



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: G.B.M. KARIUKI, J.A. (In Chambers))
CIVIL APPLICATION NO.NAI 148 OF 2013 (UR 101/2013)

BETWEEN
MILKA WANJIRU MATHU..... APPLICANT
AND
WAMUITA KAMAU.....RESPONDENT

(Being application for Extension of time to file and serve Notice of Appeal and Record of Appeal out of time from the judgment and Orders of the High Court of Kenya at Nairobi (Waweru, J.) delivered 9th October, 2013

in

H.C.C.C. NO.975 OF 2001)

RULING

The applicant, **Milka Wanjiru Mathu**, made an application to this Court on 5.7.2013 by way of a notice of motion dated 20th June 2013 seeking the following orders:

1. *That this application be certified as urgent and service hereof be dispensed with in the first instance.*
2. *That leave be granted to the applicant to file and serve Notice of Appeal out of time against the ruling delivered by H.P.G. Waweru J. in respect of originating summons dated 8th August, 2006 filed in HCC No.975 of 2001 (O.S) (the matter) delivered on 9th October, 2012.*
3. *That consequently, the time limited by the Court of Appeal Rules for filing of the Record of Appeal be also thereby extended accordingly.*
4. *That the cost of this application be provided for.*

The application was made on the grounds appearing on the face of the motion and was supported by the affidavit of **Mr. Eric Mutinda Kivuva**, the applicant's advocate, sworn on 20th June 2013.

The background to the application is that the High Court delivered on 9.10.2012 a ruling dismissing an application by the applicant dated 8.8.2006 in High Court Suit No.975 of 2001 (OS) (where the applicant was the defendant and the respondent the plaintiff) in which the applicant sought orders for (1) setting aside of the judgment in the said suit entered on 28.7.2005 by Aluoch J, as she then was, and (2) leave to defend the suit.

The application before me shows that the respondent, Wamuita Kamau, claimed from the applicant in Nbi HCCC No.975 of 2001 under the doctrine of adverse possession a piece of land measuring 0.096 of a hectare (or 0.0237 of an acre) comprised in land title number Githunguri/Gathiga/T.370 which she alleged her late husband had bought from the applicant's late husband in 1959 or thereabouts. Both the applicant and the respondent are elderly ladies.

The application before me further shows that the suit was heard *inter partes* and the respondent gave evidence but the applicant failed to attend Court on the day reserved for the hearing of her case. Her counsel, however, was in attendance throughout. As indicated above, judgment was delivered on 28th July 2005 by Aluoch J. as she then was. An attempt to set it aside did not meet with success as Waweru J., dismissed on 9.10.2012 her application dated 8.8.2006. It is in respect of Waweru J's ruling that the applicant is seeking orders so as to pursue an appeal, hence her application for leave to file notice of appeal.

The application came up for hearing before me as a single Judge sitting in Chambers by dint of rule 53(1) of the Rules of this Court. The applicant's counsel, **Eric Mutinda Kivuva** filed a supporting affidavit in which he avers that the ruling delivered on the 9th October 2012 by the High Court (Waweru J.) had been inordinately delayed and that the applicant was forced to lodge a complaint to the Chief Justice following which the Deputy Registrar served a notice dated 1.10.2012 indicating that the ruling on her application would be delivered on 5.10.2012 at 12.00 noon in Court No.22. A copy of the notice was attached to the affidavit in support of the motion. The applicant further avers that the ruling was not delivered on 5.10.2012 as the Court did not sit on that day and no fresh notice was issued to indicate when it would be delivered. Subsequently, the applicant's advocates perused the Court file and discovered that the ruling was delivered on 9.10.2012 whereupon they lodged a Notice of Appeal on 14.5.2013 dated 13.5.2013 without leave. I have perused it.

Although paragraph 11 of the supporting affidavit refers to **judgment** having been delivered on 9.10.2012, prayer 2 of the notice of motion before me refers to **ruling** having been delivered on that date. The motion also refers, it seems in error, to "*originating summons dated 8th August 2006*" instead of Chamber summons dated 8th August 2006. But these are not fundamental errors and the Court will focus on substance in the application instead.

The notice of appeal dated 13th May 2013 attached to the application states that the applicant, "*being satisfied with the whole judgment of the Honourable Justice Waweru delivered on 9th October 2012 intend (sic) to appeal to this Court against the whole of the said judgment.*" Two things seem incorrect in the notice of appeal. First, the judgment in Civil Suit No.975 of 2001 was delivered on 28th July 2005 by Aluoch J, as she then was, and not by Waweru J as stated in the notice of appeal. But even assuming that the applicant referred in error to judgment instead of ruling still, the notice shows that the applicant states that she was satisfied with it. But no matter.

The applicant's counsel **does not disclose** in paragraph 11 of his affidavit in support of the application when his clerk, one Ms Fanice Kanini perused the court file with a view to finding out about the delivery of the ruling, that is to say, the date on which she discovered the ruling had been delivered on 9.10.2012. Counsel indicates in the affidavit in support of the application that he **undertook a further perusal** to find out whether a notice had been served to notify parties about delivery of the ruling. However, he **does not disclose the date when this further perusal** of the court file was done. These

dates are important because if known, they would reveal whether the applicant acted with dispatch in coming to Court to seek the orders she prays for and in lodging the notice of appeal without leave. As matters stand, the applicant does not disclose the date when she discovered that the ruling had been delivered on 9.10.2012 and therefore the Court is disabled from discerning how long the applicant took to lodge the application on 5.7.2013 and to file the notice of appeal on 14.5.2013.

What is discernible from the application in that:

1. the ruling sought to be set aside was delivered on 9.10.2012
2. the ruling had been scheduled to be delivered on 5.10.2012 and
3. subsequently on a date that is not stated, the applicant's advocates perused the court file and ascertained that the ruling was delivered on 9.10.2012 and
4. the applicant's advocates lodged notice of appeal on 14.5.2013.

If one pauses here, it is clear that it is not possible to decipher how long the applicant took before filing the notice of appeal on 14.5.2013 and the instant application on 5.7.2013 after the applicant's advocates discovered that the ruling was delivered on 9.10.2012. The applicant has kept away the date from the Court. What is clear however is that the period between the delivery of the ruling on 9.10.2012 and the filing of notice of appeal on 14.5.2013 spans seven months and the period between 9.10.2012 and the date on which the instant application was filed on 5.7.2013 spans 9 months. The information kept away from the Court is vital for the Court to make a determination whether the applicant acted within a reasonable time after discovering that the ruling was delivered on 9.10.2012. It is the applicant who was seized of that information. Her advocates failed to place it before the Court, yet it is so vital as the application turns on it. The applicant is represented by advocates who are not inexperienced and who know or ought to know the significance of such evidence. It is not alleged that the applicant or her advocate cannot remember it. In its absence the only inference the Court can make is that perhaps, the evidence would have been prejudicial to the applicant. The application does not even attempt to show roughly how soon after discovering that the ruling was delivered on 9.10.2012 the applicant came to Court to seek the orders she prays for. The burden of showing that she acted with dispatch and came to Court within a reasonable time to seek the orders reposed on her. It was incumbent on the applicant to show that she was not indolent or guilty of laches. By failing to disclose when she discovered that the ruling was delivered on 9.10.2012, the applicant has withheld vital facts and/or failed to discharge the burden of showing that she came to Court for redress within a reasonable time and is not guilty of laches.

Although the respondent, who was served, did not file any replying affidavit or attend Court, this did not lessen the standard or the burden of proof reposing on the applicant to satisfy the Court that her application has merit. Candour is a *sine quo non* to the exercise of Court's discretion and an applicant who fails to place before the Court or keeps away from the Court vital facts within his or her knowledge cannot expect the Court to exercise its discretion in his favour. The whole object in the exercise of judicial discretion is to do justice and a party who keeps away from the Court vital or material facts especially on which an application may turn does not deserve assistance from the Court. In the instant application, the applicant, apart from stating that the intended appeal is meritorious does not show any arguable point. However, the applicant has annexed the intended memorandum of appeal in which she faults the High Court for not finding that she was entitled to defend the suit. Aluoch J, as she then was, delivered the judgment in H.C.C.C. No.975 of 2001 (O.S) on 28th July 2005. The applicant came to Court in 2006 seeking to have it set aside. Waweru J. heard her application dated 8.8.2006 by way of written submissions. The judgment by Aluoch J. followed *inter partes* hearing as the applicant's advocate was in court throughout but the applicant failed to attend Court on the day reserved for her defence hearing. The learned Judge observed that the respondent's claim against the applicant was for adverse possession and that the respondent had been on the land from 1959 or thereabouts and has developed it and further that the suit land was registered in the name of the respondent on 23rd March 2006 following delivery of the judgment and that title deed was issued on 7th July 2006.

In the light of the above, I am unable to allow the application and to grant the orders sought by the applicant. Accordingly, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 9th day of April 2014.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR