



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 272 of 2012 (UR 197/2012)

BETWEEN

VINCENT KIMANI

ARCADIUS NJORA CHEGE

ONESMUS BURUGU “C”APPLICANTS

AND

MICHAEL NJOROGE “B” & OTHERS..... RESPONDENTS

(Application for extension of time to file and serve the record of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Njagi, J) delivered on the 16th September, 2009

in

H.C.C.A. NO.5 OF 2009)

RULING

The notice of motion about to be determined was dated 3rd October, 2012, and filed under Ss.3, 3A, 3B, 7 of the Appellate Jurisdiction Act and Rule 4 of the Rules of this Court. The main prayers sought by the applicants were:

- (i) *that leave be granted to file and serve record of appeal out of time within a specified period; and*
- (ii) *that the time for filing the record of appeal be extended.*

The background in this matter is briefly this: a decree was issued on 21st January, 2008 in a case that had been heard at Gatundu in respect of Land Parcel No.Ndaragu/Gathaite/252A which involved several heirs/beneficiaries.

Being dissatisfied the present applicants filed NBI HCCA 5/09. They also filed a chamber summons dated 18th May, 2009, praying, *inter alia*, for a stay of execution pending the hearing and determination

of that appeal.

Njagi J. heard that summons and on 6th September, 2009 declined to grant the stay on the grounds that the applicants did not satisfy him by demonstrating that they stood to suffer substantial loss if the stay was not granted. In essence the applicants ought to have proceeded to prosecute their appeal No.5/09.

However, on 27th October, 2009 they filed an application for review of Njagi J.'s ruling. In it they claimed that they had since Njagi J.'s ruling, come by an important matter to warrant a review and also that if the review and stay prayers were not granted the suit land could be subdivided and transferred to 3rd parties all to the detriment of the beneficiaries. After hearing this review application, Nambuye J. as she then was, found that the conditions laid to warrant a review under the Civil Procedure Rules, had not been satisfied, but applying the overriding objective principle and noting that the subject matter was the usually emotive land issue, the learned judge granted the review sought, adding that applicants had demonstrated that two decrees had been extracted from the lower court judgment, making it hard for the parties to know which one to execute. The stay order that was granted read in part:

“6. ...*(the) stay is granted on condition that the applicant is to move speedily to ready the appeal for hearing and disposal within 90 days from the date of the reading of the ruling.*”

It should be pertinent at this stage to note that the 90-day stay order was granted on 21st October, 2011 so that the applicants in HCCA. 5/09 could move with speed to have that appeal finally heard and determined.

The present motion brought under the Act and Rules governing this Court contains prayers for leave to file a record of appeal out of time in this Court. Mr. Ondieki, learned counsel for the applicant submitted that on 30th November, 2009, they filed a notice of appeal dated 25th September, 2009. The notice read:

“TAKE NOTICE THAT the Respondents herein being dissatisfied with the entire ruling and consequential orders of the Honourable L. Njagi J. delivered in Nairobi on the 16th day of September, 2009 intends (sic) to appeal to the Court of Appeal in the Republic of Kenya against the whole of the said judgment in High Court Civil Case No.5/09.”

On the outset, the respondents said to be dissatisfied are those in HCCA 5/09 – a proceeding in which Njagi J. made a ruling on 16th September, 2009 refusing stay and Nambuye J. in her hearing on review granted the 90 days stay on 21st October, 2011. Then one is left wondering which HCCA No.5/09, whose entire judgment is to be appealed against. As per the grounds in the body of the present motion, the two affidavits sworn by Vincent Kimani one of the applicants, and submissions by their counsel, Mr. Ondieki, the position taken was that they could not lodge their appeal in the Court of Appeal within 90 days which Nambuye J. had granted them because the court file was misplaced for a long time. That they enlisted the intervention of the Chief Justice to recover it. The proceedings and orders were typed and furnished to the applicants on/about 12th October, 2012. That the certificate of delay issued, stated that from 16th November, 2011 to 11th November, 2012 when the typed record was collected a total of 295 days had elapsed. It is not clear from this certificate of delay, as to the significance of 16th November, 2011 and why that date featured. The rulings in HCCA 5/09 were delivered by Njagi J. on 16th September, 2009 and by Nambuye J. on 21st October, 2011. But be that as it may, Mr. Ondieki urged this court to grant the prayers in the notice of motion because the delay resulting in failure to appeal against the ruling of Njagi J. was occasioned by loss of the court file from the registry. As it remained missing, the applicants could not utilize the 90 days Nambuye J. granted to them to file and prosecute their appeal. They now desire for leave to file their appeal, already drafted so that it can be heard. The subject matter was land.

Mr. Kahuthu, learned counsel for the respondents strenuously opposed the motion, relying on their replying affidavit and the essence of the 2 rulings alluded to above. Of central focus was the argument that Nambuye J. granted 90 days stay to the applicants so that they could file and move to dispose of HCCA 5/09 and not any other. He argued that those 90 days did not relate to filing an appeal in this Court

and that following the notice of appeal that was lodged on 30th November, 2009 nothing more had been done. The applicants had not paid for the proceedings or taken any other step.

Mr. Kahuthu told the court that the applicants had not disclosed to this Court that at one point they filed HC. Misc. App.No.5/12 seeking orders to reconstruct HCCA 5/09 file which Kariuki J. declined to give on 5th July, 2012, because that file had been available all along and at no time did it go missing. Asked as to why this material had not been disclosed to this court either by affidavit or at time of submissions Mr. Ondieki simply termed the omission an oversight, not intended to withhold any relevant material from the court. He added that in Kariuki J. had merely said that the applicants had not made reasonable efforts to trace and access the file alleged to be missing.

After having heard submissions, gone over the affidavits and perused the records and all the material placed before me, I am disinclined to grant the orders sought because the applicants appear to have misconceived and misapprehended the question of the two appeals – one intended for this court and HCCA 5/09 in which judges Njagi and Nambuye delivered rulings.

Njagi J. delivered his ruling in HCCA 5/09 on 16th September, 2009 declining to order a stay. The applicants sought a review of that ruling together with a stay of execution. Nambuye J. granted the orders on 21st October, 2011 in which she gave a clear condition:

“...to move speedily to ready the appeal for hearing and disposal within 90 days from the date of this ruling.” (underlining added.)

The appeal in question was/is HCCA 5/09. That was the appeal in which the applicants had to ensure that it was prepared, heard and determined in 90 days. That given period of time had nothing to do with the intended appeal to this court against Njagi J.'s ruling on 16th September, 2009, as the applicants appear to represent here. Thus they were entirely in error to appear to propose to this court that the 90 days were for the appeal intended to be lodged in this Court. And even if that were the position, hopefully honestly mistaken, there has been no demonstration on the part of the applicants that from the time they filed the notice of appeal here, they did anything more to file the appeal itself. It has not been shown the failure to file that appeal in time was because of this or that reason.

In sum this motion is misconceived, without merit and accordingly dismissed with costs.

Delivered and dated at Nairobi this 24th day of May, 2013

J. W. MWERA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc