April 2012, but the court did not sit on that day. The registry informed counsel that the Ruling would be delivered on Notice, but no notice was forthcoming for a long time. The applicants then wrote to the Registrar on 5th September, 2012 to enquire about the delayed Ruling only to be informed that the Ruling had been delivered on 15th May, 2012. This was confirmed to be so on 2nd October, 2012 upon perusal of the court file. It is then that they applied for copies of the proceedings and made this application some eleven weeks or so later on 20th December, 2012.

In the affidavit in reply sworn by the 3rd respondent and in submissions of learned counsel, Mrs. Mwangangi, there is confirmation that the Ruling was delivered without notice to the parties, including the respondents. Their only concern was that the applicants took more than two months after learning about the delivery of the Ruling to file the application now before the court. In the respondent's view, this amounted to indolence or a calculated intention to deny the 3rd respondent the fruits of his judgment.

The discretion exercisable by the court under **rule 4** is in terms unfettered and the factors that may be considered thereunder have no limit as long as they are relevant. See **FAKIR MOHAMMED V. JOSEPH MUGAMBI & 2 OTHERS NAI. 332/04**. The only requirement is that the discretion shall be exercised on reason, or as more commonly put, judicially, and not on whim or caprice. Since the enactment of **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Article 159** of the new Constitution, the exercise of the discretion has been anchored on firmer ground. The guiding beacon under the Act is the overriding objective which is to facilitate the **"just, expeditious, proportionate and affordable resolution of disputes under the Act"**. However, as this Court cautioned in the case of **CITY CHEMIST (NRB) & OTHERS vs. COMMERCIAL BANK LTD NAI. 302/2008**, the amendment to the law did not uproot well established principles and precedent on the exercise of the court's discretion, but served to enrich the principles and embolden the court in applying a broad sense of justice and fairness. The new Constitution underscored this approach by providing for the guiding principles in the exercise of judicial authority in **Article 159**. I shall bear in mind all those provisions and principles of the law as I consider the matter before me.

It is common ground that the Ruling of the High Court which is intended to be challenged on appeal was delivered without serving any notice to the parties. I have no hesitation, therefore, in decrying such process, or more appropriately lack of due process. I condemned it in the authority relied on by the applicants, **OSHWAL ACADEMY (NRB) & ANOTHER VS. INDUVISHWANATH NAI. 79/2011**, as a blatant breach of the rules of natural justice. It would entitle a party seeking relief to extension of time as of right. The only issue for consideration is whether, in the circumstances of this case, the applicants are deprived of the relief by the further delay in filing this application once they knew about the delivery of the Ruling in October, 2012. It is a delay of about eleven weeks and it is relevant to consider, particularly when the explanation for the delay was an oral one made by counsel during submissions stating that they were awaiting instructions from the applicants to proceed.

I have perused the record before me and it shows that the main protagonists in the dispute are brothers. The five applicants assert that their brother, 3rd respondent, registered himself as the absolute proprietor of some 100 acres or so (41.83 Hectares) of land in Mutonguni, Kitui county, although the land originally belonged to their father and so ought to have been held in trust for them and shared out when the trust came to an end. The dispute appears to have gone through arbitration before the Kitui Land Disputes Tribunal and the Senior Resident Magistrate's Court in Kitui for judgment, but the applicants said all those processes were irredeemably flawed. They went before the High Court to vindicate their grievance through a Judicial Review application, but the High Court threw them out and gave the land solely to their brother. That is the decision they intend to challenge on appeal before this Court.

I cannot, for obvious reasons, decide on the merits or otherwise of the intended appeal, but it is my view, in the circumstances of this case, that the applicants should have an opportunity to test the Ruling of the High Court before this Court for the final decision which will hopefully lay the matter to rest and restore peace in the family. I find no prejudice to the 3rd respondent, other than the anxiety of waiting a little longer, since he is currently in possession of the disputed land.

Being of that frame of mind, it follows that I shall exercise my discretion in favour of granting the application and extending time to file and serve the notice of appeal against the Ruling of the High Court in Machakos made on 15th May, 2012. The notice of appeal shall be filed and served within 14 days of this Ruling. The costs of the application shall abide the result of the main appeal. Orders accordingly.

Dated and delivered at Nairobi this 21st day of February, 2014.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR