



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 267 of 2011

ELIUD BUKU THUKUAPPLICANT

AND

PAUL KARIUKI MWANGI

(Deceased)Substituted by

BEATRICE WAMBUI MWANGIRESPONDENT

(An application for extension of time to file Notice of Appeal and for extension of time to file memorandum of appeal out of time against the judgment of the High Court of Kenya at Nyeri (Sergon, J) dated 23th September 2011

in

H.C.Civ. Appeal NO. 238 of 1992)

RULING

1. By a Notice of Motion dated 1st November 2011 M/s Eliud Buku Thuku seek two orders under rule 4 of the Court of Appeal Rules 2010 that:-

1. That the Honourable Court be pleased to grant leave to file Notice of Appeal and extend time in which to file and serve memorandum of appeal and record of appeal.

2. That the costs of the application do abide the outcome of the appeal.

2. The ground in support of the application is that owing to financial constraints, the applicant did not file the notice of appeal within time.

3. Mr. Eliud Buku Thuku, by a plaint dated 26th August 1992 sought judgment against Paul Kariuki Thuku as the 1st defendant and the Land Registrar-Muranga as 2nd defendant, for various orders of declaration *inter alia* that transfer of 1.21 hectares out of parcel No. LOC.19/GACHARAGEINI/1297 to the 1st defendant by the Plaintiff's father was null and void *ab initio* and that land parcel no. LOC.19/GACHARAGEINI/1297 was transferred to the 1st defendant wrongfully, fraudulently and or unlawfully.

4. The first defendant filed a defence to deny the plaintiff's claim. The case proceeded to full hearing and judgment was delivered on 23rd September 2011 in open court in presence of counsel for the applicant. The plaintiff's suit was dismissed with costs. No notice of appeal against the judgment has been filed in the matter.

5. In the present application, the applicant seeks leave to file the notice of appeal out of time. The affidavit in support is deposed to by the applicant who gives the reason for delay as financial constraints. It is deposed that by letter dated 24th September 2011, counsel for the applicant advised him that judgment had been delivered on 23rd September 2011 but due to financial constraints, he was unable to file the notice of appeal; that as soon as he was able to raise the funds, he filed the present application; that the intended appeal is not frivolous and raises triable issues.

6. The respondent filed a replying affidavit opposing the application. That the applicant delayed for a period of 45 days to file the present application from the time of judgment and 37 days from the time he allegedly received the letter from his advocate informing him that judgment had been delivered. That the applicant has not disclosed he did not attend court on the 23rd September 2011 when judgment was read; he has not explained why he did not get in touch with his to know the outcome of the case; that the nature of financial constraints has not been shown; when he managed to raise the funds is not indicated; no grounds of appeal has been attached to the application; the filing fee for a notice of appeal is Ksh. 450/= which is a small amount of money and that the notice of appeal is a simple document that Counsel should have filed and does not require instructions from a client.

7. Learned Counsel **Mr. Kiminda** appeared for the applicant while learned counsel **Mr. S. K. Njuguna** appeared for the respondent.

8. I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of "*sufficient reasons*". Nevertheless, it ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004** (unreported).

9. There is also a duty now imposed on the Court under **sections 3A and 3B** of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.

10. The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September 2011. As was stated by Tunoi JA. (as he then was) in **Njoka Muriu & another – v- Evan Githinji Muriu & another Civil App. No. NAI 356 of 2003**), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client's interest. In **Njagi – v- Munyiri (1975) EA 179**, this Court observed that a notice of appeal attracts a small fee and does not need to await instruction.

11. The applicant gives the reason for delay in filing the notice of appeal as financial constraints. No evidence has been given in support of this statement. It is not enough to allege financial constraints; an applicant must demonstrate the constraint either through production of a statement of financial means;

lack of employment or absence of a source of income or such other means. In **Mutiso – Mwangi 1997 KLR 630**, the criteria that govern an application under Rule 4 were given as:

“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 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 application is granted.

12. Applying the foregoing criteria, the applicant has not attached draft grounds of appeal to the application; it is thus not possible to *prima facie* determine the chances of the appeal succeeding; the reason given for delay is not supported by evidence as no affidavit of means was presented; the applicant has not demonstrated that the respondent shall not be prejudiced if leave is granted.

13. I am not satisfied that the 45 day period of delay in this matter has been satisfactorily explained. I decline to exercise my discretion in favour of granting leave to file the notice of appeal out of time. The Notice of Motion application dated 1st November 2011 is hereby dismissed with costs.

Dated and delivered at Nyeri this 23rd day of May, 2013

OTIENO-ODEK

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR