



**AT NYERI COURT OF APPEAL**

**(CORAM: ONYANGO OTIENO, J.A (IN CHAMBERS)  
CIVIL APPLICATION NO. NAI. 304 OF 2010**

**BETWEEN**

**JOSEPH KIRWEYA KAHWAI & 5 OTHERS ..... APPLICANTS**

**AND**

**CHARLES KIRWEYA KAHWAI & 5 OTHERS ..... RESPONDENTS**

**(Being an application for leave to file an Appeal and Notice of Appeal out of time against the Order of the High Court of Kenya at Nyeri (Makhandia, J) dated 24<sup>th</sup> November, 2009**

**In**

**H.C. Misc. Appln. No. 19 of 1997)**

**RULING**

I have before me a notice of Motion dated 18<sup>th</sup> November, 2010 but filed on 6<sup>th</sup> December, 2010 in which the applicants Joseph Kirweya Kahwai and five others are seeking orders against Charles Kirweya Kahwai and five others as follows:-

- “(a) *The surveyor report dated 11<sup>th</sup> June, 2001 was read by court on 24<sup>th</sup> November, 2009.*
- (b) *The applicants became aware that the matter was concluded on 24<sup>th</sup> November, 2009 when they engaged an advocate on 23<sup>rd</sup> June, 2010.*
- (c) The applicants instructed the advocate to review the Orders but unfortunately the application was dismissed on 23<sup>rd</sup> July, 2010.
- (d) The delay is (sic) filing this application is not inordinate.
- (e) The appeal has high chances of success.” There is an affidavit in support of the application sworn by the second applicant, Githinji Kahwai, which on the main, merely highlights the grounds set out in support of the application I have reproduced hereinabove. Together with that affidavit, are annexures which are the extracted order of court given on 24<sup>th</sup> November, 2009, Notice of Appointment of advocates, extracted order of 23<sup>rd</sup> July, 2010. Memorandum of Appeal (I presume it is a draft Memorandum of Appeal) and Notice of Appeal.
- “(i) *In all grounds put forward none of them states why the applicant did not set in motion the process of instituting his appeal in accordance with the Rules of the Court and the superior court.*
- (ii) There is unexplained and unacceptable reasons for such inordinate delay.
- (iii) The applicant has in bad faith deliberately and conveniently failed to include in his application sufficient material in the application to enable the court exercise its discretion.
- (iv) The application contravenes the mandatory provisions of Rule 13 (5) of the court of Appeal Rules and thus is incompetent.
- (v) That the applicant has not explained why he has not included in his application copies of the proceedings of the superior court to enable the court to exercise its discretion.”

In his address to the court, Mr. Kariuki, the learned counsel for the applicants, urged me to note that the applicants never slumbered for as soon as the offending ruling of the superior court was delivered, they sought review of the same order and when that review application was refused, they moved to this Court by way of this application. He stated further that the intended appeal has good chance of success and that as the dispute is between members of a family they should be given a chance to put forward their grievances to avoid any further and future feuds. Mr. Wahome, the learned counsel for the respondents, on the other hand saw no merit in the application. In his submissions, the delay period was inordinate when one considers it from 24<sup>th</sup> November, 2009 when the ruling was delivered to the date of filing the

application or from the 23<sup>rd</sup> July, 2010 when the review application was refused to the date of filing this application. In the first instance, the delay period was over one year whereas in the second instance, it was four and a half months. This delay period, whichever it is, has not been explained according to Mr. Wahome. Further, there is no material annexed to enable the Court form an informed view and exercise its discretion as to whether the intended appeal would be arguable as documents such as proceedings and ruling of the court both in respect of the ruling of 24<sup>th</sup> November, 2009 and the one of 23<sup>rd</sup> July, 2010 were not annexed to the application. Thus, Mr. Wahome contended there is no material the Court would look at so as to exercise its discretion as required by law. To that effect, Mr. Wahome referred me to the ruling of Shah, J.A., (as he then was) in the case of Dr. W.G. Machage t/a Pastor Machage Memorial Hospital vs. Charles Mageto t/a D'Akianga Stationers, C.A Civil Application No. Nai. 28 of 2001 (NRB) unreported and contended that without those annexures, the court had no alternative but to dismiss the application.

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 251 of 1995, this Court stated:-“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly, (possibly) the chances of the appeal succeeding, if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

From the above, it is clear that I cannot grant the application as I have no material upon which to exercise my discretion. Mr. Kariuki talks of the subject matter being a land dispute between members of the same family and need for peace. He raises that in reply to Mr. Wahome, but did not raise it in the applicant’s supporting affidavit nor in his address in chief. In my view, much as there is need for peace in the family, the same must come from both sides and no party should be allowed to advance this argument to frustrate the other side nor should the law be deliberately ignored in pursuit of that need for peace when one party is not interested in abiding by the law. I think, like in the case of Shah v. Mbogo & Another (1967) EA 116 the Court should only use such discretion to avoid injustice to a party who has made efforts to meet the legal requirements but not to assist a party who has slept on his rights or who seeks to delay the cause of justice like the applicants have done in this application. In my view, even with the application of *sections 3A and 3B*, I can’t see how the applicants can be helped. In the result, the application lacks merit, it is dismissed with costs to the respondents. Dated and Delivered at Nyeri this 1<sup>st</sup> day of December, 2011.

J.W. ONYANGO OTIENO  
JUDGE OF APPEAL  
I certify that this is a  
DEPUTY REGISTRAR.