IN THE COURT OF APPEAL
AT NYERI

(CORAM: BOSIRE, J.A (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 370 OF 2009

BETWEEN

GEORGE WACHIRA KIRIRA …….APPLICANT

AND

JOEL MAINA RUTHUTHI ……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 15th November, 2007

in
H.C.C.C. NO. 286 OF 1982
****

RULING

The application before me has been expressed to be brought under ***rules 4***, ***12***, ***63*** and ***87*** of the Court of Appeal Rules, but in a nutshell it is, an application for an extension of time within which to file and serve a notice of appeal and a record of appeal against the decision of the High Court (Makhandia J.) dated 15th November, 2007.
The aforesaid decision was given pursuant to an application under ***Order IXB rule 8*** of the Civil Procedure Rules in which the applicant herein prayed for an order setting aside an order of the same court dated 11th December, 2002. By that order the High Court had dismissed the applicant's application dated 14th January, 2002, for among other reasons the non-attendance of his counsel to prosecute the same.

Makhandia J expressed the view that although the application to set aside was expressed to be brought under ***Order IX8 rule 8*** aforesaid, it was essentially an application for review, and proceeded to treat it as such and based his decision on the principles for grant of an order of review under ***Order XLIV*** of the Civil Procedure Rules allegedly pursuant to the provisions of ***Order L***. ***rule 12*** of the same rules.

In the application before me, Mr. Ndegwa for the applicant has taken issue with the conversion of a setting aside application into a review application and stated that it is one of the issues the applicant intends to raise in an intended appeal to this Court against the ruling of the superior court dated 15th November, 2007 alluded to earlier.

The power of the Court under ***rule 4*** of the Court of Appeal Rules is discretionary. The power is free and is exercisable on the basis of the law and the evidence. The Court is obligated to consider all relevant circumstances in arriving at a decision whether or not to extend the time as prayed. The case of **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. Nai. 258 of 1997**, among other decisions of this Court lay down the general principles to guide the Court in applications under **rule 4**,

aforesaid. The Court has to consider the length of the delay, the reason for the delay, possibly the chances of the intended appeal succeeding and the degree of prejudice, if any, to the respondent if the application is granted. It is trite that those are not necessarily the only factors a court has to consider as each case has to be looked at on the basis of its peculiar facts and circumstances. For instance we now have the overriding objective in civil litigation to ensure not only that in the exercise of its judicial powers to facilitate the just, expeditious and proportionate resolution of matters but also that the resolution of these matters is affordable.

The applicant's land, viz Ruguru/Kiamangu/410 was sold in a public auction on 3rd September, 1998. The respondent was the highest bidder and the property was knocked down to him at a price of Kshs.240,439/=. By order of the High Court the title to the property was transferred to him and the Executive Officer of the High Court was authorized to and did execute the transfer documents. The applicant has refused to surrender the property to him. Instead he has been challenging the various orders the High Court made to effect the transfer.

This is not the first application by the applicant, seeking an order extending the time within which to file a notice and record of appeal. After the decision of 17th November, 2007, the applicant was late in filing and serving a notice of appeal. Upon application this Court (Githinji JA,) granted him an extension and allowed him 14 days within which to file and serve the notice. The applicant timeously, filed the notice of appeal, but he did not serve it on the respondent or his advocates timeously or at all. An appeal he filed pursuant to that notice was later struck out as incompetent on that account. It was thereafter that the applicant brought this application.

This application was lodged in court about a month after the applicant's appeal, to wit **Civil Appeal No. 32 of 2009** was struck out. In his affidavit in support of this application the applicant has not explained the delay in bringing this application and his failure to serve the notice of appeal upon the respondent or his counsel. That has been raised as one of the grounds for opposing this application.

It cannot be gainsaid that a party whose appeal has been struck out as incompetent has the liberty and right to restart the appellate process. It is however also true that he is obliged to explain his failure to take certain essential steps in the struck out appeal if only to enable the court assess his general conduct. The applicant's affidavit in support of the application is, as rightly pointed out by Mr. Njuguna, for the respondent, sketchy and lacking in particularly on several aspects. Much of the details included in this ruling have been gathered from the respondent's replying affidavit. It appears that the applicant brought the application in a half-hearted manner. The background to the case is lacking and one cannot make out fully why the dispute between the parties has taken long to resolve. If, as I can make out, the applicant's land was sold in execution of decree, the applicant has not explained whether the decree is still *in situ* and if so, upon what basis does he hope to convince this Court to set aside the sale in view of the fact that the decree itself will not be the subject matter of his intended appeal.

There are other issues raised by counsel for the respondent, among them the authenticity of the affidavit in support of the application before me. Mr. Njuguna submitted that the affidavit was probably not sworn by the applicant although it purports to have been sworn by him. Annexed to the replying affidavit sworn by the respondent on 14th December, 2009, are documents previously signed by the applicant which on a casual comparison with his purported signature on the affidavit in support of the application before me, clearly show variance of signatures. The signatures of the applicant on previous documents agree, but are at variance with his purported signature on the affidavit before me. As the applicant is seeking the exercise of judicial discretion he was expected to approach the Court with utmost good faith. Whether this variance is something I should close my eyes from is doubtful. Mr. Ndegwa expressed the view that in absence of the opinion of a document examiner, it should be said that the signature on the impugned affidavit is not that of the applicant. That argument does not hold any water. The applicant had notice that the respondent was doubting the authenticity of the signature on his affidavit. Is it not logical that he should have filed a further affidavit to not only deny the allegation but to explain how and why the signature differs from the previous ones?

The conduct of the applicant ever since the ruling against which an appeal is intended was given, reveals

that he has not been diligent in taking the essential steps to mount a competent appeal. He appears to me to be buying time to avoid surrendering the suit property.

For the reasons I have endeavoured to set out I am disinclined to exercise my unfettered discretion in favour of the applicant and dismiss with costs his application dated 3rd December, 2009 and filed in court on 4th December, 2009.

Dated and delivered at Nyeri this 1st day of December, 2011.

S.E.O. BOSIRE
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR