

IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPLICATION 163 OF 2009

WAGECHE MARIYUAPPLICANT

VERSUS

MUTURI MARIYU.....RESPONDENT

(Application for extension of time to serve notice and record of appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Nyeri (Juma, J.) dated 17th December, 2002

in

H.C.C.C. No. 45 of 2000)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file an appeal from the judgment and order of the superior court (*Juma, J.*) dated 17th December, 2002. The application is supported by an affidavit sworn by the applicant, **Wageche Mariyu**.

The judgment in the case before the superior court was delivered on 17th December, 2002, and a notice of appeal and the record of appeal was filed within time. However, when the appeal came up for hearing on 20th May, 2009, the applicant's learned counsel, **Mr. Wachira**, himself brought to the attention of the Court that certain primary documents were missing in the record of appeal, and on that account, the appeal was struck out as being incompetent before the Court. Thereafter, the appellant promptly filed this application for extension of time. There has been absolutely no delay in prosecuting the same.

The respondent has not filed any affidavit in reply. However, his learned counsel, **Mr. Gacheru**, has filed grounds of opposition stating that the applicant's further affidavit filed in support of the application to extend time offends the provisions of **Order 18 Rule 3(1)** of the Civil Procedure Rules, and accordingly must be struck out. He submits that the applicant has not identified the source of his information in paragraphs 2, 3, 4 and 5 of the supporting deposition. Those paragraphs are as follows:-

“2. THAT my appeal Civil Appeal No. 326 of 2003 from the High Court's judgment to this Honourable Court has been pending from 21st November 2003.

3. THAT on 20th May 2009 the Appeal was struck out for being incompetent (annexed is a copy of the said Ruling marked WW-1)

4. THAT the Record of proceedings in the Superior Court was missing and the appeal had to be struck out.

5. THAT save for the missing record of the proceedings the Record of Appeal was properly before the Court.”

As it is quite evident, the above paragraphs contain information of a factual nature, all within the knowledge of the applicant, the deponent. Accordingly, I do not see the basis of the respondent's objection, which I find to be technical, untenable and contrary to the spirit

of the new **sections 3A** and **3B** of the Appellate Jurisdiction Act, and I reject the same.

Rule 4 of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application**

No. Nai 251 of 1997 where 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.”

I have taken into account all the factors indicated above, including the fact that the subject of dispute here involves land, and the issue of trust where the parties are brothers. It is a matter that was struck out on a technicality and one that requires a final resolution.

Accordingly, and for reasons outlined, I am of the view that this application has merit and the same is allowed. The notice of appeal shall be filed and served within the next seven days, and the memorandum and record of appeal within fourteen days thereafter, failing which these

orders shall lapse. The costs shall be in appeal.

Dated and delivered at Nyeri this 13th day of May, 2010.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR