



IN THE COURT OF APPEAL
AT NYERI
CIVIL APPLICATION NO.224 OF 2008
BETWEEN
JOHN NJUE NYAGA.....APPLICANT

AND
NICHOLAS NJIRU NYAGA
HARRISON IRERI NYAGA.....RESPONDENTS

(Application for extension of time within which to file and serve record of appeal from the judgment and order of the High Court of Kenya at Embu (Khaminwa, J) dated 30th October, 2007

in

H.C.C.C NO. 30 OF 2006)

RULING ON REFERENCE TO FULL COURT

JOHN NJUE NYAGA, the applicant in this reference, made an application before a learned single Judge of this Court (Githinji, JA) under **rule 4** of the Court of Appeal Rules for extension of time within which to file and serve a record of appeal against the judgment of the superior court (Khaminwa, J) dated 30th October 2007 in High Court Civil Appeal No 30 of 2007. The learned single Judge dismissed the application and hence this reference.

Rule 54(1) (b) of the Court of Appeal Rules (“the Rules”) gives the full Court power to vary, discharge or reverse a decision made by a single Judge of this Court. However in doing so, the full Court must be satisfied that in coming to his decision the single Judge took into account what he ought not to have taken into account or failed to take into account what he ought to have taken into account or that he misapprehended some aspect of the law or that he failed to appreciate the weight and bearing of the evidence and thus reached a wrong decision in law, or that the decision itself is so plainly wrong that no reasonable tribunal could have come to it, taking into account all the circumstances of the particular case – see for example, **LEO SILA MUTISO VS ROSE HELLEN WANGARI MWANGI**, Civil Application No. NAI 255 of 1997 (unreported), **MWANGI VS KENYA AIRWAYS LTD [2003] KLR 486** and **HENRY MUKORA MWANGI VS CHARLES GICHINA MWANGI**, Civil Application No Nai 26 of 2004 (unreported).

The dispute the subject matter of the intended appeal arose this way. The applicant is the registered proprietor of a parcel of land known as Kagaari/Kigaa/1621. The respondents, who are his brothers, sued him before the District Land Disputes Tribunal to compel him to sub-divide the said parcel of land and to transfer some portions there from to the

respondents on the basis that the disputed land belonged to their deceased father and that the applicant was registered as a trustee for his father's children.

It is apparent that the District Land Disputes Tribunal found for the respondents, but, the applicant being aggrieved by that decision, preferred an appeal to the Provincial Land Disputes Appeals Committee which on 4th April 2006 upheld the decision of the District Land Disputes Tribunal. The applicant then appealed to the High Court of Kenya at Nyeri.

The applicant contended, in the main, before the superior court that:-

1. *The Appeal Committee failed to appreciate the fact that determination of the question of ownership of land was outside the mandate of Section 3 of the Act 18 of 1990.*
2. *The existence of trust cannot be established by the tribunal under the provisions of Section 3 of the said Act*
3. *The Tribunal lacked jurisdiction in determining issues relating to the suit land as the respondents' claim was of customary rights over land to which the appellant had an absolute and indefeasible right. And also that respondent's claim had been extinguished under Limitation of Actions Act Cap. 22 as it was not made within 12 years.*

The learned Judge in a short judgment held:

“I do not find that the Appeals Committee acted without jurisdiction. The trust was admitted and issue of customary rights were not raised. The Tribunal did not interfere with registered rights but it ordered the trustee to comply with the terms of trust. The appellant had no absolute and indefeasible right as he admitted he held the land in trust for the children of his father.

On the issue of Limitation of Actions Act this was not raised and does to apply to trusts issue of this nature. See Section 20 (1) of Cap 22..... The appeal is dismissed with costs.”

The applicant timeously lodged a notice of appeal on 9th November 2007. He collected the copies of proceedings and judgment from the superior court on 15th December 2007. His advocates then compiled the record of appeal which was ready by 22nd December 2007. However, it came to pass that the same was not lodged immediately thereafter because of the Christmas vacation and due to the fact that the applicant could not travel to Nairobi in the early days of the new year due to the post-election chaos.

The applicant being conscious of a perceived delay filed an application similar to this one on 20th February 2008 seeking extension of time to lodge an intended appeal. The said application being Civil Application No. NAI 28 of 2008 was later withdrawn due to latent procedural defects. It was withdrawn on 2nd July 2008.

It is worthy of note here that the applicant ought to have filed his intended appeal on or before 8th March 2008 since the applicant had 60 days from 15th December 2007, having discounted the Christmas vacation as per **rule 3(e)** of the Court of Appeal Rules. It follows, therefore, that civil application No. NAI 28 of 2008 was filed before the time limited for the filing of the intended appeal had expired. The application now before us was filed on 16th July 2008 exactly 14 days after the withdrawn application.

Mr Kariuki, learned counsel for the applicant, submits in the reference that the learned single Judge misapprehended the facts and thereby made an erroneous finding that the applicant took an unreasonably long time to file the withdrawal notice. Mr Kariuki also faulted the learned single Judge for holding that the applicant lodged this application 4 months late. There is merit in this submission and we accept it. Actually, the delay involved was only 14 days and we do not subscribe to the assertion that it was inordinate in the particular circumstances of this case. Moreover, there is reasonable

explanation as to how it occurred.

We are satisfied, therefore, that the applicant has shown that the learned single Judge failed to take into account the import and time in which Civil Application No Nai 28 of 2008 was filed and withdrawn, a relevant matter which he ought to have taken into account in determining whether there was an inordinate delay or not. We have no doubt in our minds that had he done so he would have exercised his discretion in favour of the applicant.

The main issue in the intended appeal is whether the Land Disputes Tribunal had jurisdiction to determine the question of ownership of a registered land and whether the existence of trust was a matter which could be entertained by the tribunal. We would think that, indeed, these are arguable grounds of appeal and the learned single Judge ought to have considered that the issue of jurisdiction, that is whether the tribunal was properly seised of the dispute before it, is at the heart of the dispute.

Relatively, it cannot be said that the land dispute is old. It was first registered in the superior court in 2006. The parties are brothers and all of them live on the land the subject matter of the intended appeal. This fact was not considered by the learned single Judge.

With the greatest respect to the learned single Judge whom we hereby upset, we are satisfied that he did not exercise his discretion judicially in the particular circumstances of this case.

In the result, the reference is allowed.

The notice of motion dated 1st July 2008 is hereby allowed and the time to file and serve the record of appeal is hereby enlarged. The applicant shall file a record of appeal within 21 days hereof. Costs in the intended appeal.

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

P.K. TUNOI
.....
JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR