



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

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

CIVIL APPLICATION NO. NAI 127 OF 2010

BETWEEN

MWOBE GATHUTE APPLICANT

AND

TERESIA KAGONDU ELASTO RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Serگون, J) dated 1st December, 2009

in

HCCC NO. 122 OF 1995)

RULING

The applicant, **MWOBE GATHUTE**, asks me under **Rule 4 of the Court of Appeal Rules**:

“THAT time be enlarged to the Applicant within which to file and serve a notice of appeal and the Record of Appeal out of time.”

Since 1995, the applicant who is obviously a very old man, has been involved in litigation with **Teresia Kagondu Elasto** over land which was originally known as Number **Ngariama/Ngiriambu/719**. Teresia had claimed in her plaint filed in the High Court in Civil Case No. 122 of 1995, that the original land had been fraudulently sub-divided into two plots, namely Plot No. 852 and Plot No. 853. Teresia asked that the two titles be closed and merged into the original No. Ngariama/Ngiriambu/719 and by his judgment dated the 17th March, 1999, Juma, J, entered judgment for Teresia and ordered that Title Nos. 852 and 853 be closed and consolidated into the original Title No. 719.

Juma, J’s judgment was, however, entered *ex parte*. The applicant had been represented by a lawyer but it would appear from the record that at some stage, the lawyer withdrew his services. The applicant was said to have been served with a hearing notice but did not attend the hearing and hence the *ex parte* judgment entered by Juma, J on 17th March, 1999.

The judgment was followed by several applications made by the applicant through various lawyers. On

21st September, 2001, one such application asked that the *ex parte* judgment be set aside and the applicant be allowed to defend. It is not clear if the applicant or his advocates participated in the hearing of that motion but the end result was that the motion failed. Another motion was then filed on 25th August, 2005, seeking the review of the contested judgment; the review application was also rejected. Once again on 10th September, 2009, the applicant returned to the High Court seeking the setting aside of the judgment.

Understandably, Serگون, J, ruled that the application to set aside the judgment was *res judicata*, one such application having been rejected and no appeal having been filed against the rejection. In addition, there was the rejected application for review and against that order, no appeal had been lodged. However, it appears from the record that even the application before Serگون, J, was heard *ex parte* both the applicant and his advocate on record being absent.

The strange thing about this matter is that the applicant has always had legal advice; I have no doubt on the material before me that the applicant has been badly let down by his various legal advisors. One asked that the *ex parte* judgment be set aside. When that prayer failed, instead of appealing against the rejection, they advised the applicant to file an application for review of the judgment and when the review application was itself rejected, the applicant was once again instructed to file another application for setting aside the judgment. It is this latter application which Serگون, J rejected as being *res judicata* and against which the applicant now wishes to appeal. The order of Serگون, J was made on 1st December, 2009; the applicant's present motion was filed nearly six months later and he explained the delay on ill health and apparently lack of money to enable him proceed promptly. As I have said, the applicant is a very old man and he clearly feels that he has never had his day in court and tell his side of the story. On several occasions, he has received faulty legal advice and before me, he told me he had brought with him his entire family because he wants to be heard. With the enactment of **Sections 3A and 3B of the Appellate Jurisdiction Act**, we now live in a more liberalised legal regime which focuses on the overriding objective of litigation, that is, that the substance or merit of the dispute ought to be gone into where that is possible. I do not know that even if I extend time for the applicant as requested, he will be able to convince the Court that Serگون, J was wrong in ruling that his last application to set aside the *ex parte* judgment was *res judicata*. Taking into account all the surrounding circumstances, I think I should give the applicant a chance to try to convince the Court that in spite of all the legal flaws which have attended his attempts the courts ought to hear him on the merits.

Accordingly, I allow the notice of motion dated 25th May, 2010 and lodged in the court on 27th May, 2010 and I make the following orders:

1. ***The Applicant shall file and serve his notice of appeal within seven (7) days from the date of this order;***
2. ***The Applicant shall file and serve his record of appeal within fourteen (14) days from the date the notice of appeal is filed. The record of appeal shall itself be served within seven (7) days from the date it is lodged; and***
3. ***The Applicant shall pay to the Respondent, Teresia Kagondu Elasto, the costs of this motion in any event, such costs to be taxed if not agreed.***

Those shall be my orders in the motion.

Dated and delivered at Nyeri this 8th day of July, 2011.

R. S. C. OMOLO

JUDGE OF APPEAL

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

DEPUTY REGISTRAR