



IN THE COURT OF APPEAL
AT NYERI
Civil Appli 301 of 2007 (UR 15/2007)
NJIRU KIRIRAGIAAPPLICANT

AND

SILVESTER NJIRU NJERU.....RESPONDENT

(Application for extension of time to serve and file notice of appeal from the judgment of the High Court of Kenya at Embu (Lenaola, J) dated 11th July, 2005

in

H.C.C.C. NO. 65 OF 2002)

RULING OF THE COURT

This is a reference under *Rule 54* of the Rules of the Court from a decision of the learned single Judge of this Court, (*Onyango Otieno, J.A.*) delivered on 22nd May, 2008 by which he dismissed the applicant's application for extension of time within which to prefer an appeal from the judgment of the High Court of Kenya at Embu (*Lenaola, J*) dated 11th July, 2005.

It is submitted before us by *Mr. Muyodi*, counsel for the applicant, that the learned single judge failed to consider the fact that the respondent was in actual possession of the suit land, the subject matter of the intended appeal, and that by reason thereof the respondent would not suffer prejudice if the application was granted. *Mr. Muyodi* further contended that the learned single judge did not adequately consider the reasons which led the applicant not to file his appeal within the prescribed time.

It is manifestly clear from perusal of the record that prejudice and delay were considered by the learned single judge and counsel's submission otherwise cannot be sustained. Further, it is plain that the question of the applicant's inability to raise funds for the purposes of lodging an appeal had been adequately considered and rejected by the learned judge in his said ruling. It would follow therefore that the counsel's submissions are entirely without any basis.

It is trite that a reference is not technically an appeal but it has the nature of one and we are mindful of our duty not to interfere with the exercise of a discretion of the single judge of appeal from whom the reference is brought unless it is clear that the judge had erred or had exercised his discretion on improper grounds and the onus is on the applicant to persuade the court of this.

It is our view that the applicant has not demonstrated how the learned single judge erred or exercised his discretion improperly. In the circumstances there cannot be any legal basis upon which this Court can interfere with the learned Judge's exercise of discretion. Consequently, this reference fails and is accordingly dismissed with costs.

DATED AND DELIVERED at NYERI this 22ND day of May, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR