



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 325 OF 2009

BETWEEN

NELSON MUGUKU ..... APPLICANT

AND

ARCHBISHOP RAPHAEL STEPHEN

NDINGI MWANA A'NZEKI ..... 1<sup>ST</sup> RESPONDENT

PALEN D'SOUZA ..... 2<sup>ND</sup> RESPONDENT

THE REGISTERED TRUSTEES OF

THE ARCHDIOCESE OF NAIROBI .... 3<sup>RD</sup> RESPONDENT

(Application for extension of time to file and serve notice of appeal and memorandum of appeal out of time from the ruling and order of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 22<sup>nd</sup> May, 2007

in

H.C.C.C. NO. 189 OF 2003)

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### RULING

This is an application under **Rule 4** of the *Court of Appeal Rules* (Rules) for extension of time within which to file and serve a notice of appeal and a memorandum of appeal against the ruling of the superior court Ang'awa, J. delivered on 22<sup>nd</sup> May, 2007.

The dispute between the applicant and respondents (Church) relate to the ownership of L.R. No. 12948/272 (suit land) Mountain View Estate, Kangemi measuring approximately 0.00908 of a hectare or

0.224 of an acre.

On 27<sup>th</sup> February, 2003 the Church filed a suit against the applicants seeking, among other reliefs, a declaration that the suit land belongs to the church and a permanent injunction restraining the applicant from interfering with the church's quiet possession. The church averred in the plaint, *inter alia*, that it was allocated the suit land by the Commissioner of Lands on 25<sup>th</sup> May, 2001; that the church accepted the allotment, paid requisite fees and developed the plot by constructing St. Joseph the Workers Catholic Church and other buildings and that the applicant claimed ownership of the suit land on 18<sup>th</sup> February, 2003.

The applicant filed a defence and counter-claim claiming that he was the registered proprietor and counter-claiming for eviction of the church from the suit land and damages.

The church filed an application for interlocutory injunction contemporaneously with the plaint. The application was supported by the affidavit of Father Gerald Kevin Whelan – Father in Charge of St. Joseph; the workers Catholic Church, Kangemi erected on the suit land. He deposed in the replying affidavit, among other things, that the suit property was one of the plots in land known as Block V, L.R. 1127/1; that Mount Swiss Developers Ltd. who owned the property initially donated to the church a public utility land in fulfillment of the City Council's requirement for sub-division; that up to 1999 the plot had not been registered in the name of anybody and that the applicant had only laid claim to the land after 16 years.

The respondent filed a replying affidavit to the application deposing, *inter alia*, that he bought the suit land and four other plots in the vicinity in 1983 from Mount Swiss Developers (Kenya) Ltd. and that the suit land is registered in his name. In a later affidavit, the applicant exhibited a copy of a Certificate of Title indicating that he is the registered lessee of the suit land for a term of 99 years from 1<sup>st</sup> July, 1983. The Certificate of Title is shown to have been issued on 9<sup>th</sup> November, 1987. According to the valuation report made by M/s. Bageine Karanja Mbuu Ltd. in 2004, there are four double-storeyed blocks of residential flats erected on the suit land all valued at Shs.8,900,000/= while the plot is valued at Shs.2,500,000/=. There are also buildings constructed on the neighbouring plot L.R. No. 1294/290 extending to the suit land.

When the suit came for hearing on 6<sup>th</sup> May, 2004, the parties settled the matter. It was agreed that the church do pay the applicant Shs.3,500,000/= as compensation for the plot. The full terms of the consent are embodied in the decree given on 6<sup>th</sup> May, 2004 and are briefly that; the church was to pay first instalment of Shs.1,800,000/= before 31<sup>st</sup> May, 2004 and the balance of Shs.1,700,000/= on or before 30<sup>th</sup> January, 2005; that the applicant was to hand over relevant documents and was to execute the transfer documents on payment of last instalment; that transfer charges were to be paid by the church, that in default of any one instalment, the applicant would take possession of suit land immediately and, lastly, that, the church would pay costs of the suit to the applicant. The church paid the first instalment on time but failed to pay the second instalment. By an application filed on 5<sup>th</sup> July, 2005 the respondent applied for eviction of the church from the suit land. The church apparently filed a replying affidavit dated 25<sup>th</sup> July, 2005 which has not been included in the record of the present application. On the hearing date of the application, however, counsel for the church did not attend. Instead he sent another counsel who applied for adjournment on the ground that counsel for the church was sick. The trial judge (Aluoch J.) (as she then was) apparently rejected the application for adjournment and granted an order of eviction on 1<sup>st</sup> November, 2006. That was not the end of the matter for the church filed an application on 16<sup>th</sup> January, 2007 seeking, amongst other prayers, leave to apply for extension of time to pay the balance of the decretal sum.

In support of the application Father Ludwig Van Heucke explained the failure to pay on time as due to lack of advice from and the unavailability of the church's lawyers. The application was heard by Ang'awa, J. who blamed the church's lawyer for negligence and allowed the application on 22<sup>nd</sup> May, 2007, and extended time for payment of the balance of the decretal sum by 30 days. She further ordered

that the money be deposited in court, if the applicant failed to accept payment and that the applicant should execute the transfer documents in favour of the church and in default the documents to be executed by the Registrar of the High Court. The applicant intends to appeal against those orders.

It is trite law that the unfettered discretion of the Court to extend time under **Rule 4** should be exercised judicially. The applicant should demonstrate that he is entitled to the exercise of discretion in his favour by showing, among other things, that the intended appeal is not frivolous; that the application has been brought within a reasonable time, that is, without inordinate delay; that the church would not suffer undue prejudice if the application is allowed, and, that, in accordance with the overriding objective principle, it is just in all circumstances of the case to allow the application.

As regards the issue of delay, the applicant intends to appeal against the ruling of the superior court delivered on 22<sup>nd</sup> May, 2007. The present application was filed on 13<sup>th</sup> November, 2009 – that is 2½ years after the decision. Both the applicant and his advocate, Mr. Andrew Wandabwa has explained the delay in their respective affidavits. Both affidavits show that the delay was on the part of the applicant's erstwhile lawyers and the lawyers now on record. It has transpired that the applicant's former advocates, indeed, filed a notice of appeal which is dated 29<sup>th</sup> May, 2007 and subsequently filed *Civil Application No. Nai. 259 of 2007* in this Court on 22<sup>nd</sup> October, 2007 seeking stay of execution of the orders of Ang'awa J. given on 22<sup>nd</sup> May, 2007 pending appeal. It is conceded that the notice of appeal is still existing and that the application for stay of execution has not been prosecuted. It is that notice of appeal which sustains the pending application for stay of execution. Although by **Rule 82 (a)** a notice of appeal is deemed to have been withdrawn if a party does not institute an appeal within the prescribed time, this Court has consistently held that a formal application should be made to have the notice of appeal struck out or expurged from the record. To the extent that the applicant seeks extension of time to file a notice of appeal when there is already a notice of appeal on record, the application is incompetent.

It follows therefore, that I can only consider the application for extension of time to file a record of appeal.

By **Rule 81**, the record of appeal should have been filed within 60 days of the date when the notice of appeal was lodged. By proviso to that rule, the time certified by the registrar as required for preparation and delivery of a copy of the proceedings provided is excluded from computation of time, that an application for a copy of such proceedings is made in writing within 30 days of the date of the decision and a copy thereof sent to the respondent. The applicant does not rely on the proviso to **Rule 81** and so no period is to be excluded in computing time. It follows therefore, that the applicant is required to explain the delay from 29<sup>th</sup> May, 2007 when the notice of appeal was filed. Mr. Wandabwa deposes that when he was instructed by applicant to take over the case from the applicant's former advocates, M/s. Enonda Makoloo Makori & Co. Advocates, he requested the applicants former advocates to forward all relevant documents to him; that upon getting the documents he noticed that the notice of appeal was not signed nor sealed by the Deputy Registrar, that he made efforts to obtain a sealed and signed copy but could not get any; that in early October, 2009, he sought professional advise from senior advocates; that he was later advised that a signed and sealed copy was necessary and that by the time he got the advise, time for filing the record of appeal has elapsed. He takes full responsibility for delay. He does not disclose in the supporting affidavit when he was instructed to take over the case. Nor has he exhibited a notice of change of advocates. It is clear however, that the notice of motion – *Civil Application No. Nai. 259 of 2007* for stay of execution was drawn by his firm M/s. Wandabwa advocates on 22<sup>nd</sup> October, 2007. There is also a letter dated 12<sup>th</sup> March, 2008 written by Mr. Wandabwa asking the Deputy Registrar of the High Court to supply signed and sealed copies of the notice of appeal. In my view, the explanation given for the long delay is not plausible. It is incredible that it could have taken over 2 years to verify whether a signed and sealed copy of notice of appeal existed or that a signed and sealed copy was necessary. It is also incredible that professional advice was required regarding the format of a notice of appeal seeing that **Rule 74** provides what the notice should contain and even prescribes a form – Form D, in the First Schedule to the Rules.

I conclude therefore, that the delay in this case is inordinate and inexcusable and thus disentitles the

applicant of favourable exercise of judicial discretion.

The applicant merely deposes that the intended appeal is not frivolous without disclosing the grounds of the intended appeal. Mr. Wandabwa does not even refer to the merits of the intended appeal in his supporting affidavit. It is stated in the body of the application that applicant has a plausible appeal with a high chances of success. Again, the grounds of the intended appeal has not been disclosed. Moreover, the applicant has not annexed a draft memorandum of appeal.

Thus, the applicant has not demonstrated in the documents filed in court that the intended appeal raises arguable issues fit for consideration by the Court.

The church will suffer great prejudice, if the application is allowed. Due to long period of inactivity by the applicant, the orders that the applicant intends to appeal against were executed. The balance of the decretal sum – Shs.1,700,000/= was deposited in the superior court after the applicant failed to accept the money. The Registrar of the High Court executed the documents after the applicant failed to surrender documents of title and to execute the transfer and the church was registered as proprietor of the suit land on 22<sup>nd</sup> November, 2007. A provisional Certificate of Title was issued on 29<sup>th</sup> January, 2009.

The church has constructed four blocks of flats whose value in 2004 was almost Kshs.9,000,000/=. It is now much more. The applicant has already received Kshs.1,800,000/= in partial satisfaction of the decree.

On the other hand the decretal sum of Shs.3,500,000/= has been paid by the church. I do not see any prejudice or injustice to the applicant unless he expects to acquire free of charge the four blocks of flats constructed on the plot by the church in addition to retaining Shs.1,800,000/= already paid to him.

Lastly, it is in conformity with the overriding objective principle in **Section 3A** of the *Appellate Jurisdiction Act* that this application which seeks to prolong the already protracted dispute should be rejected.

For those reasons, I dismiss the application with costs to the 3<sup>rd</sup> respondent.

Dated and delivered at Nairobi this 24<sup>th</sup> day of March, 2010.

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**