



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: NYAMU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 140 OF 2010

BETWEEN

PETER KIRUKI M'NKANATA (Legal representative of the estate of
M'NKANATA M'MBOGORI
(DECEASED).....APPELLANT

AND

SABELA NCEKEI KIRIMA (legal representative of the estate of
M'RIRIA M' MBOGORI
(DECEASED).....RESPONDENT

(An application for extension of time to file and serve notice of appeal and record of appeal

from the ruling of the high court of Kenya at Meru (Sitati, J) dated 30th June 2004

in

H.C.C.C. NO 184 of 1988)

RULING

The application before the court is dated 7th June 2010 and is brought under sections **3A** and **3B** of the Appellate Jurisdiction Act and **rules 4** and **42** of the Court's Rules. It is based on the five grounds appearing in the body of the application as follows:-

1 That the High Court at Meru did on 30th June 2004 gave a ruling against the applicant in favour of the respondent in a land case No. 184 of 1988, which the applicant is dissatisfied with.

2 That the applicant filed on time both the Notice of appeal and the Record of Appeal.

3 That by oversight the record of appeal did not contain the copies of the pleadings thus rendering the appeal incompetent.

4 That due to the above the record of appeal did not comply with Rule 85(1) of the Rules of this Court

5 That there will be no prejudice to be suffered by the respondent if this application is allowed.

The application is also supported by an affidavit sworn by Mr Charles Mureithi advocate for the applicant on 7th June 2010.

During the hearing the respondent was represented by Mr. Mwirigi Kaburu advocate who on his part relied on the respondent's affidavit in reply.

During the hearing I cautioned both counsel from arguing the merits of the application but all the same they took sometime to demonstrate arguability or non arguability of the intended appeal the gist of which is whether the decree the subject matter of the intended appeal had expired and therefore not capable of being executed. On this I am of the view that the points concerning arguability of the intended appeal cannot even at this stage be said to be frivolous.

Regarding the length of delay it is common ground that the delay ranged from 27 to 30 days.

On possible prejudice it has been argued that since the subject matter of the intended appeal is land and the respondent is fairly elderly granting the extension could keep her away from the fruits of a judgment in her favour and this could constitute sufficient prejudice in law.

According to the applicant's counsel the reason for the delay was due to the striking out of a previous record of appeal on the grounds that pleadings which constitute primary documents under the rules of the Court were not contained in the struck out record. This area of procedural law has undergone extensive transformation in terms of the applicable jurisprudence in the past two years. Thus in terms of the holdings in the leading case of **Dorcus Indombi Wasike & Benson Wamalwa Khisa and 2 Others C.A. Appl. No 87 of 2004** all the applicant would have been required to do was to seek leave to file a supplementary record to include the omitted documents. Again, as per the holdings in the recent case of **Daniel Kimani Njihia v Francis Mwangi Kimani & Anor C.A. NO NAI 146 of 2010** an explained delay of 30 days would certainly place the applicant on the right side of the overriding objective and therefore would qualify for an extension of time.

It is also evident that right from the beginning the appellant save for the above omission had filed both the notice and the record of appeal within the stipulated time and what he now seeks from the Court is to be allowed to file a fresh notice of appeal and a record of appeal again.

On the whole, I do not consider the delay of 30 days inordinate in the circumstances. Similarly the reasons for the delay are in my view satisfactory. The chances of the intended appeal is a matter for determination on merit but for now the grounds raised in the draft memorandum are to me not frivolous. Finally on the issues of prejudice both parties are mortal and it would be inappropriate in my view to shut out a party from ventilating an arguable appeal in the final Court in the land on the basis that his opponent is elderly.

In the result, I am of the view that the main consideration here is whether the intended extension will be in accordance with the requirements of the overriding objective as set out in **section 3A and 3B** of the Appellate Jurisdiction Act. All in all I consider that the demands of justice will be better met by allowing the application so as to enable the parties to ventilate their respective positions on merit. I find that a delay of 30 days and which has been satisfactorily explained is on the right side of the overriding objective and an extension ought to be granted.

I accordingly allow the application and order that the applicant to file and serve the notice of appeal within 7 days and a record of appeal within 7 days of the service of the notice of appeal
It is so ordered.

Dated and delivered at Nyeri this 19th day of November, 2010.

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR