



REPUBLIC OF KENYA



KENYA LAW
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**Njihia v Kimani & another (Civil Application 146 of 2010)
[2013] KECA 344 (KLR) (12 April 2013) (Ruling)**

Daniel Kimani Njihia v Francis Mwangi Kimani & another [2013] eKLR

Neutral citation: [2013] KECA 344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 146 OF 2010
ARM VISRAM, MSA MAKHANDIA & S OLE KANTAI, JJA
APRIL 12, 2013**

BETWEEN

DANIEL KIMANI NJIHIA APPLICANT

AND

FRANCIS MWANGI KIMANI 1ST RESPONDENT

THIKA DISTRICT LAND REGISTRAR 2ND RESPONDENT

(An application for extension of time to file notice and record of appeal out of time in the intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiero, J.) dated 7th June, 2006 in H. C. C. No. 6085 of 1990)

RULING

1. By this reference brought under rule 55 (1) (b) of the [Rules of this Court](#), the applicant, Daniel Kimani Njihia, seeks reversal of orders made by a learned single Judge of this Court (Nyamu, JA) on 12th November, 2010 by which the learned single Judge declined to grant orders to the applicant to file notice and record of appeal out of time, in the intended appeal from the judgment and decree of the High Court (Osiero, J) delivered on 7th June, 2006. The genesis of the reference now before us may briefly be given as follows:
2. This is an old dispute that relates to alleged excision of land from land parcel LOCI Mukarara/253 which was allegedly added to another parcel No. 960 more than 20 years ago. The applicant, aggrieved by the decision of the High Court, filed and served a notice of appeal within the stipulated time, but then went to slumber for some four years. His application for extension of time before the learned single Judge was grounded on the reasons that his counsel had left private practice and joined in the employment of Kenya Anti Corruption Commission; his inability to raise legal fees; and his indisposition between May 2007 and December 2007.



3. The above application before the learned single Judge was opposed on the grounds, among other things, that the applicant had offered no good reason to explain the four year delay; that the delay was inordinate; and that the respondent would suffer prejudice in the event the orders were granted.
4. The learned Judge, in rejecting the application for extension of time, rendered himself, in part, as follows:

“For this reason, it is clear to me that the Record of Appeal should have been lodged on 8th August, 2006 within 60 days of the decision but this was not done. In addition, no certificate of delay was produced yet the proceedings were availed to the applicant on 14th March, 2007. Again the documentary evidence of the alleged indisposition does not show that the six days of hospitalization were the cause of the lengthy delay in taking action since the nature of the illness is undisclosed and the affidavit is silent on it. Similarly the inability to raise money to mount an appeal cannot be an excuse because the applicant could have invoked Rule 112 in seeking relief from fees in civil appeals but did not do so and it is not clear to me why a whopping Kshs.150,000/= was needed to mount an appeal! In any event the sale agreement according to its terms placed in the applicant’s hands Kshs.75,000/= which again should have been sufficient to pursue the appeal. I agree with the respondent that client/advocates relationship concerning money should never be visited on the respondent because it can only affect the client/advocate interse. On the issue of arguability or chances of the appeal succeeding, prima facie, this is not apparent although I cannot at this stage say more. Turning to the consideration of any possible prejudice to the respondent, I agree with the applicant that since both parties are in possession of their respective parcels prejudice is not apparent. However, as regards this consideration of prejudice, I prefer to take a broad view of it. As a single Judge, I consider that the delay of four years in reaching finality could also be regarded as prejudicial in the circumstances taking into account that the matter has been in court now for 20 years. Indeed finality of any matter should be an important cog in the wheel of justice and delay of four years in reaching finality is in my view, even on its own, extremely prejudicial to both parties and the wider interests of justice.

Taking a broad view of the situation, the applicant has as per the above analysis failed to explain important time limits and also failed to take essential steps in order to pursue his appeal in terms of rule 81 of this *Court’s Rules*. It is clear to me that the application has been brought after the advent of the overriding objective (O2), as stipulated in section 3A and 3B of the *Appellate Jurisdiction Act*. Failure to observe essential time lines defeats the objectives of a proper case management process. To my mind the omissions and lapses as described above derogate from both the objective of the *Appellate Jurisdiction Act* and the statutory duty of the Court.”

5. It is manifest from the ruling that the learned single Judge looked for any explanation for the delay and found none. He then went on to consider other issues such as the chances of the intended appeal succeeding, the prejudice to the respondent if the time was extended and so on, but in our view, having found that the delay of four years remained wholly unexplained, it was really not necessary to consider these other issues.
6. The learned single Judge, in dismissing the motion, was exercising an unfettered discretion under rule 4 of the *Court’s rules*. He took into account relevant factors; he did not take into account any irrelevant factor and there is absolutely nothing on the record to show that he failed to appreciate any part of the evidence or law essential to his exercise of discretion. With respect, the applicant did not point out to us



any single thing from which we could conclude that the learned single Judge had improperly exercised his discretion. Even on the merits, both the motion and the reference were bound to fail.

7. In the result, this reference fails and is ordered dismissed with costs thereof to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2013.

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ALNASHIR VISRAM

JUDGE OF APPEAL

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M. S. A. MAKHANDIA

JUDGE OF APPEAL

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S. OLE KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

