



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: WAKI, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 27 OF 2010**

BETWEEN

**MIRIAM WANGUI KIMANI
SAMMY MAINA KIMANI (*suing as the Administrator of the Estate of
JESSEE KIMANI NYUKU*APPLICANTS**

AND

MIRIGI GICHEHA MACHARIARESPONDENT

(An application for extension of time to file notice of appeal and lodge memorandum and record of appeal out of time from the ruling of the High Court of Kenya at Nakuru (Maraga, J.) dated 25th September, 2008

in

H.C.C.C. No. 35 OF 2006 (O.S)

RULING

The motion before me is dated 29th December, 2010 and was taken out by **Miriam Wangui Kimani** and **Sammy Maina Kimani** (“*the applicants*”) both of whom describe themselves as the “*administrators of the estate of Jeseo Kimani Nyuku (deceased)*”. They were indeed issued with a temporary grant of Letters of Administration on 1st November, 2005 and they were subsequently sued on 14th February, 2006 by **Marigi Gacheha Macharia**, the respondent herein, who sought ownership, through adverse possession, of some 5.2 Hectares out of parcel No. Nyandarua/ Ol’ Kalau South/82, then registered in the name of the deceased. That suit, by way of Originating Summons, was determined by the High Court (Maraga J) on 25th September, 2008, who declared that the respondent herein was entitled to the portion of land he claimed and it ought to be excised from the main Title and transferred to him.

Although the applicants were dissatisfied by that decision and filed a notice of appeal through their counsel on record timeously on 2nd October, 2008, they did not file the record of appeal in accordance with the rules. They came before this Court on 5th June, 2009, in Civil Application No. NAI. 09 of 2009 and sought extension of time under **rule 4** of the Courts Rules to file “*Notice of Appeal, Memorandum and Record of Appeal*”. That application came before me and for reasons given in my ruling delivered on 6th November, 2009, I granted the applicants leave to file the record of appeal out of time and gave a limit of 14 days to do so. The filing ought to have been done on or before 20th November, 2009, but the order was neither complied with nor did the applicants return to seek extension of the 14-day limitation period.

It would appear from the record that in the absence of any appeal or order for stay of execution, the respondent proceeded to apply for execution of the decree and by a ruling of the High Court (Wendo, J) made on 26th November, 2010, orders were issued for sub-division of the disputed land and for transfer of 5.2 Ha. to the respondent. It was confirmed at the hearing of the motion before me that the respondent has already obtained title to the land after execution of the decree.

The applicants were represented by counsel throughout the proceedings before the High Court. But the motion dated 29th December, 2010 was drawn and filed by them in person without any indication that they had changed their representation. That was one of the legal issues taken up by the respondent's counsel, Mr. Kahiga Waitindi submitting that the application was incompetent in law. It is a valid issue to raise, but I would nevertheless proceed to consider the application, that defect notwithstanding as there is no dispute raised by the erstwhile advocates. The other objection raised by Mr. Waitindi on incompetence was that the application was a duplication of the earlier motion which this Court had heard and determined on 6th November, 2009. There is merit in that objection.

The applicants simply copied the earlier notice of motion and sought the same orders in their latter motion when a decision had already been made on those orders! That would be *res judicata*. What the applicants perhaps wanted to seek was an extension of the 14-day time limit granted in the earlier application but that is not their prayer. In the affidavit in support of the motion they seek to explain why they did not file the record of appeal despite extension of time having been granted but the explanation comes more than one year late (404 days). What is the explanation?

The applicants say they had no money to engage an advocate to proceed with the matter, but this is a lame excuse considering that there was an advocate on record up to 29th December, 2010 and in any event, impecuniosity is addressed under **rule 115** of the rules of this Court, which the applicants never invoked. They also say that the court file went missing after delivery of the ruling of this Court and it was not therefore possible to obtain a copy of the ruling for appeal purposes. As correctly pointed out by Mr. Waitindi however, there is no demonstration at all that either the Court of Appeal file or the High Court file was missing at any stage. There is no record of any complaint made in any of the registries or any attempt made to seek reconstruction of the file. In any event, the ruling of this court was readily available and is exhibited with the replying affidavit, and other proceedings have taken place before the High Court since November, 2009. There is no truth in the assertions of the applicants. The truth of the matter is that they went into slumber or cared very little, if at all, about the consequences that would ensue by their failure to comply with this Court's earlier order on extension of time. Consequently they are not deserving of any further indulgence by this Court as they are in blatant breach of the overriding objective under **sections 3A** and **3B** of the Appellate Jurisdiction Act which the court is under a duty to observe and enforce. The delay is inordinate and the applicants must be told that there must be an end to litigation, even in land matters.

In my assessment after full consideration of the application it is not only incompetent but also lacking in merit. I order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nakuru this 29th day of September, 2011.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR