



IN THE COURT OF APPEAL
AT NYERI

(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A.)

CIVIL APPLICATION NO. NAI. 371 OF 2009 (NYR.42/09)

BETWEEN

GATUGI MUGIRA APPLICANT

AND

ONESMUM GITOBU M'NKANATA 1ST RESPONDENT
LAWRENCE MIRITI BAKARI 2ND RESPONDENT

(Application for extension of time to file Notice and Record of Appeal from judgment and decree of the High Court of Kenya at Meru (Ouko, J.) dated 7th November, 2008

in

H.C.CR.A NO 43 of 2007)

RULING OF THE COURT

This is a reference to the full Court of the decision of a single Judge (Nyamu, J.A.) given on 24th June, 2010 in an application under **rule 4** of the Court of Appeal Rules, for an order extending the time within which to file a notice of appeal and a record of appeal. There was a second prayer for an order of inhibition but that was not a matter which, under the Rules of Court as they stand, a single judge of the Court would have jurisdiction over. Consequently, he did not render a decision on it.

The dispute between the parties started before a Magistrate's Court. The applicant's parcels of land Nos. Igoji/Kinoro/1324 and 1235, were auctioned in execution of decree. **Lawrence Miriti Bakari**, the 2nd respondent, was the purchaser. After the land was auctioned, the applicant unsuccessfully applied for an order to set aside the sale. He appealed against that decision. The High Court (Ouko, J.), heard that appeal and on 7th November, 2008, he rendered his decision, which is the subject matter of the appellant's intended appeal. The appellant filed a notice of appeal on 24th November, 2008, which was about three days outside the time stipulated for doing so. He filed this application on 23rd December, 2009, about one year and one month thereafter.

The application, aforesaid, was heard by Nyamu, J.A. and a ruling was given on 24th June, 2011, dismissing that application and hence this reference. The learned judge in dismissing the application rendered himself thus:-

"I have also focused my attention on the requirements as set out in the overriding objective. With the

above in view, I think that the initial delay in filing the notice of appeal would have been excusable because the delay ranged from 1 to 3 days only. However, the subsequent delay of one year one month in filing the application for extension of time has not been satisfactorily explained. Although there were medical reports upto 2005, there were no corresponding medical reports for the period from 2005 to 2009. Those submitted were illegible and unhelpful to the applicant's case. Concerning the merit of appeal this is not apparent from the grounds in the body of the application and the applicant did not imply (sic) his position by annexing a draft memorandum of appeal.

In submissions in support of the reference, Mr. Mwarania, counsel on record for the applicant, criticised the learned single Judge that he failed to bear in mind that what was annexed to the affidavit in support of the motion for extension of time were not medical reports but medical notes. These, he said, explained the delay by the applicant in taking the essential steps relating to mounting his appeal. He also submitted that the learned single Judge failed to appreciate that further delay was caused by the retrial of the suit. He also observed that the learned single Judge did not fully appreciate the merits of the intended appeal, more so the fact that the applicant's land was sold without a decree and that he was being denied his entire land without being at fault.

In ***Morn Farmers Co-operative Union Ltd. vs. Abdul Aziz Suleman (No.2) [1966] EA 442***, the Court of Appeal for East Africa in considering a ruling in a reference to it said [Newbold, P.],

“May I pause here to deal with one point which counsel for the respondent made. He submitted rightly, as a matter of law, that the Court on an appeal and presumably on a reference of a single Judge, will not interfere with the exercise of the discretion of the Judge from whom the appeal or reference is brought unless it is clear that the Judge was wrong and had exercised his discretion on improper grounds.”

In ***Murai vs. Wainaina [1982] KLR 38***, Wambuzi, J.A. while commenting on what a reference as the one before us is, said:-

“It would appear therefore that, although technically a reference is not an appeal, it is in the nature of an appeal. Under rule 4 of the rules of this Court, the power to grant or refuse extension of time is discretionary.”

Counsel for the applicant in his submissions before us, proceeded as if a reference is an appeal. The power of the Court does not extend to the consideration of the issue whether in arriving at his decision the single Judge was wrong.

The Court is obliged to consider the process of arriving at that decision namely:- whether the learned single judge took into account extraneous factors or that he failed to take into account relevant matter, and thereby came to a wrong conclusion; or for that or other reason he is plainly wrong. That is why in ***Morn Farmers Co-operative Union Case*** (supra), the Court of Appeal for East Africa, said that a Court will be constrained to interfere where either the decision is plainly wrong or that improper grounds were considered in arriving at the decision.

Leo Sila Mutiso v. Rose Hellen Wangari Mwangi No. NAI. 255 OF 1997 (Unreported) has summarized the factors which guide the Court in the consideration of an application under **rule 4** of this Court's rules. The learned single Judge made reference to those factors before he came to the conclusion which we reproduced earlier.

As stated earlier, the learned judge in coming to his decision was exercising judicial discretion. He considered the length of the delay in taking the essential step or steps. He considered the issue of prejudice and also, on a prima facie basis, the merits of the intended appeal. The applicant as stated earlier, complains that the learned Judge failed to consider the reasons which he gave for the delay in bringing this motion. The reason which the applicant gave was that after the decision of the High Court, he fell ill and as a result he was confined at home. He exhibited copies of medical notes relating to his treatment, which the learned single judge considered. He has referred to them in his ruling as medical reports, but they were only medical notes. The applicant has taken issue with that, but the misdescription

of those notes of itself without more, does not avail the applicant of anything. They are in the nature of medical reports. The learned single judge considered them and came to the conclusion that they related to a period outside that within which the applicant should have but did not bring this application. In our view, the learned judge considered all the proper grounds, and it cannot be said that there are grounds he took into account which he ought not to have taken into account or that he failed to take into account a relevant factor before coming to his decision.

This not being an appeal it is immaterial that had we been the ones handling the application, we would have come to a different decision. The grounds for challenging the exercise of judicial discretion are circumscribed, and if it is clear that the learned single Judge did not err in principle or that his decision is not prima facie, wrong; a full Court would have no basis for interfering. We think that the learned single judge properly exercised his judicial discretion and we have no proper grounds for interfering.

In the circumstances, we are constrained to and hereby dismiss the applicant's reference, with costs to the respondent.

Dated and delivered at Nyeri this 2nd day of December, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR