



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 19 OF 2010

BETWEEN

JOHN BUNDI MAGIRI APPLICANT

AND

CO-OPERATIVE BANK OF KENYA LTD 1ST RESPONDENT

ISABEL WARUGURU MWANGI 2ND RESPONDENT

(An application for leave to file and serve a Notice of Appeal and Record of Appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 23rd October, 2009

in

H.C.C.C.NO.443 OF 2008)

RULING

This is an application under **Rule 4** of this Court’s Rules. It seeks two orders, first, that this Court be pleased to grant leave to the applicant to file the Notice of Appeal out of time, second, that leave be granted to the applicant to file and serve a Record of Appeal out of time.

The background facts are that on 23rd October, 2009, the superior court **Khaminwa, J.** had upon application for review dated 19th June 2008 reviewed her own orders issued on 6th May 2009 and 25th November, 2008. The first order stated:

‘On 30th July 2008, an injunction was issued by the High Court restraining the 2nd defendant from interfering with the plaintiff’s quiet occupying of the plaintiff’s property until 5th August, 2008. The Orders were extended from time to time the 2nd defendant has filed a defence and a counterclaim for orders of possession or against the plaintiff and mesne profits at the rate of Kshs.12,000 per month until possession is granted I see there are several issues to be tried between

the parties. The suit is to be tried together not by instalment and it is my view that the parties ought to set the suit down for hearing.”

The second order states:-

“I have examined the 2nd defendant’s affidavit and statement of defence and it is clear that she purchased the property in auction and there is no evidence on her part such as would warrant her sale being cancelled. I do not see any reason to keep her from her property. She is the registered owner.”

Concerning the two orders, the learned Judge delivered herself thus:-

“The court is now being asked by the purchaser 2nd defendant to set aside the dismissal of her application dated 29th October, 2008 and grant orders as prayed in that application. It is clear the court overlooked the first order which was really in favour of the second defendant The order of review is granted.”

The grounds relied upon are in the body of the application and the supporting affidavit of the applicant sworn on 10th February 2010. However, it is clear to the Court that, the critical grounds are that the applicant who should have filed a notice of appeal on or before 5th November, 2009 failed to do so because he was unwell and also outside Nairobi, and could not instruct his advocates to file a notice of appeal and secondly that, the intended appeal had a chance of success since an eviction order cannot be granted summarily as the superior court did without a full hearing.

Mr Langi, the advocate for the applicant re-echoed the same grounds in his submission to the Court. ***Mr Munge*** for the 1st respondent opposed the application for extension of time on the grounds that the application for extension of time was filed on 10th February 2010, four months after the ruling being appealed against and the delay has not been explained although it is patently inordinate; and secondly that no medical evidence has been given to support the assertion that the applicant was unwell and thirdly, the intended appeal has no chances of success since property Nairobi/Block 82/2190, the subject matter of the proceedings and this application was transferred and registered in the name of the second respondent on 14th June 2008, long before this application was filed, and therefore, the 2nd respondent has all the rights of an absolute proprietor under **section 27** of the Registered Land Act and as a registered proprietor, any extension of time is likely to prejudice her quiet enjoyment of the property taking into account that the title is already vested in her in law and as a result the applicant’s relief if any lies in damages.

Miss Ngetich, advocate for the 2nd respondent adopted in full the arguments of ***Mr Munge*** but highlighted the degree of prejudice to the 2nd respondent as a purchaser and registered owner which would result from any further extension of time. She reiterated the contents of the replying affidavit of the 2nd respondent.

As is the practice concerning applications under **rule 4** of this Court’s rules, a good starting point is to consider the factors which this Court takes into account when exercising its unfettered discretion. The factors are:-

- a) ***the length of delay***
- b) ***the reason for the delay***
- c) ***possibly, the chances of the appeal succeeding if application is granted; and***
- d) ***the degree of prejudice to the respondent, if the application is granted this being only possible consideration.***

In the circumstances of this case and as described in the affidavits in opposition to the application no

proper reason has been given for failure to file a notice of appeal within 14 days of the decision in question. To illustrate the point, no medical evidence of the alleged illness has been exhibited or reasons given why at this time and age, the advocate for the applicant could not obtain instructions on phone or even file and serve a notice of appeal pending full instructions from the client as is the practice in many advocates' chambers. In addition, the delay of four months in coming to this Court has not been explained at all. Moreover, the applicant in his application was silent on the current state of the register to the effect that the property is in the name of the 2nd respondent. In this regard, since the power conferred on the Court under **rule 4** is discretionary, an applicant must demonstrate utmost good faith by disclosing all the material facts which the applicant in this case has failed to do. Without expressing any view concerning the success of the intended appeal, the issue of registration which has been disclosed by the two respondents, does substantially have a strong bearing on the chances of its success and it also does give indications of the prejudice a registered owner might suffer should the extension be granted and so far, there is no challenge to the issue of registration. In my assessment of the facts and in exercise of my unfettered discretion, I find that the applicant has failed to satisfy requirements (a) to (d).

Taking all the above factors into account, I am of the view that, granting an extension would not advance or further the overriding objective (O₂) and I am therefore minded not to grant the extension because the fact of registration of the transfer in the name of the 2nd respondent does give rise to a fresh dimension in the proceedings in the superior court, and possibly, new causes of action by the applicant. Pursuant to the overriding objective, I cannot overlook the likely impact of registration to the proceedings before the Court. I think I am entitled even at this stage to consider whether any further steps as intended would serve the ends of justice and in my view, in the circumstances set out, any further step would result in further delay and costs without facilitating finality.

With the advent of the overriding objective, the factors which the Court may take into account are many and in my view, they shall vary with the facts of each appeal or case. To my mind in civil matters, the overriding objective casts the light on each situation before the Court. In the matter before me and in the context of the O₂ principle, the issue of whether or not the intended appeal is arguable looms large and cannot be ignored. Thus, the registration of a new owner without a challenge of such ownership in the proceedings *prima facie* indicates that the intended appeal might be academic and plainly unarguable. This in turn means that, if I were to extend time, Court's resources would be misapplied resulting in bad management of the appeals which in my view would be a derogation of the overriding objective. What emerges from the application of the O₂ principle to the facts before me is that the factor of arguability must in future occupy a central position in the determination of similar applications because in my view plainly unarguable appeals have only a statistical and nuisance value in that they result in backlogging an already overloaded system of appeals thereby denying meritorious appeals the resources the Court ought to devote to them. What is clear with each passing day is that it is difficult to predict with precision the circumstances in which the court is likely to apply the overriding principle because the management of the principle has to be on a case to case basis and therefore dependent on the facts of each appeal or case, but what is certain is that the application of the principle will open the doors and windows of justice wide and further assist the courts in developing and expanding better management techniques of cases and appeals. With the above in view, I would have no hesitation whatsoever in declining to extend time. I would dismiss the application on this ground alone as well and the same is hereby dismissed with costs to the applicant.

DATED and delivered at Nairobi this 16th day of July, 2010.

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR