



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPLICATION 266 OF 2009

CHEBASWONY CHEPKIYENGAPPLICANT

AND

SAMSON EMMANUEL KIBETRESPONDENT

(An application for extension of time to file and serve notice and record of appeal out of time from the judgment and decree of the High Court of Kenya at Kitale (Wanjiru Karanja, J.) dated 30th November, 2005

in

H.C.C.C. NO. 53 OF 2001)

RULING

This is a motion under **rule 4** of the Court of Appeal Rules in which **Chebaswony Chepkियeng**, prays for an order extending the time within which to lodge and serve a notice of appeal and thereafter a record of appeal against the decision of the superior court (Wanjiru Karanja, J.) given on 30th November, 2005, in its Kitale High Court Civil Case No. 53 of 2001. The superior court gave judgment in favour of **Samson Emmanuel Kibet**, the respondent herein, as plaintiff in the suit, by decreeing, on the main, that the Land Register in respect of parcel No. Sergoit/Koiwoptaai/Block 1 (Kelji)/9 be altered to add the name of the respondent as a joint registered owner.

The applicant filed a notice of appeal on time, but failed to file a record of appeal within the time stipulated in the rules of this Court for doing so. His case is that he had instructed an advocate, one Chebii, to file an appeal. The said advocate after lodging a notice of appeal in the High Court, addressed a letter, dated 21st December, 2005, to the Deputy Registrar of that court bespeaking copies of proceedings for purposes of an appeal. The advocate, however, did not copy the said letter to the respondent's advocate, with the result that he could not take advantage of the proviso to **rule 81** of this Court's Rules. An application filed to seek an extension of time within which to file a record of appeal was found to be incurably defective and was therefore withdrawn under **rule 55 (6)** of the rules of court.

In the meantime, the applicant was affected by some illness which, according to him, made it difficult for him to pursue the matter with his then advocates. As a result of that there was delay in taking any steps to file an appeal. When he regained his health, he says, he discovered that no appeal had been filed and that his advocate was more preoccupied with a teaching job he had with Moi University. It was then that he engaged another firm of advocates, to wit Gicheru & Company Advocates, to take necessary steps to lodge an appeal. It took time to obtain his file from his previous advocates and that led to further delay.

The applicant contends that his intended appeal is meritorious as in his view the superior court lacked jurisdiction to order alteration of the Land Register in view of the provisions of **section 143 (1)** of

the **Registered Land Act Cap 300** Laws of Kenya.

The respondent opposes this application. His case and his advocate's submission is that, the long delay in filing an appeal has not been satisfactorily explained. Allegation of illness is of no significance as the applicant was not bed-ridden. He took part in proceedings leading to a written consent on the issue of costs. Consequently, whatever illness he might have had did not prevent him from pursuing his intended appeal.

In applications under **rule 4** aforesaid, the court exercises discretionally jurisdiction. It is a jurisdiction which is unfettered and is judicial in nature. The principles which guide the court are clear. The Court has to consider: the length of the delay in taking the essential step, the reason for the delay, the strength of the appellant's case on appeal, among other reasons.

There is no doubt that the delay in taking the essential steps is long. Judgment was delivered on 30th November, 2005. Since then a period of over 5 years has elapsed. The applicant filed his notice of appeal on 14th December, 2005, which was the last day he was supposed to do so. He did it at the last minute. The letter bespeaking copies of proceedings is dated 21st December, 2005. It was filed on 22nd December, 2005, about 8 days before the period stipulated for doing so elapsed. The contents of that letter are deficient. In the first place, the applicant did not request for a copy of the judgment which under the Court rules, is supposed to be certified. Secondly, the letter was not copied to the opposite party. It appears that the applicant's advocates were taking steps half-heartedly. Incidentally a certificate of delay included in the record of the application states that copies of proceedings were applied for on 8th December, 2005. However, a part from the copy of a letter dated 21st December, 2005, there is no letter on record dated 8th December, 2005 bespeaking copies of proceedings. According to the aforesaid Certificate of Delay copies of proceedings were availed to the applicant's advocates on 16th May, 2007 but the applicant did not file **Civil Application No. NAI. 222 of 2007**, for extension of time within which to file a record of appeal, until 23rd August, 2007, over three months upon realizing that an extension of time to file a record of appeal was necessary. That application was subsequently withdrawn at the request of the applicant's counsel allegedly because it was found to be defective. There is no indication on record as to when that application was withdrawn.

The respondent filed a replying affidavit on 10th February, 2010, five days before this motion was placed before me for hearing. In it he disputes the applicant's allegation that he was prevented by illness from pursuing his appeal. He has deposed *inter alia*, that the applicant personally negotiated with him regarding the costs of this suit in the High Court, implying, firstly, that he was fit to pursue his intended appeal, and secondly, that he had accepted the judgment of the superior court. The respondent has also deposed that the judgment against which an appeal is intended has been executed fully, and there is nothing outstanding.

The delay in entering an appeal is clearly inordinate. The delay has not been satisfactorily explained. The applicant's conduct clearly shows that he was not enthusiastic in pursuing the appeal. It is true as he says that he is a man aged 73 years. He did not, however, state that he is too old to do anything towards mounting an appeal. His alleged illness, was not such that he was totally incapacitated.

I concede the dispute between the parties involves land. The respondent's case as pleaded in his plaint dated 19th March, 2001, is that the applicant and himself agreed to contribute some money to purchase a parcel of land which upon registration became Sergoit/Koiwoptaoi/Block.1 (Kurji)/9. The respondent avers that he raised Kshs.402,000/= and the applicant Ksh.578,000/= as purchase price. The land would be shared on a *pro rata* basis. He avers that his share was to be 36.38 and that of the applicant 52.62 acres. The applicant allegedly caused the entire land to be fraudulently registered in his sole name and that provoked the suit. The respondent and applicant both live on the land. The trial court agreed with the respondent and notwithstanding the provisions of **section 143 (1)** of Registered Land Act, that court held that the respondent's name could be inserted in the Land Register as a joint proprietor. The court relied upon the case of **Kanyi v Muthiora (1984) KLR 712** in coming to its decision in which this Court (Kneller, Chesoni and Nyarangi, JJ.A) held:

“The appellant's registration was a first registration the rectification of which is prohibited by section 143 (1) of the Act, however, in this case, the addition of the Respondent's name does not amount to a rectification but an alteration by addition of the Respondent's name to make the register comfortable with the transfer for the land.”

The trial court also relied on another decision: **Mutsonga v. Nyati Civil Suit No. 295/1976**

(Mombasa) in which Kneller J (as he then was) held:

“Though section 143 of the Act forbids any rectification of the register where such rectification, which is the sense in which it is often applied is to correct an entry in a register, and this is different from making an entry recording a lawful transfer ordered by a court.”

Whether or not the applicant’s intended appeal is meritorious, would be a matter for the full court if the applicant had taken all necessary steps to mount an appeal. He sat on his rights, and where he took some steps he was dilatory. I am unable to exercise my unfettered discretion in his favour. Litigation must come to an end. Besides, the applicant is silent on what happened to the earlier notice of appeal filed on 14th December, 2005. A party is not entitled to file more than one notice of appeal against the same decision.

In the result I dismiss the motion dated 2nd September, 2009 and filed in court on 3rd September, 2009, and will award the respondent, the costs of the motion.

Dated and delivered at Eldoret this 17th day of February, 2010

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR