



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI

Civil Appeal (Appli) 110 of 2006

NJOGU MACHARIA.....APPLICANT/APELLANT

AND

PAUL WAIRURI MWANGI.....RESPONDENT

*(Application for extension of time to file and serve record of appeal from the judgment of the*

*High Court of Kenya at Nairobi (Aganyanya, J.) dated 12<sup>th</sup> November, 2002*

*in*

*H.C.C.C. NO. 231 OF 2000)*

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**R U L I N G**

Before me is an application by way of Notice of Motion expressed as brought “***Under Rule 4 and Rules 42(i) and (2) of the Court of Appeal Rules.***” In this application the applicant, ***NJOGU MACHARIA***, seeks the following orders:-

- “1. THAT the Honourable Court be pleased to grant extension of time to the applicant to file and serve Record of Appeal out of time.***
- 2. THAT Record of Appeal fille (sic) herein be deemed as properly filed and within time.***
- 3. THAT the costs incidental to this Application abide the said appeal.***

The application is supported by the affidavit of the said ***NJOGU MACHARIA*** who deponed as follows:-

- “1. THAT I am the appellant herein hence competent to swear this affidavit.***
- 2. THAT my advocates on record inform me that the time within which the Notice of Appeal was to be filed has expired.***
- 3. THAT I verily believe it is a matter of urgency that this Honourable Court extends the time within which to file the Notice of Appeal.***

4. **THAT I make this affidavit in support for my application.**

5. **THAT what is deponed to herein is true to the best of my knowledge information and belief.”**

This is the application that came up for hearing in Chambers before me on 25<sup>th</sup> March, 2009 when Mr. P.K. Njoroge appeared for the applicant, while Mr. J.K. Njuguna, appeared for the respondent.

In his submissions, Mr. Njoroge contended that there was a delay of **11 days** after the expiry of **60 days** following the receipt of certificate of delay. In his view this delay of **11 days** was not inordinate. He went on to submit that the intended appeal raises an important legal issue concerning the interpretation of **sections 27, 28 and 30** of the **Registered Land Act**.

In response to the foregoing, Mr. Njuguna started his submissions by stating that the application was incompetent as it did not comply with **rule 42(1)** of this Court's Rules in that it did not contain the grounds upon which it was brought. He went on to contend that the body of the application was at variance with the supporting affidavit. He further submitted that Mr. Njoroge was not properly on record since there was no change of advocates filed. On the merit of the application, Mr. Njuguna submitted that there were no reasons given for the delay and that the letter asking for copies of proceedings was not copied to him. He contended that there was a delay of three years which remains unexplained. Finally, Mr. Njuguna submitted that the respondent was already in possession of the land and that the title is in his name.

The dispute in this matter started in the Senior Resident Magistrate's Court at Thika in *Civil Suit No. 1244 of 1995*. The hearing of the suit in that court commenced on 9<sup>th</sup> August, 1999 and ended with the judgment which was delivered on 8<sup>th</sup> October, 1999. The dissatisfied party (*Paul Wairuri Mwangi*) preferred an appeal in the superior court vide **Civil Appeal No. 231 of 2000** which came up for hearing on 4<sup>th</sup> November, 2002 before Aganyanya, J. (*as he then was*). The learned Judge delivered his judgment on 12<sup>th</sup> November, 2002 allowing the appeal. That is the judgment that the applicant herein now wants to challenge in this Court. What is significant here is that the judgment of the superior court was delivered on 12<sup>th</sup> November, 2002. A notice of appeal was duly filed on 20<sup>th</sup> November, 2002. It would appear that nothing happened until 5<sup>th</sup> July, 2006 when this application was lodged at the Registry of this Court. There is however a letter dated 8<sup>th</sup> March, 2006 from the Deputy Registrar of the High Court informing the advocates for the parties that the copies of proceedings and judgment were ready for collection on payment of **Shs.1,380/=**. Hence, it can be stated that as from 8<sup>th</sup> March, 2006 the applicant and his legal advisers should have been in a position to lodge the appeal. There is a Memorandum of Appeal dated 2<sup>nd</sup> June, 2006 and lodged in the Registry of this Court on 5<sup>th</sup> June, 2006.

On procedural aspect of this application, I tend to agree with Mr. Njuguna that it is incompetent. **Rule 42(1)** of this Court's Rules provides:-

**“Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application.”**

(emphasis provided)

In this application, no grounds were stated. The application was supported by an affidavit only.

In the body of the application the applicant is seeking extension of time to **“file and serve Record of Appeal out of time.”** But in supporting affidavit the applicant depones:-

**“3. THAT I verily believe it is a matter of urgency that this Honourable Court extends the time within which to file the Notice of Appeal.”**

From the foregoing, it is clear that while the applicant seeks extension of time to file and serve Record of

Appeal out of time as per the notice of motion in his own supporting affidavit, he is seeking extension of time in which to file the Notice of Appeal! Which is which? Again I agree with Mr. Njuguna that the body of the application and the supporting affidavit are at variance.

On substantive aspect of the application, it must be pointed out that the law is now settled as regards the principles to be applied by this Court when considering an application under **rule 4** of this Court's Rules. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions the Court has to exercise such discretion upon reasons. Among the matters to be considered are first the period of delay. Second the Court has to consider the reasons for the delay. Thirdly, the Court would consider whether the appeal or the intended appeal is arguable that is it is not frivolous. Fourthly, the Court is to consider if the respondent would be unduly prejudiced if the application were to be granted. These are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

In **PATEL V. WAWERU & 2 OTHERS [2003] KLR 361** at p. 362-3 this Court had the following to say in response of **rule 4** of this Court's Rules:-

***"This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application No. NAI. 251 of 1997 this Court stated:-***

***"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."***

In the present application before me there is the supporting affidavit by the applicant but as can be seen from this affidavit no attempt is made to give any explanation for the delay. Similarly, Mr. Njoroge in his submissions before me did not give any explanation for the delay apart from submitting that the intended appeal raises serious issue of interpretation of **sections 27, 28 and 30** of the Registered Land Act. With due respect to Mr. Njoroge, I would say that **Registered Land Act (Cap. 300 Laws of Kenya)** came into effect on **16<sup>th</sup> September, 1963**. From that time this piece of legislation has been subjected to judicial interpretation by all our courts (*from Subordinate Courts to the Court of Appeal*) in the Country. I therefore do not know what is so novel that the applicant intends to raise in his intended appeal.

I must confess that the applicant and his counsel have failed to demonstrate any seriousness in their approach to this matter. Granting of extension of time cannot be considered as a matter of routine. This Court has set out the matters to be considered when dealing with an application of this nature. The applicant has miserably failed in satisfying the guidelines set out by this Court. The Rules of the Court must be complied with. As was said in **RATMAN V. CAMARASAMY [1964] 3 ALL ER 933** by Lord Guest at p. 935:-

***"The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."***

I have carefully considered what has been placed before me in this application but I am not persuaded that the applicant has satisfied me on the principles that would warrant me to exercise my discretion in his favour. I therefore refuse to exercise my discretion in favour of the applicant. Accordingly this application is dismissed with costs to the respondent.

*Dated and delivered at NAIROBI this 27<sup>th</sup> day of March, 2009.*

*E.O. O'KUBASU*

.....

*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR**