



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appli 224 of 2008 (NYR 25/08)

JOHN NJUE NYAGA.....APPLICANT

AND

NICHOLAS NJIRU NYAGA

HARRISON IRERI NYAGA.....RESPONDENTS

(Application for extension of time within which to file and serve record of appeal from the judgment and order of the High Court of Kenya at Embu (Khaminwa, J) dated 30th October, 2007

in

H.C.C.C. NO. 30 OF 2006)

RULING

This is an application under *Rule 4* of the Court of Appeal Rules for extension of time within which to file and serve a record of appeal against the judgment of the superior court (*Khaminwa, J*) dated 30th October, 2007 in High Court Civil Appeal NO. 30 of 2007.

The appeal in the superior court was from the decision of the Provincial Land Disputes Appeal Committee Embu dated 4th April, 2006 in Tribunal case NO. 30 of 2005. The appeal to the Provincial Appeals Committee was in turn from the decision of the Land Disputes Tribunal established under the Land Disputes Tribunal Act NO. 18 of 1990.

The applicant has neither annexed the proceedings or the decision of the Land Disputes Tribunal nor the proceedings or the decision of the Provincial Land Disputes Appeals Committee. In the absence of those documents it is difficult to appreciate the full nature of the claim which was before the Land Disputes Tribunal and the evidence tendered in support thereof or in opposing of the claim. It is however clear from the short judgment of the superior court that the applicant is a brother to both respondents. It is also clear that the dispute in the Tribunal concerned land title No. Kagaari/Kigaa/1621 which was registered in the name of the applicant under the Registered Land Act. It is apparent that the respondents' claim was that the land belonged to their deceased father and that the applicant was registered as a trustee of his father's children. It is apparent from the judgment of the superior court that both the Land Disputes Tribunal and the Provincial Appeals Committee decided the case against the applicant and ordered the transfer of shares to the beneficiaries.

Although the court has unfettered discretion to extend time, such discretion is required to be exercised

judicially. And in order to be entitled to the discretion of the court the applicant is required to show, among other things, that the intended appeal is not frivolous; that the delay is not inordinate and that the respondents are not likely to suffer undue prejudice if the application is allowed – (See WASIKE V. SWALA [1984] KLR 591.)

On the question of the merits of the intended appeal, the applicant has made no effort to show that the intended appeal is arguable. As I have already observed the applicant has not filed relevant proceedings or decisions of both the Land Disputes Tribunal or of the Appeals Committee. The terse judgment of the superior court is not helpful as it contains very scanty details.

Furthermore the application does not contain any material relating to the dispute. Worst of all, the applicant does not state either in the body of the application or in the supporting affidavit that the intended appeal is arguable nor disclose the grounds of the intended appeal. In addition, the judgment of the superior court shows that the applicant admitted before the tribunal that he was registered in respect of the land in dispute as a “trustee of my father’s children.”

In my view the applicant has totally failed to show that the intended appeal is arguable.

By his own admission the applicant collected the copies of proceedings and judgment from the court on 15th December, 2007. He had 60 days to file the appeal discounting the period of Christmas vacation (*rule 3 (e) Court of Appeal Rules.*) The period of Christmas vacation by *Rule 2 (2) (b) of the High Court (Practice and Procedure) Rules* made under the Judicature Act covers the period from the 21st of December of every year to 13th January every year.

Thus when the period of the Christmas vacation is excluded, the 60 days expired on or about 8th March, 2008. This application was filed on 16th July, 2008 – over 4 months later. It has been explained that the applicant filed Civil Application No. NAI. 28 of 2008 on 20th February, 2008 and that the application was later withdrawn as it was defective. The applicant has not been diligent. The first application for extension of time was filed probably before the time limited for filing the appeal had not expired. If the previous application was withdrawn (which fact is disputed) the applicant took unreasonably long time to file a notice of withdrawal of the application. In my view there was inordinate delay which has not been reasonably explained.

Lastly, it is evident that the respondents would suffer undue prejudice by prolonged delay in the distribution of the suit land already adjudicated as family land by three entities i.e. the Land Disputes Tribunal; the Provincial Land Disputes Appeals Committee and by the High Court.

For those reasons, the application has no merit. I dismiss it with costs to the respondents.

DATED and DELIVERED at NYERI this 15TH 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