



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appli 328 of 2008 (NRR 31/08)

MWAI KARINGAAPPLICANT

AND

WARUGUR KIBERESPONDENT

(An application for extension of time to file notice of appeal and to lodge memorandum and record of appeal out of time from the judgment of the high court of Kenya at Nyeri (kasango, J.) Dated 13th July, 2007

In

H.C.C. Nos. 156 of 1997)

RULING

This is an application under Rule 4 of the Rules of this court. The applicant seeks leave to file notice of appeal, memorandum and record of appeal out of time. Mwai Karinga, the appellant relies on the grounds set out in the body of the application and the applicant's affidavit sworn on 27th October, 2008.

The background to this application is that the applicant filed suit in the superior court at Nyeri **H.C.C. No. 156 of 1997** against the respondent, **Waruguru Kibe** in the suit the applicant sought orders to the effect that the respondent vacates the land Parcel No. **Githi/Kirerema/698 and 699** formerly known as **Githi/Kirerema/35**. the applicant's claim against the respondent was that the respondent had illegally and fraudulently caused a sub-division of the plaintiff's parcel of land known as **Githi/Kirerema/35** into **Githi/Kirerema/698 and 699** and permanently deprived the respondent land parcel **Githi/Kirerema /698** measuring 1.4 ha.

The respondent's defence in the superior court is a denial of the fraud as pleaded o at all. He stated that land parcel **Githi/Kirerema/35** was sub-divided equally and the applicant given **Githi/Kirerema/699** while the respondent was given **Githi/Kirerema/698**. The respondent claims that the applicant and one **Wambui Mwai** were joint owners of land parcel **Githi/Kirerema/35**. this parcel was in turn sub-divided into two parcels and the applicant was allocated **Githi/Kirerema/699** while **Wambui Mwai** was allocated **Githi/Kirerema/698**. in her lifetime, **Wambui Mwai** applied to have the applicant registered as a joint owner with herself of land parcel **Githii/Kirerema/698**. Upon her demise, the title over parcel **Githi/Kirerema/698** was registered in the name of the applicant as sole owner of the parcel by operation of law as is the case with all joint owners. This court was also informed that the applicant was not a party to the **Mukurweni Succession Cause No. 6 of 1981** upon which his claim against the respondent is grounded.

The grounds upon which the application is found are:

- (1) *That the applicant's failure to lodge the memorandum and record of appeal in time is due to the mistake of the court.*
- (2) *That the certified of proceedings applied for herein were only ready for collection on 2nd April, 2008.*

- (3) *The copy of the Decree was issued on 18th April, 2008.*
- (4) *The applicant had lodged his notice of appeal within the time prescribed by the law.*
- (5) *That the certificate of delay was issued herein on 29th September, 2009.*
- (6) *The application was filed on 31st October, 2008.*

The applicant informed the court that the length of delay as a whole is six months and that the court should take into account that fact that he filed the notice of appeal within the prescribed time. He had also applied for the certified copies of proceedings and judgment.

On 4th December, 2007 he wrote to the court inquiring about the fate of the proceedings. He concluded by saying that there cannot be any undue prejudice to the respondent because the two parties are in possession of their respective parcels. Upon being asked by the Court to specify the delay in respect of each step the applicant's counsel did not respond.

The respondent's counsel Mrs. Rika opposed the application by urging the court to note that the letter, applying for the certified copies of proceedings and judgment was never served on her and that the applicant was not entitled to rely on the certificate of delay. So further asked the court to note that the applicant made only one inquiry with the court and thereafter went to sleep hence the admitted delay of six months.

On the issue of merit she argued that even without going into the actual merits, it is apparent on the face of the judgment of the superior court that there was no proof of fraud and that her client the respondent was not a party to the proceedings which led to the institution of the suit. She submitted that there cannot possibly be any arguable appeal.

I have considered the submissions of the learned counsel as set out above. It is trite that under **rule 4** of the Court of Appeal Rules this Court has unfettered discretion to extend time but the court's discretion is a judicial one.

While the doors of justice should as far as is practicable remain open to willing litigants, an end to litigation especially unmeritorious litigation must be discouraged. Ordinarily, I would not have hesitated granting the required extension, but I am convinced that the failure by the applicant was silent on this and made no attempt to explain the lapse. In addition, apart from the one reminder to the court to release the proceedings the applicant appears to have gone to sleep for about six months. This in my view is inordinate delay and it has not been satisfactorily explained. It is incumbent upon the applicant to specify the delay and to give reasons for the delay.

I have, on the point of merit, addressed my mind to the need not to look for overwhelming chances of success of the intended appeal. However even a causal look at the facts as per the pleadings, and the judgment of the superior court, the issue of merit is a matter of great concern to me. I have in mind the facts as set out above and the nature of joint ownership. It is not clear to the court what is arguable about one willing joint owner transferring to the other joint owner. I must of course remind myself that silence is golden at this stage, but I consider that, I have a duty to explain the considerations which influenced my decision.

Taking into account the information availed to the court, submissions of counsel as outlined above and apply facts to this Court's well known considerations on applications for extension of time namely length of delay, reasons for delay, merit of the intended appeal and whether undue prejudice would be caused to the respondent, I have come to the conclusion that the applicant has not satisfactorily explained the delay of six months. Considerations 1 and 2 have not therefore been met. On the issue of merit, I have addressed the same as above. As regards whether undue prejudice has been caused to the respondent, since the parties are in possession of their respective parcels no undue prejudice would be caused, except lack of finality in a litigation where the applicant never thought it fit to serve a copy of the letter requesting for process dings thereby causing unnecessary anxiety and uncertainty to the respondent. The applicant has succeeded on this ground but he has failed on the consideration of failing to give reasons and the consideration of merit.

All in all, and for the above reasons, I am under the circumstances unable to exercise my discretion in favour of the applicant.

The applicant is dismissed. This being a family affair I make no order as to costs. It is so ordered.

Dated and delivered at Nyeri this 22nd day of May, 2009.

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR