



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPLICATION 274 OF 2011**

**JOHNSON NEHONDO ..... APPLICANT**

**AND**

**CHRISTOPHER NASHISAKO ..... 1<sup>ST</sup> RESPONDENT**

**FREDRICK NAMATSI .....2<sup>ND</sup> RESPONDENT**

**(An application for extension of time to file and serve notice of appeal, Memorandum & Record of Appeal from the judgment and decree of the High Court of Kenya at Kakamega (Chitembwe J.) delivered on 30<sup>th</sup> September 2010**

in

**H.C.C.C. NO. 335 OF 1988 (O.S)**

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**RULING**

By a judgment of Chitembwe J. delivered on 30<sup>th</sup> September 2010 at Kakamega in **H.C.C.C.NO. 335 of 1988 (OS)** the suit by **Johnson Nehondo** (*applicant*) was dismissed with costs. The applicant filed a notice of appeal which was lodged in court on 8<sup>th</sup> October 2010 and was duly served upon the advocate for the respondents within time. The applicant’s advocate also wrote to the High Court Registry requesting to be furnished with certified copies of the proceedings and judgment. The letter was also copied to the advocate for the respondents. The certified copies of proceedings and judgment were ready for collection 19<sup>th</sup> October 2011. This is according to the Certificate of delay that was issued by the Deputy Registrar, High Court at Kakamega.

By a Notice of Motion dated 22<sup>nd</sup> November 2011, brought under **rules 4 and 41** of the Court of Appeal Rules, the applicant seeks for the following orders:

- (a)The Honourable court be pleased to grant the applicant extension of time to file the memorandum of appeal and record of appeal.**
- (b)The costs of and incidental to the application do abide the result of the intended appeal.**

This application is supported by the grounds stated on the body thereto and the matters deposed to in the supporting affidavit sworn by the applicant on 22<sup>nd</sup> November 2011.

Briefly summarized, the judgment in Kakamega HCCC NO. 335 of 1988 (OS) was delivered on 30<sup>th</sup> September 2010. Being dissatisfied with that judgment, the applicant lodged notice of appeal on 8<sup>th</sup> October 2010 and served it upon the respondent's advocates on 12<sup>th</sup> October 2010. The applicant also applied for certified copies of the proceedings and judgment and paid for the same on 11<sup>th</sup> October 2010. It took the Court Registry 365 days to prepare and certify the proceedings and judgment which were ready on 10<sup>th</sup> October 2011 and the Certificate of Delay was issued on 19<sup>th</sup> October 2011.

Mr. Akwala, learned counsel for the appellant submitted the delay in filing the appeal was caused by the court registry. That the applicant is desirous of pursuing an appeal against the judgment in which his claim for a parcel of land that he and his family occupied all their lives was dismissed. He further submitted that the respondents will not suffer prejudice as they will have an opportunity to present their case before the Court of Appeal.

This application was opposed by **Mr. Ombito**, learned counsel for the respondents. He relied on the replying affidavit sworn by **Fredrick Namatsi** on 30<sup>th</sup> May 2012. The matters deposed in that affidavit largely torch on the merits of the appeal. As far as the present application is concerned, Mr. Ombito submitted that the applicant failed to demonstrate that while the proceedings were being prepared, there is no material to show the applicant was vigilante by constantly reminding the registry to issue the proceedings.

It is trite law that the issue of whether or not to grant an order for extension of time should be granted lies entirely in my unfettered discretion. That discretion must however be exercised judicially and the guiding principles have been enunciated in a long line of authorities especially the often cited case of **Fakir Mohamed vs. Joseph Mugambi & two others** Civil Application No. Nai. 332/2004(04) thus:

**“The exercise of this Court’s discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of delay (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the importance of compliance with time limits: the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive by factors ...”**

That decision was made long before the enactment of **sections 3A and 3B** of the Appellate Jurisdiction Act which introduced the “*overriding objective*” of civil litigation and thus imposed a legal duty on the courts to facilitate “a just expeditious proportionate and affordable resolution of disputes”. This is the same spirit envisaged as a thread that kneads through the administration of justice under the provisions of the Constitution of Kenya 2010, in particular Article **159**.

It is the applicant’s case and indeed a common ground that the applicant duly applied for the certified copies of the proceedings and judgment within time but the delay was caused by the court registry that took up to 10<sup>th</sup> October 2011 to prepare them. That delay cannot be attributed to the applicant. Since the certificate of delay was issued to the applicant on the 19<sup>th</sup> October 2011, it follows that he would have been perfectly in time if he proceeded to fill the Memorandum and Record of Appeal within sixty 60 days after the issuance of the Certificate of Delay.

The applicant had up to 19<sup>th</sup> January 2012 which period he perhaps overlooked and applied for leave instead of filing the appeal.

I have considered all the issues raised for and against this application. Apart from the fact that the applicant was not at all to blame for the delay herein except that he squandered the time for filing the appeal by filing this application which was unnecessary in the circumstances, sight should also not be lost

of the fact that the dispute involves the ownership of land which the applicant claims he has been in occupation throughout his life.

The respondents complain that the dispute has taken many years and litigation should come to an end. It is in the interest of justice that the applicant should ventilate his case before the Court of Appeal, as the matter involves determination of what I would regard fundamental rights to property as applicant claims to have lived on the suit land with his family throughout their lives. Obviously the respondents will be inconvenienced by the prolonged litigation but that is the price one has to pay while seeking for as a durable solution to a land dispute, that inconvenience can also be compensated with costs.

For the foregoing reasons, I allow the application; extend the time within which to file the Memorandum and Record of appeal by **21 days** from today's date. The applicant shall bear the respondents costs of this application.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of June 2012.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**