



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 180 of 2011

WARIBU CHONGOAPPLICANT

AND

BENSON MAINA GATHITHIRESPONDENT

(An application for extension of time to file an appeal out of time in Civil Appeal NO. 117 of 2009 against the judgment of the High Court of Kenya at Nyeri (Sergon, J) dated 17th September 2010

in

H.C.C. A. NO. 117 OF 2009)

RULING

By a Notice of Motion dated 22nd June 2011 M/s Waribu Chongo seek two orders under rule 4 of the Court of Appeal Rules 2010 (the rules) that:-

“1. That the Honourable Court may be pleased to grant the applicant, leave for extension of time to file an appeal out of the stipulated time from the judgment of the High Court of Kenya at Nyeri by Justice J. K. Sergon dated 17th day of September 2010.

2. That the costs of and incidental to the application do abide the outcome of the intended appeal.

The Applicant herein, Mr. Waribu Chongo, by a plaint dated 8th August 2006 sued the respondent, Mr. Benson Maina Gathithi, in the Resident Magistrates Court at Muranga being SPMCC No. 265 of 2006 claiming *inter alia*

(a) A declaration that all the blue gum trees growing at the common boundary of land parcel No. LOC.8/Matharite/300 and LoC.8/Matharite/301 belong to the plaintiff and compensation at the market value of the cut down 15 blue gum trees.

(b) Costs of the suit.

The learned magistrate entered judgment in favour of the applicant herein that the trees growing on the

common boundary belong to the applicant and the respondent herein do compensate the applicant the sum of Ksh. 161,000/=. The respondent in this appeal was aggrieved and lodged an appeal to the High Court. By judgment dated 17th September 2010, the learned judge of the High Court (Sergon J.) set aside the judgment of the learned magistrate and dismissed the suit.

Aggrieved by the judgment of the learned judge, the applicant through his legal counsel filed a Notice of Appeal on 28th September 2010. No appeal was filed within the stipulated time frame as required by the Rules of this Court. The present application now seeks leave to file the appeal out of time.

The explanation for the delay is given in the affidavit in support of the application sworn by the applicant in person and the submissions before me made by his counsel **M/s C.M. Kingori**.

The applicant states that immediately after the judgment was delivered at the High Court he instructed his then lawyers **M/s Kiribu Mwangi Ben & Co. Advocates** to lodge an appeal against the judgment. That on 28th September 2010, his said advocate filed a Notice of Appeal. That on 15th October 2010, the advocate applied for certified copies of the proceedings and judgment for purposes of filing an appeal. That a deposit of Ksh. 500/= was paid towards the certified copies and on 24th November 2010 the balance of Ksh. 160/= was paid; the advocate collected the certified copies. That he made inquiries from the advocate to find out the progress of his appeal with no success. That he later visited the advocate's office in February 2011 and retrieved his file only to find that no appeal had been filed. That the delay in filing the intended appeal was contributed to by the professional negligence of his said advocates who are to blame. That no injustice will be occasioned to the respondent if leave to file appeal out of time is granted. That he stands to suffer if leave is not granted. A draft memorandum of appeal is attached to the supporting affidavit outlining the proposed grounds of appeal. That mistake of counsel should not be visited upon a client.

In opposing the application, learned counsel for the respondent **Mr. H. K. Ndirangu** contended that there has been delay since the Notice of Appeal was filed. In his view, the intended appeal has no chance of success; the intended appeal is a second appeal and can only be urged on points of law. That having perused the intended memorandum of appeal, the grounds relied upon are matters of fact and not points of law. That from the original suit before the magistrate's court, judgment was for a monetary claim for compensation for alleged blue gum trees on a common boundary. That the learned judge found that the trees which were valued were on a different parcel of land and thus the intended appeal is bound to fail. That the applicant has not given an assurance that he would be in a position to recompense the respondent in the event the appeal fails.

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 usual 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). 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.

It is not unheard of for lawyers, even experienced ones, to overlook or fail to file appeal on time and in this case, I would not condemn unheard the applicant's advocates M/S Kiribu Mwangi Ben & Co. Advocates. The issue before me is not to determine whether the said firm of advocates was professionally negligent or not.

I note that the application before me was filed by the applicant in person. The applicant retrieved his file from his then advocates in February 2011 and filed the present application in person in June 2011, after a period of 4 months. Is four months an inordinate delay? No explanation for the 4 month period has been

given. I have taken into account that when this application came before this Court on 23rd May 2012, the respondent was given 14 days to file a replying affidavit. A replying affidavit was filed on 8th May 2013 almost a year later without explanation for the delay. Both parties have not offered explanation for their respective delays and equity dictates that all should be treated in the same manner.

The 2010 Constitution of Kenya requires this Court to administer justice without undue regard to technicalities. The Applicant feels aggrieved by the decision of the learned judge. Whether or not he will succeed in the appeal, is in the province of the appellate court to decide. It is my view that at this stage, I should not delve into the merits of the intended grounds of appeal and the issues to be raised in appeal. It is my considered view that the respondent shall not be prejudiced if the applicant gets his day in court to challenge the judgment of the learned judge. The judgment of the High Court did not impose any obligation on the respondent. The respondent can be compensated by an order for costs in the event intended appeal is not successful.

For those reasons, I would exercise my discretion in favour of granting leave to file the appeal out of time. The appeal shall be filed and served within fourteen (14) days of this ruling. Failure to comply with the time limits stipulated heretofore, the Notice of Motion application dated 22nd June 2011 shall stand dismissed with costs. Orders accordingly.

Dated and delivered at Nyeri this 16th day of May, 2013

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR