



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 177 of 2008 (NYR 20/08)

PAUL MUCHIRI MAINAAPPLICANT

AND

NDUYU GITATHA.....RESPONDENT

(Application for extension of time to file notice and record of appeal from a judgment of the High Court of Kenya at Nyeri (Makhandia, J) dated 25.10.2007

in

H.C.C.A. NO. 135 OF 2003)

R U L I N G

Before me is an application under *Rule 4* of the Court of Appeal rules for orders, firstly, that the time for filing and serving a notice of appeal be extended. Secondly, that the time for lodging and serving a record of appeal be, too, extended. The applicant, *PAUL MUCHIRI MAINA*, the defendant in a dispute which commenced before the Mukurweini Land Disputes Tribunal, successfully appealed against that Tribunal’s decision to the Provincial Land disputes Appeals Committee, Nyeri. No further appeals followed. The respondent, in that appeal, however, in the words of the superior court, surreptitiously filed an application in the Chief Magistrate’s Court, Nyeri, for judgment in terms of the award made by the Mukurweini Land Disputes Tribunal, which was vacated on appeal. Judgment was duly entered as the respondent did not disclose the fact that the award had been set aside on appeal.

The applicant is desirous of appealing against a decision of the superior court in which that court, on appeal, set aside an order of the Chief Magistrate’s Court at Nyeri, refusing to review the judgment, aforesaid. The decision of the superior court was given on *25th October, 2007*, but neither party expressed any desire to challenge that decision within the stipulated 14 days period. It is the applicant’s case that he was not present when the decision was given and he never became aware of it until *11th April, 2008*, when he received a letter from his then advocates advising him of it. Following that letter he visited the offices of his advocates on *16th May, 2008*. It is then that he learnt that the said advocates, contrary to his instructions, had not filed a notice of appeal announcing his desire to appeal against that decision. He deposes in the affidavit in support of the application, that he resides in Malindi where he works and was therefore not able to make frequent visits to his advocates’ chambers and hence the delay in receiving the information about the outcome of his case. He has also deposed in that affidavit that his former advocates had full instructions to appeal if judgment was given against him as happened.

Whether or not the court should extend time is a matter within its discretion. The principles which guide the Court in the exercise of that discretion are now well settled. The length and reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted are generally the main matters the court has to consider in deciding whether or not to grant an extension of time. (See PAN AFRICAN PAPER MILLS (E.A) LTD V. OLAKA [2001] IKLR.8).

The only reason the applicant gives to explain the length and reason for the delay is the failure by his former advocates to notify him of the outcome of his matter. The former advocates have not sworn any affidavit to confirm that fact. All we have is the applicant's terse assertion. His counsel, *Mr. Mahan*, submitted before me that as soon as the applicant was made aware of the decision he acted with promptitude by instructing him to take the essential steps of entering an appeal. It was his view also that the Chief Magistrate lacked the jurisdiction to review the judgment and that the respondent's only course of action was to appeal against the entry of judgment. For that reason he was of the view that the intended appeal is meritorious.

Nduyu Gitatha, the respondent, opposed the application. In a replying affidavit filed on 27th October, 2008, he has deponed that the applicant is from his village, and he therefore knows him well. The applicant, according to him, was present in court when the judgment of the superior court was delivered, and that the contention that he was not aware of the outcome of the appeal was in effect a red herring. The respondent's counsel *Mr. Kiminda* submitted, on the main firstly, that the applicant does not have a right of appeal against the decision against which an appeal is intended. Secondly, learned counsel submitted that the applicant did not adduce proof that indeed he had instructed his former counsel to appeal. Thirdly, he urged the view that the applicant has not explained the delay in taking the essential steps of entering an appeal.

As I stated earlier, the decision against which an appeal is intended was given on 25th October, 2007. Costs were taxed on 12th March, 2008. The applicant's former counsel, *Rika & Co. Advocates*, notified him of the taxation by their letter dated 13th March, 2008. It is noteworthy that the letter was promptly addressed to the applicant and according to him he received it on 11th April, 2008. The wording of the letter is instructive. It reads, in pertinent part, as follows:-

"Please note that the bill of costs was taxed at Kshs.53,800.00 which you are required to pay within 30 days. Kindly pay to avoid imminent court action."

The way the letter is worded does not portray an advocate who had instructions to appeal but failed to do so. He was aware of the consequences for non-action. It is also instructive that despite the fact that the applicant by 11th April, 2008 had become aware of the judgment against him this motion was not filed until over two months later. That delay has not been explained. In my view, the applicant's conduct since the decision complained of to the date of this application has not been satisfactorily explained.

An issue was raised regarding a right of appeal to this Court. *Mr. Kiminda* submitted that the applicant does not have any right whatsoever to appeal to this Court. The issue of jurisdiction of the civil courts is covered by Section 3 of the Land Disputes Tribunals Act, Act NO. 18 of 1990. That section makes provision for matters which the Land Disputes Tribunal has jurisdiction over. These are, the division of land, determination of boundaries to land, a claim to occupy or work land; or trespass to land. Appeals from that Tribunal lie to the Appeals Committee, and by Section 8(8) of the aforesaid Act, "no appeal shall lie therefrom to any court". *Mr. Mahan* for the applicant expressed the view that the respondent had no recourse to the High Court except by way of judicial review. He, in effect, implied that the respondent had no right of approaching the High Court by way of an appeal. That is the point I perceived, his client wishes to pursue in the intended appeal.

Mr. Kiminda countered that submission by urging that the respondent by going to the High Court was not challenging the decision of either the Tribunal or Appeals Committee, but the refusal of the Magistrate's court to review an illegal decision.

I have looked through the provisions of the aforesaid Act, and considered the submissions of counsel, against the decision of the superior court and I entertain grave doubts whether the applicant's intended appeal is arguable. Granting an extension of time will, I apprehend not only be unwarranted but it is likely to be prejudicial to the respondent.

In the result, I am disinclined to exercise my unfettered judicial discretion in favour extending time as prayed for. Accordingly I dismiss the application dated 24th June, 2008, with costs to the respondent.

DATED and DELIVERED at NYERI this 20th day of MAY, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR