



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL APPLICATION 371 OF 2007

BETWEEN

GATUGI MUGIRAAPPLICANT

AND

ONESMUS GITUBU M'KANATA1ST RESPONDENT

LAWRENCE MIRITI BAKARI2ND RESPONDENT

*(Application for extension of time to file notice and record of appeal from a judgment of the High Court of Kenya at Nyeri
(Ouko, J.) dated 7th November, 2008*

in

H.C.C.A. NO. 21 OF 2006)

RULING

The application before me dated 23rd December 2009, seeks extension of time to enable the applicant to file a notice of appeal and the record of appeal out of time. The application invokes **rule 4** of this Court Rules and is based on the grounds appearing in the body of the application and the applicant further relies on the affidavit in support of application sworn by the applicant on 6th December, 2009.

The application is opposed by both respondents but it is only the second respondent who has filed an affidavit in reply sworn by her on 6th April 2010.

The facts giving rise to the application and the intended appeal are that in the Chief Magistrate's Court at Meru the applicant was a judgment debtor of the 1st respondent and in execution of the decree by the judgment creditor the applicant's parcels of land namely Igoji/Kinoro/1324 and Igoji/Kinoro/1235 were sold to the 2nd respondent pursuant to provisions of **Order 21** of the Civil Procedure Rules.

In those proceedings the applicant challenged the legality of the sale and the Chief Magistrate Court J.R. Karanja (as he then was) dismissed the application challenging the sale and following an appeal to the High Court, by a judgment dated 7th November, 2008 Ouko, J. dismissed the appeal. It is this order of dismissal which is the subject matter of the intended appeal. The applicant took the following steps:-

"(1) A notice of appeal was filed on 24th November, 2008 one day outside the 14days according to the applicant but 3 to 4 days according to the respondents.

(2) This application was filed on 23rd December, 2009 a period of one year one month approximately.

Perhaps it is important also to highlight that the initial judgment which led to execution of the decree was given in 1993 and execution carried out in the year 2005 and the second respondent was registered as owner of the parcel of land in 1995.

At the hearing of the application the applicant was represented by learned counsel Mwenda Mwarania whereas the 1st respondent was represented by learned counsel Mr. Mwirigi Kaburu and the second respondent was represented by Mr. C. Kariuki.

In his submission Mr. Mwarania just highlighted the six grounds appearing in the body of the application. The principal submissions were that the execution was not supported by a decree; that the prohibitory orders were never registered against the title before the sale; that the delay of one year one month was due to the indisposition of the applicant and a change of lawyers and that the applicant was born on the contested parcels of land and finally no prejudice would be caused to the respondent because the stale of the titles from 2005 has remained the same.

Mr. Kariuki learned counsel for the 2nd respondent submitted that the applicant had not annexed any draft memorandum of appeal and therefore he could not demonstrate that he had an arguable appeal. In any event the decree having been given in the magistrate's court the same must have been drawn by the same court as is the practice and therefore it must have been in existence since the applicant's counsel was present at the time the terms and conditions of sale were settled yet he did not raise the issue of the alleged missing decree and that the only issue he raised was whether the intended sale price was adequate. Counsel stated that the applicant had over the years filed several applications and concerning the subject matter and in his view

the application was aimed denying the respondent purchaser quiet possession yet the judgment which gave rise to these proceedings was given in 1993.

The learned counsel also submitted that the length of delay of one year one month was inordinate and urged the Court to particularly note that from 1993 to year of the judgment is approximately 17 years and in the exercise of my discretion I should take this into account, since there must be an end to litigation.

Mr. Mwirigi Kaburu for the 1st respondent associated himself with the submissions of the learned counsel for the 2nd respondent Mr. Kariuki but submitted that the medical reports produced in support of the application related to the period upto 2005 and the other medical reports after this are illegible. Concerning chances of the intended appeal he submitted that no draft memorandum of appeal was exhibited.

I have also considered the submissions of counsel as outlined above and also affidavits filed in this application.

In exercising the Court's powers I have largely been guided by the requirements set out in the case of WASIKE V. SWALA [1984] KLR 592 as follows:-

“(a) That there is merit in the appeal

(b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

(c) That the delay has not been inordinate.”

I have also taken into account a line of later decisions of the Court concerning the nature of the Court's discretion.

I have also focused my attention on the requirements as set out in the overriding objective. With the above in view I think that the initial delay in filing the notice of appeal would have been excusable because the delay ranged from 1 to 3 days only. However, the subsequent delay of one year one month in the filing the application for extension of time has not been satisfactorily explained. Although there were medical reports upto 2005, there were no corresponding medical reports for the period from 2005 to 2009. Those submitted were illegible and unhelpful to the applicants' case. Concerning the merit of appeal this is not apparent from the grounds in the body of the application and the applicant did not amplify his position by annexing a draft memorandum of appeal.

Turning to the requirement of prejudice I have taken into account the fact that prima facie the 2nd respondent is a purchaser for value who has had a title in his name since 1995 and that title stems from final judgments of the two courts below.

In my view, these two considerations do reflect some prejudice to the decree holder who has been denied finality since 1993 and the purchaser for value, (who has in some past decisions being described as the darling of the court) the second respondent has also been kept away from properties registered in his name since 1995. All in all, even if I were to determine this matter solely on the accepted factors under **rule 4** my inclination would be to reject the application since the delay of one year one month has not been satisfactorily explained and in any event it is inordinate.

As stated above I am conscious of the need of the court to have regard to the requirements of the overriding objective when exercising its powers under this Court's Rules and the provisions of the Appellate Jurisdiction Act so as to give effect to the overriding objective. Accordingly in the circumstances described above, I cannot possibly give effect to the 02 principle by granting the application because the delay of one year one month is patently inordinate. In my view it goes counter to the 02 principle in that it would cause further delay and enhance costs. Delay and cost constitute the main scourge of the civil justice system and I consider that we have a responsibility to address the two in each case. The 02 principle has also in my view given me a wider latitude and for this reason enables me to take into account that the judgment that gave rise to the challenged execution was given nearly 17 years ago. In my interpretation of the 02 principle it does also embrace what has often been described as the need to bring litigation to an end. Achieving finality in disposing of cases or appeals is an important cog in the wheel of justice and in my view constitutes one of the principal aims of the 02 principle.

With all the above in view, I would dismiss this application with costs to the respondents. It is so ordered.

Dated and delivered at Nyeri this day 24th 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