



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 244 OF 2009**

**BETWEEN**

**JOSEPHAT KARIUKI KAMAU .....APPELLANT**

**AND**

**PIAS NUNGARI KANGARI & ANOTHER .....RESPONDENT**

*(Application for extension of time to file an intended appeal out of time from the ruling of the High Court of Kenya at Nairobi (Etyang' J.) dated 21<sup>st</sup> March, 2000*

**in**

**H.C.SUCC. C. NO. P & A 1123 OF 1989)**

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**RULING**

In a ruling dated and delivered on 21<sup>st</sup> March 2000, in the High Court of Kenya at Nairobi P & A No. 1123 of 1989, Etyang' J. (as he then was) distributed the properties of **Esther Gathoni Kamau** (deceased) between **Pias Nungari Kamau** and **Ernest Mwaura Kamau** on the one hand and **Josephat Kariuki Kamau** on the other hand. Josephat Kariuki Kamau, the applicant herein, felt aggrieved by the ruling and wanted to appeal.

The record shows that he filed notice of motion for leave to file notice of appeal out of time on 9<sup>th</sup> June 2000 in this Court. Vide a notice of withdrawal under **Order 24 rule 1** of the Civil Procedure Rules, the applicant, acting in person withdrew that notice of motion. He says he did so on wrong advice of his advocate, but all the same he duly signed that notice of withdrawal in person. In response to that notice, a letter dated 21<sup>st</sup> November 2000 was addressed to the applicant by the Deputy Registrar of this Court informing him that the application was marked withdrawn. That was Civil Application No. 158 of 2000.

Sometimes later, about five years later, in the year 2006, the applicant filed another application for extension of time to file notice of appeal. It was Civil Application No. NAI. 35 of 2006. That application was placed before Tunoi, JA who heard it as a single Judge in chambers. The learned single Judge, after considering the application, dismissed it in a ruling dated and delivered on 27<sup>th</sup> April, 2006. In dismissing it, Tunoi JA had this to say:-

***“The procrastination in bringing this application is prejudicial to the respondents. To prolong the dispute by a frivolous appeal, also is detrimental to the interests of both parties. The estate has been fully administered according to the order of Etyang’ J. and the applicant is collecting rents.***

***The inordinate delay involved makes me not exercise my discretion in favour of the applicant. I dismiss the application with costs.”***

The applicant was still dissatisfied with that ruling. He sought a reference to the full Court. That was granted and the reference proceeded before the full court. In a ruling dated and delivered on 14<sup>th</sup> November 2008, the full court refused the reference stating:-

***“In the end, we decline to reverse the decision of the single Judge pursuant to rule 54 (1) of the Court of Appeal Rules, and dismiss the reference to the full court with costs to the respondent.”***

Normally that would have been the end of the entire desire to lodge an appeal against Etyang’ J’s ruling dated 31<sup>st</sup> March 2000, but unfortunately it was not. About nine (9) months later, the applicant was back in court with this notice of motion before me dated 6<sup>th</sup> August 2009 and filed into the court on 11<sup>th</sup> August 2009. He is seeking three orders namely:-

- “1. That this Honourable court be pleased to extend time for serving notice of appeal out of time in terms of the annexed draft notice of appeal.***
- 2. That cost of an (sic) incidental to this application to abide the result of the intended appeal.***
- 3. That any other order this court may deem fit to grant.”***

It is filed on grounds:-

***“(a) That this application has been brought without delay.***

***(b) That this is fair and just for the applicant to be given an opportunity to argue his intended (sic) for it to be determined on merit.***

***(c) That the delay to serve the notice of appeal and lodging appeal was not intentional on the part of the applicant.”***

Before me, the applicant who prosecuted his application in person mainly insisted that he did not know his application was withdrawn even after he was shown the notice of withdrawal duly signed by him. Further he insisted that he wanted to have his appeal heard as other people had deprived him of his property. Mr. Kamaara on the other hand gave the history of the matter and urged me to dismiss the application as a similar application on the same issue had been heard and disposed of by a single Judge whose decision was confirmed on a reference to the full Court.

This notice of motion is ill advised and cannot, in law, succeed. The main reason is that I have no jurisdiction to entertain it because, arising from the decision of Etyang’ J. dated 21<sup>st</sup> March 2000, an application for extension of time to file notice of appeal was filed, heard by a single Judge, Tunoi J. and was dismissed. A reference against that dismissal was sought, granted, heard and also dismissed thereby leaving the single Judge’s decision confirmed as the decision of the whole Court. In the event, I have no powers to entertain a similar application on the same issue as for me to do so, would not only mean sitting on appeal upon a decision of a single Judge but also sitting on appeal against decision of a full Court. I have no such powers and the law is clear.

Even, if I were to be naive as to assume such powers, I would still not grant it as the delay from the date the full court confirmed single Judge's decision to the date it was filed i.e. for 14<sup>th</sup> November 2008 to 14<sup>th</sup> August 2009 a delay of about nine (9) months has not been explained at all and no attempt was made to explain it. Further by the time Tunoi J. heard the same matter the estate had been fully administered. That was way back by April 2006. The learned Judge found it would have been prejudicial to make such an order. Today, the period has increased by another four years. It would be more prejudicial to the respondents to open up the issues. I want to make it clear that my comments here about lack of explanation and prejudice are only matters that would have militated against allowing the appeal if I had jurisdiction to hear it but the main and only reason for refusing it is that I have no jurisdiction whatsoever to entertain the application.

In short the notice of motion dated 6<sup>th</sup> August 2009 and filed on 11<sup>th</sup> August 2009 is dismissed with costs to the respondents.

***Dated and delivered at Nairobi this 28<sup>th</sup> day of May, 2010.***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**