



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**CIVIL APPLICATION 301 OF 2009**  
**BETWEEN**

**BONIFACE NJUGUNA GAKURU .....APPLICANT**

**AND**

**PAUL NJOROGE GAKURU .....RESPONDENT**

*(An application for leave to file and serve notice and record of appeal out of time against the judgment of the High Court of Kenya (Makhandia J.) dated 22<sup>nd</sup> July, 2009*

**in**

**H.C.C.C. NO. 92 OF 2007)**

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**R U L I N G**

The applicant has invoked **rule 4** of this Court's Rules in seeking an extension of time to file and serve a notice of appeal and record of appeal out of time against the judgment of Makhandia J. delivered on the 22<sup>nd</sup> July 2009 in High Court Civil Appeal Nyeri No. 920 of 2007. In support of the application the applicant has relied on grounds in the body of the application namely, that the applicant is not guilty of inordinate delay; the respondent is not likely to suffer any prejudice and that the applicant has a good appeal with high chances of success. In addition the applicant has more extensively explained the above grounds in an affidavit in support of the application sworn on 29<sup>th</sup> September 2009.

The principal grounds relied on by Mr. Nganga, learned counsel for the applicant is that the applicant's advocate at the time the judgment was delivered on 22<sup>nd</sup> July 2009 had advised that there was nothing more which could be done and that by the time the applicant sought advice from the second advocate Mr. Nganga, the time for filing the notice of appeal had expired. Mr. Nganga further submitted that the applicant was outside the prescribed time for the filing of the notice of appeal by 37 days which was largely due to the change of legal representation and that this delay was not in the circumstances inordinate and could be excused. As regards the chances of success of the appeal Mr. Nganga explained that as the subject matter of the dispute in both the District Land Disputes Tribunal and the Provincial Land Disputes Tribunal and by extension, the decree in the Resident Magistrates Court involved a registered title, he intends to argue on appeal that the District Land Disputes had no jurisdiction to deal with registered land and that the tribunal's award was a nullity and therefore all the other bodies which handled the matter thereafter perpetuated a nullity and consequently the superior court had seriously misdirected itself on the matter.

He concluded the submissions by stating that since the matter involved land and it is not likely to be interfered with in terms of ownership between now and the determination of the intended appeal, the respondent would not experience any hardship or suffer prejudice.

On her part Miss Mwai contended that the application was misconceived and therefore an abuse of the court process; that no reasons for the delay of 37 days was given; that no leave had been sought and allowed by the superior court and

therefore there is currently no right of appeal to this Court; that the court has no jurisdiction to entertain the application and finally that as the application in the superior court was heard on merit it was properly dismissed instead of being struck out.

I have considered the factors which guide the exercise of this Court's discretion under **rule 4** – see ***Leo Sila Mutiso vs Rose Hellen Wangari, Civil Appeal No. 255 of 1997 (unreported)***. I have also considered the factors which assist in giving effect to the overriding objective as set out in the Appellate Jurisdiction Act. I have deliberately brought in this important consideration, because the 02 principle is the whole objective of the Appellate Jurisdiction Act and therefore the 02 principle is both substantive and procedural. The factual basis is that the total delay occasioned was 37 days which period elapsed as the applicant made arrangements to change representation and I have also taken into account that the matter involves ownership of land. In addition, I have also taken into account the apparent arguability of what prima facie appears to be a substantive jurisdictional issue touching on the initial tribunal and the subsequent decision making bodies and for all these reasons my inclination is to grant a reasonable extension of time.

Since the purpose of the overriding objective is to enable this Court to do justice in the special circumstances of each appeal, I consider that in the special circumstances before me preventing the applicant from having an appeal which touches on jurisdiction heard on merit because of a delay of 37 days and which in my view has been satisfactorily explained would be unjust.

All in all, I allow the application and order that the applicant files and serve a notice of appeal together within 14 days from the date hereof and a record of appeal within 14 days of the service of the notice of appeal. I further order that the costs abide the outcome of the appeal. It is so ordered.

***Dated and delivered at Nyeri this 24<sup>th</sup> day of June, 2010.***

**J. G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**