



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KANTAI, J. A (IN CHAMBERS))

CIVIL APPLICATION NO. 28 OF 2013

BETWEEN

THOMAS ANZEZE MUSILAAPPLICANT

AND

SAMSON MUSILA JALENGARESPONDENT

*(An application for extension of time to file Record of Appeal out of time
from a judgment of the High Court of Kenya at Kakamega (Hon. Lady Justice
B. Thurania Jaden) dated the 18th day of December, , 2012)*

in

KAKAMEGA HCCA No. 95 OF 2007)

RULING

The application before me is the Notice of Motion dated 12th August, 2013 filed by the Applicant Thomas Anzeze Musila in person. It is an application under Rule 4 of the Courts Rules seeking an extension of time for the lodging and service of Notice of Appeal and Memorandum of Appeal. The Motion is supported by the affidavit of the applicant sworn on 12th August, 2013 where it is deponed inter alia that the applicant, who was represented by counsel at the High Court, was not informed by his advocate that judgement had been delivered; that in July, 2013 the applicant attended at the High Court Registry, Kakamega, and discovered that judgement had been delivered on 18th December, 2012; that even in March, 2013 the applicants advocates were still telling him that judgement was pending undelivered and for those reasons the applicant was unable to comply with the time-lines for lodging a Notice of Appeal.

The Motion came for hearing today when the applicant appeared but there was no appearance for the respondent who was duly served.

The applicant in his address more or less repeated the averments in the affidavit which I have cited above

I have perused the Motion, the affidavit in support, the various annexures and I have also considered the

submissions of the applicant as he urged the application.

The principles upon which I am to consider an application under Rule 4 of this Courts Rules are fairly well settled. The discretion is unfettered and the factors, if relevant, are not limited. I may consider such factors as period of delay, possibly chances of the intended appeal succeeding if the application is granted, prejudice to the respondent if the application is granted, the effect of delay on public administration, importance of complying with time limits, the resources of the parties, whether the matter raises issues of public importance – these are but some of the factors.

What was before the High Court was an appeal from a decision of a Tribunal on a dispute over land between the applicant and respondent. The High Court found that the appeal was incompetent and struck it out on the ground that appeal to the High Court from the Provincial Appeals Committee under the Registered Land Act Chapter 300 Laws of Kenya (now repealed) were only permitted on grounds of law.

I have no jurisdiction to pronounce on this holding and I must leave it alone.

The judgement of the High Court subject of an intended appeal was delivered on 18th December, 2012. Notice of Appeal required to be filed within fourteen days of that judgement.

The applicant has deponed in the affidavit and also argued before me that he was represented at the High Court by a law firm which either gave him no information or gave him misleading information.

I have seen a letter annexed to the applicants affidavit dated 22nd March, 2013 by M. Kiveu Advocate to the respondent warning him of certain consequences should he continue to deal with the suit land because

“...The above matter is still pending judgement in court...”

So in late March, 2013 the applicants advocates were informing the respondent, and the applicant as the letter is copied to him, that judgement in the suit at the High Court was still pending awaiting delivery when judgement had been delivered on 18th December, 2012. There is no indication whether there was appearance by any party when judgement was delivered on that date.

The applicant has further deponed in the affidavit that it was not until July, 2013 when through his own initiative through visiting the High Court Registry, Kakamega, that he discovered that judgement had been delivered in the matter. He then filed the application which is before me.

I am satisfied that the applicant acted in a vigilant manner by trying to correct what appears to be misrepresentation by his lawyer. I am further satisfied that the applicant is entitled to a favourable exercise of my discretion in this application

Leave is hereby granted to the applicant to file Notice of Appeal within fourteen (14) days of today and serve the same on the respondent within seven (7) days thereof. Record of Appeal to be filed within thirty (30) days of receipt by the applicant of proceedings and judgement from the High Court. Costs of the Motion shall abide the intended appeal.

Dated and delivered at Kisumu this 19th day of December, 2013

S. ole Kantai

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR