



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPLICATION 226 OF 2009

BETWEEN

1. ELIAS NJAGI NJOKA

**2. PHYLIS MICERE KUBUTAAPPELLANTS
AND**

KABITA KIBOTHO.....RESPONDENT

*(An application for extension of time to file notice of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nyeri (Okwengu, J.) dated 27th February, 2004
in*

H.C.C.C. No. 65 of 1997)

RULING

This application by notice of motion is under rule 4 of the Court of Appeal rules. It seeks leave of this Court to extend the time for the applicant to file the record of appeal against the superior court's decision (*Okwengu, J.*) delivered on 27th February, 2004 at Embu High Court. The grounds upon which the application is founded as shown on the face thereof are:-

“(a) That the applicant did not file the record of appeal due to the mistakes of their former advocates.

(b) That it is mete and just to allow this application.”

The supporting affidavit in the main blames previous counsel, *M/s Wambugu Kariuki & Associates Advocates* for the delay in filing the record of appeal in that although the applicants paid the said counsel some deposit to enable them file the said record of appeal this was not done. The applicants who had been assured by previous counsel that the appeal would be filed were surprised when they went to Kianyaga Divisional Offices and found the suit land amongst the parcels awaiting consent by Gichugu Land Control Board for transfer. This then prompted them to instruct present counsel *M/s Magee Wa Magee Advocates* who then filed the application herein on 3rd July, 2009. That by mistake this application had earlier been filed at Embu High Court on 29th May, 2009 instead of being filed in this Court.

A replying affidavit by the respondent opposed the application on the grounds that there had been undue delay due to the applicants' constant change of lawyers. That the applicants had in the year 2006 filed an application for stay of execution which was dismissed, and thereafter the respondent was duly registered as proprietor of the suit land, which he later subdivided into ten portions which he had since transferred to new owners.

The application was heard on 12th May, 2010 wherein *Mr. Githinji* appeared for the applicants while *Mr. Muyodi* holding brief for *Mr. Rugaita* appeared for the respondent. Though in his submissions *Mr. Githinji* did not tell the Court when the applicants made discoveries

about the subdivision of the suit land he stated that he – as new counsel was instructed in November, 2008 and he applied for extension of time on 7th November, 2008 in the High Court at Embu instead of the Court of Appeal at Nyeri. He submitted that the delay had been explained and that the intended appeal had overwhelming chances of success as shown by the grounds in the draft memorandum of appeal. That although the judgment had already been executed, the Court had power to set aside the order of the superior court and to have the titles to third parties revoked. According to his submissions the mistake of counsel should not be visited on the parties.

Mr. Muyodi on behalf of *Mr. Rugaita*, learned counsel for the respondent opposed the application on the basis of the replying affidavit and because the applicants had not demonstrated that they acted diligently. That there was no indication on the Court record to show that the applicants had applied for proceedings in time or at all. According to the submissions the application was defective and/or incompetent because though the suit land had been sub-divided and portions thereof transferred to about twelve other people they were not included as parties to the intended appeal.

The judgment out of which the intended appeal is based was delivered on 27th February, 2004. The applicant was represented by an Advocate of the High Court of Kenya, who duly filed a notice of appeal on 12th March, 2004. This was within the prescribed period. In spite of this, however, no record of appeal was filed as required by law until when an application was filed by the present firm of lawyers representing the applicants at Embu High Court on 7th November, 2008 for extension of time. Of course the application was filed in the wrong court and did not make any sense. This was after more than four years since the judgment was delivered by the superior court. In spite of this apparent mistake it is not revealed when the applicants' counsel realized they had filed the application in the wrong court – though the present application was filed herein on 3rd July, 2009 – which is a delay of over five years. The present counsel for the applicants blames previous counsel for the delay between 12th March, 2004 to the time they were instructed to handle the matter but give no explanation or a reasonable one as to why they themselves filed an application for extension of time in the High Court at Embu on 7th November, 2008 or why they delayed for another six months to file the present application. I agree with counsel for the respondent that this unexplained long delay reveals that the applicants and/or their counsel were not diligent in handling this matter given the sensitivity of land matters.

I cannot predict or say much about the possibility of success of the intended appeal but given the agreement by counsel for both parties that the judgment of the superior court has been executed and the suit land has been sub-divided and registered in the names of many other third parties who are not parties to the intended appeal, I cannot but echo the sentiments of counsel for the respondent that granting this application will be highly prejudicial to the respondent. In the ultimate I am not persuaded that the factors to be taken into consideration before the Court exercises its discretion in an application of this nature have been met, – see *Mwangi v Kenya Airways Limited [2003] KLR 486*. Consequently this application is dismissed but I direct each party(ies) to bear their/his own costs thereof.

Dated and delivered at Nyeri this 24th day of June, 2010

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

