



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 309 of 2008

DANIEL MIGWI NJAI.....APPLICANT

AND

HIGHVIEW FARM LIMITED

GEORGE NDUNGU MWICIGI.....RESPONDENTS

**(Application for extension of time to file and serve a notice of appeal in an intended
appeal from a ruling and order of the High Court of Kenya at**

Nairobi (Osiero, J.) dated 9th October, 2008

in

H.C.C.C. NO. 4060 OF 1985)

R U L I N G

The applicant seeks extension of time under **Rule 4** of the Court of Appeal Rules for filing and serving a notice of appeal and for a further order that the notice of appeal annexed to the application be deemed to have been filed and served within such extended time.

The applicant intends to appeal against the ruling of the superior court (Osiero J) dated 9th October, 2008 whereby the superior court dismissed the applicant's notice of motion dated 29th June, 2006. The said notice of motion was mainly brought under **Sections 3A** and **34** of the *Civil Procedure Act* (CP Act) for the main orders:

“5. That the 2nd plaintiff George Ndungu Mwachigi be restrained by himself, his agents and or servants from selling and or changing L.R. No. 11453/1 North East of Thika Municipality in Thika District until further orders

6. That the transfer of the said L.R. No. 11453/1 be cancelled forthwith.

7. That the 2nd plaintiff do deliver to the defendant the provisional title documents in respect of

L.R. No. 11453/1.

8. That as an alternative to 6 and 7 above the 2nd plaintiff do pay the defendant Kshs. 1.75 million together with interest as from 1985.

9. That the order made on 22nd February, 2006 be set aside.”

The dispute between the applicant and George Ndungu Mwicigi (2nd respondent) has a long history. But for the purposes of this application it is sufficient to state just the outline.

By a sale agreement dated 17th January, 1985 the applicant agreed to sell land parcel No. L.R. 11453/1 comprising of 97.66 Hectares (approximately 241 acres) to the 1st respondent which was in the process of being incorporated at a consideration of Shs.1,750,000. The 1st respondent paid Shs.175,000/= being the 10% deposit in accordance with the agreement of sale. This was an agricultural land situate at Makuyu and the requisite consent of Land Control Board was obtained. Thereafter the 2nd respondent – a director of the 1st respondent was given vacant possession of the land in accordance with the said agreement. When the applicant was subsequently requested to execute the transfer, he declined saying that he no longer wished to complete the transaction. This forced the two respondents to file *Civil Case No. 4060 of 1987* in the High Court of Kenya at Nairobi for specific performance of the agreement of sale. On 11th February, 1988 the superior court (Bandari J) decreed specific performance in favour of the 2nd respondent in the following terms:

“The court grants second plaintiffs prayer for specific performance of the said contract and orders that the defendants do transfer the said property to the second plaintiff free of all encumbrances on this plaintiff tending the balance of the agreed sale price”.

The applicant being aggrieved by the judgment of the superior court, appealed to the Court of Appeal in *Civil Appeal No. 139 of 1989* against the decision of the superior court. However, the appeal was dismissed on 14th August, 1995.

On 9th February, 2006, over ten years after the appeal was dismissed the 2nd respondent filed a chamber summons in the superior court for the main order that:

“1. THAT the Deputy Registrar of the court do sign the transfer of the suit land to the 2nd plaintiff”.

The application was based on the ground that the applicant had refused to sign the transfer to the 2nd respondent. On 22nd February, 2006, the superior court (Mugo J) granted the order and on the same day the Deputy Registrar of the superior court executed the transfer in favour of the 2nd respondent. The instrument of transfer which was executed states in part:

“NOW THIS INSTRUMENT WITNESSETH THAT pursuant to the said agreement and IN CONSIDERATION of the sum of one million seven hundred and fifty thousand Kshs.1,750,000 paid by the purchasers to the Vendor on or before the execution of these present (the receipt of which the Vendor hereby acknowledges the Vendor HEREBY TRANSFERS unto the purchaser all its right title in an to the property”.

It seems that the transfer was registered on or about 10th April, 2006.

The application dated 29th June, 2006 which was dismissed by the superior court giving rise to this application was mainly grounded on **Section 34** of CP Act which provides:

“(34) (1) All questions arising between parties to the suit in which the decree was passed, or their

representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.

(2) The court may subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit and may, if necessary, order payment of any additional court fees.

(3)

By the application dated 29th June, 2006 the applicant complained, among other things, that the 2nd respondent had executed the decree fraudulently and in contravention of the decree as he had not tendered the balance of the purchase price; that the applicant as unpaid vendor has a lien or equitable charge; that the applicant had not been approached to execute the transfer before the application was made to court; and that the application was made by his former advocate without his knowledge.

The superior court dismissed the application saying in part:

“After considering the applicant’s application in light of the affidavit evidence on record and the submissions, by both counsel I find no merit in the applicant’s application. The applicant having lost in the High Court and the Court of Appeal, this court has no jurisdiction to interfere with the decree so issued and therefore, the application fails”.

The applicant states that the intended appeal has good chances of succeeding because, *inter alia*, the superior court overlooked the facts that the land was transferred to the 2nd respondent in contravention of the decree; that the 2nd respondent procured the transfer of the property to himself fraudulently; the superior court refused to grant the alternative prayer that the purchase price be paid with interest, and, lastly, that, the superior court overlooked the fact that the application was under **Section 34** of the CP Act as it concerned the execution of the decree of the superior court in an illegal and fraudulent manner.

The 2nd respondent has sworn a replying affidavit. He deposes in paragraph 22 that he paid the 10% to deposit; that he prepared the completion cheque many years ago which he gave to applicant’s former advocates who in turn called the applicant to collect the cheque; that applicant declined to collect the cheque; that the respondent recalled the stale cheques and he ultimately issued a replacement cheque for Shs.1,750,000.

Before the Court can exercise its discretion of favour of an applicant, the applicant should demonstrate, *inter alia*, that the appeal is not frivolous, that the extension of time will not cause undue prejudice to the respondent and that the delay has not been unreasonable. (See **Wasike vs. Swala**, [1984] KLR 591, **African Airlines International Ltd. vs. Eastern & Southern African Trade & Development (PTA Bank)** [2003] KLR 140).

In **Wasike’s** case (*supra*), the Court considered the merits of the intended appeal or appeal as the most important factor followed by the question of prejudice and lastly by the consideration of delay. I agree that at least where the appeal has not been filed at the time the application comes for hearing, the merits of the intended appeal is an important consideration for it would be futile to extend time where the intended appeal is *prima facie* hopeless.

The respondent deposes in the replying affidavit that the intended appeal is frivolous for reasons stated therein particularly in paragraph 17 – 27. Mr. Wanjohi, learned counsel for the respondent in addition stated that the purchase price was deposited in the applicant’s bank account which he withdrew on 14th November, 2005 Mr. Rajji, learned counsel for the applicant conceded that the applicant has received the purchase price but contended that the purchase price was paid almost 20 years after the date of the decree and that the applicant is, at the very least, entitled to interest.

The notice of motion dated 29th June, 2006 which was dismissed by the superior court on 9th October, 2008 raised the question whether the decree of specific performance was executed in accordance with the

decree of the superior court dated 11th February, 1988.

By the decree the order for specific performance was granted on the plaintiff tending the balance of the sale price. The applicant contended that by the time the superior court executed the instrument of transfer and even at the time the respondent was registered as proprietor of the suit land the respondent had not paid the balance of the purchase price. The applicant has produced a copy of instrument of transfer dated 22nd February, 2006 which verifies that the balance of the purchase price had been paid to the applicant before the execution of the instrument and that the applicant had acknowledged the payment. The respondent's affidavit, however shows that the cheque for Shs.1,750,000/= was issued on 28th October, 2008. This is 2 years since the respondent was registered as proprietor of the suit land and over 20 years since the respondent was given vacant possession some time in 1985. By the application which was dismissed by the superior court, the applicant had claimed interest on purchase price since 1985 as an alternative to the prayer for cancellation of the title (see prayer 8).

The applicant faults the superior court for failing to appreciate that the application was grounded on **Section 34** CP Act and for failing to consider the application on its merits particularly the question of interest.

I appreciate that the full purchase price has now been paid to the applicant. However the issue of interest is still alive seeing that the money was never deposited in a bank account where it could earn interest.

In the final analysis, I am satisfied that the intended appeal is not frivolous. The intended appeal raises the issue of the scope of **Section 34** CP Act and other matters including fraud relating to the execution of the decree of the superior court fit for consideration by the Court.

On the question of delay, the ruling that the applicant intends to appeal against was delivered on 9th October, 2008. The present application was filed on 3rd December, 2008. The notice of appeal should have been filed within 14 days from the date of the ruling, that is, on or about 23rd October, 2008. The delay that the applicant should account for is from 24th October, 2008 to 2nd December, 2008 – that is a delay of 40 days. The applicant deposes that he left Kenya for Virginia, USA on 7th October, 2008 and returned to the country on 6th November, 2008 and he has annexed a copy of his passport to verify this. It is not disputed that the applicant was abroad for that period and I accept that explanation for part of the delay – that is from 24th October, 2008 to 6th November, 2008 – a period of 12 days. That reduces the 40 days delay to 28 days. The applicant further states that it is on 13th November, 2008 when he went to see his advocate that he was informed that the ruling was delivered on 9th October, 2008. The 2nd respondent for the reasons stated paragraphs 4 to 11 of the replying affidavit, states that the delay of 56 days is deliberate, inordinate and has not been satisfactorily explained. As I said in **Wasike vs. Khisa & Another** [2004] 1 KLR 197, it would be a fetter of the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained. I further said in the same case, that it is only unreasonable delay which would disentitle a party to the exercise of court's discretion in his favour.

Further, this Court in **African Airlines International Ltd.** (supra) held that the discretion to extend time should be exercised flexibly which I understand to mean liberally. I think that, that is the correct approach for a strict application is likely to deny many litigants access to the court of the last resort.

I have considered all the respondent has said about delay in the replying affidavit. I have computed the capable delay in this case as 28 days. I have also made a finding that the intended appeal is not frivolous. In my view, the delay of 28 days is not so unreasonable as to disentitle the applicant access to this Court. Such a delay can be adequately compensated by an award of costs.

The respondent is unlikely to suffer undue prejudice if the application is allowed. He is still the registered proprietor of the suit land and he is still in possession of the land.

In the result, I allow the application to the extent that I extend time for filing and serving a fresh notice of appeal. The notice of appeal be filed and served within 14 days from the date hereof.

Costs of the application to the 2nd respondent.

Dated and delivered at Nairobi this 21st day of May, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR