



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**CIVIL APPLICATION 55 OF 2009**

**FRANCIS ORIOSA ORANGO ..... APPLICANT**

**AND**

**JOSEPH MATO NGOKO ..... RESPONDENT**

*(Application for leave to lodge and serve the Notice of Appeal out of time in an intended appeal from the judgment and/or ruling of the High Court of Kenya at Kisii*

*(Musinga, J.) dated 16<sup>th</sup> May, 2008*

*in*

**H.C.C.C. NO. 267 OF 1996)**

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**RULING**

This is an application under **Rule 4** of the Court of Appeal Rules for two orders namely, that the applicant be given leave to lodge and serve the Notice of Appeal out of time against the whole decision of the superior court given on 16<sup>th</sup> May, 2008 and that the applicant be granted leave to file and serve a record of appeal out of time against the judgment or ruling of the superior court made on 16<sup>th</sup> May, 2008.

The applicant intends to appeal against the Ruling of the superior court (Musinga, J.) dated 16<sup>th</sup> May, 2008 in **H.C.C.C. NO. 267 of 1996** whereby the superior court ordered that the suit be determined in terms of the Land Registrar's report filed in court on 23<sup>rd</sup> November, 2007.

Sometime in 1996, the applicant filed a suit at **High Court Kisii H.C.C.C. NO. 267 OF 1996** against **Joseph Mato Ngoko (Respondent) (1<sup>st</sup> Defendant in the suit)**, and **Ambrose Bwoma Boruma (as 2<sup>nd</sup> defendant)**. He averred in the plaint that he was the registered proprietor of land title No. Nyaribari Chache B/B/Boburia/1990 while the respondent is the registered proprietor of land title No. Nyaribari/Chache/B/B/Boburia/1989 bordering the applicant's land and that Ambrose Bwoma Boruma was the registered proprietor of land title No. Mariberi Chache/B/B/Boburia/3313 also bordering the applicant's land. He averred further that both defendants trespassed into his land sometime in 1993, removed or defaced the boundary features which were forming common boundaries and curved out some portions of the applicant's land. He pleaded that the respondent had excised a portion of his land

measuring approximately 5 metres by 82 metres while Ambrose Bwoma had excised a portion of the applicant's land measuring approximately 5 metres by 20 metres. He sought four main reliefs in the plaint namely, firstly, a declaration that the defendants were trespassers and an order of eviction; secondly, general damages for removal of the boundary and for trespass, thirdly, mesne profits and lastly, a permanent injunction restraining the defendants from interfering with the applicant's land. Both defendants filed respective defences denying trespass.

The respondent in particular pleaded that the applicant's father had in **H.C.C.C. NO. 661 of 1994** claimed the same land; that the District Land Registrar visited the land and settled the dispute on **18<sup>th</sup> August, 1994** and that boundaries were fixed.

The suit ultimately came up for hearing before Gacheche, J. on **15<sup>th</sup> May, 2007** when consent order in the following terms was recorded.

- (a) The matter in dispute herein be and is hereby referred to the District Land Registrar and the District Surveyor Kisii to visit the locus quo for purposes of establishing and fixing the boundaries between L.R. NO. Nyaribari Chache/B/B/1989 and L.R. NO. Nyaribari Chache/B/B/1990.**
- (b) Each party be at liberty to engage a private surveyor to accompany the District Land Registrar Kisii and District Surveyor Kisii.**
- (c) The District Land Registrar Kisii and the District Surveyor Kisii, respectively do compile and file their report within the next 30 days.**
- (d) Costs of the District Land Registrar and the District Surveyor Kisii to be shared equally by the parties."**

The superior court fixed the matter for mention for **28<sup>th</sup> June, 2007**.

The District Land Registrar and the District Surveyor complied with the court order and on **23<sup>rd</sup> November, 2007**, Mr. J.O. Owuor, District Land Registrar Kisii/Gucha District, filed his report in Court. The report among other things contained his verdict thus:-

**"(i) Under the power conferred to me by CAP. 300 section 21(2) of Registered Land Act, I directed the District Surveyor to mark and re-establish the boundary on the ground in accordance to each actual acreage reflected in the Land Register kept under our custody at Kisii District Land Registry.**

**(ii) Having noticed that complainant's temporary house structures constructed within part of the defendant's land I directed their removal within 30 days from date hereof failure to which the defendant would seek court eviction orders to enforce the same.**

**(iii) The cost of re-installing permanent agreeable common fence be shared equally by the disputed parties"**

On **22<sup>nd</sup> April 2008**, the respective advocates for the parties appeared before the superior court (Musinga, J) and made brief submissions on the Land Registrar's report. Mr. Momanyi, who appeared for the applicant, submitted in the superior court, inter alia, that the report of the District Land Registrar was not conclusive; that the applicant employed his own surveyor who also filed a report; that the Land Registrar's report was only a document meant to assist the court and not an award, and, that, the suit should be fixed for hearing so that the Land Registrar and surveyors could testify and produce their reports.

On the other hand, Mr. Oguttu, learned counsel for the respondent, contended in the superior court, among other things, that the dispute was purely a boundary dispute; that the report had dealt with all the issues in dispute; that it had been established that the applicant had encroached into the respondent's land;

that the report was filed pursuant to a consent order and was therefore an award, and, that, a hearing would serve no purpose.

The superior court considered the submissions and made findings, inter alia, that the same boundary dispute had been referred to the District Land Registrar in 1993; that the Land Registrar established that it was the applicant who had encroached into the respondent's land; that the Land Registrar fixed boundaries; that following the re-filing of the present suit and prior to the recording of the consent order, the exercise of establishing the boundary in dispute had been undertaken by six other Land Registrars; that by the consent order it was intended that dispute be referred to District Land Registrar for the very last time; that by the consent order it was not intended that the court would hear and determine the matter after the filing of the Land Registrar's Report; that the Land Registrar reported that he had re-established the boundary; that the Land Registrar's Report was like an award and that there were no grounds for setting aside the consent order. The superior court accordingly ruled that "***the suit be and is hereby determined in terms of the Land Registrar's Report .....***"

The applicant intends to appeal against those findings.

It is trite that the Court has unfettered discretion to extend time under **Rule 4** which discretion should however be exercised judicially and upon settled principles which require an applicant to satisfy the court, among other things; that the appeal or intended appeal has merit, that the delay has not been inordinate and that the extension of time would not cause undue prejudice to the respondent. (see **WASIKE V. SWALA [1984] KLR 591**).

Dealing first with the question of the merits of the intended appeal, I appreciate that I have no jurisdiction at this stage to inquire fully into the merits of the intended appeal. I can only make some general observations.

The applicant has listed three grounds of the intended appeal in the draft memorandum of appeal namely, that the learned Judge erred in treating the Land Registrar's report as an award, that the learned Judge erred in law in prematurely entering judgment in terms of the Land Registrar's Report, and that in the circumstances of the case, the learned Judge failed to do justice in the matter before him.

The applicant's and the respondent's parcels of land are registered under the **Registered Land Act (RLA)**.

**Section 21(2)** of the RLA provides:-

***"Where any uncertainty or dispute arises as to the position of the boundary, the Registrar on the application of any interested party shall on such evidence as the Registrar considers relevant determine and indicate the position of uncertained or disputed boundary."***

It is a common ground that there has been a long standing boundary dispute between the applicant and the respondent. The respondent deposes that the boundary has been fixed by various Land Registrars on six occasions and that the Land Registrar has determined the boundary. The superior court indeed found that, prior to the making of the consent order, the process of establishing a boundary has been undertaken by six Land Registrars. By the consent order, the District Land Registrar and the surveyor were mandated to visit the disputed boundary for purposes of establishing and fixing the boundary between the applicant's and the respondent's parcels of land. It is clear, therefore, that the Land Registrar and the District Surveyor were not merely required to visit the *locus quo* and file a report but to establish a boundary and fix it.

It is also clear that the District Land Registrar did establish and fix a boundary between the two parcels of land. The authority of the District Land Registrar to establish and fix a boundary was not only derived from the consent order but also from **section 21(2)** of the Registered Land Act. Thus, the District Land Registrar had statutory authority to determine and indicate the boundary upon such evidence that he considered relevant. The truth in this case is that the District Land Registrar has already ascertained the boundary and fixed it in accordance with the consent order and the Registered Land Act. That action of

the District Land Registrar has its own legal consequences.

The report of the District Land Registrar followed the determination and establishment of the boundary. Further, the determination of the suit in terms of the report also followed the determination of the boundary. It follows that regardless of whether the report was akin to an award or whether the suit should have gone to full hearing after the filing of the report, or, whether or not the Court should have entered judgment in accordance with the report, the truth is that the boundary dispute was determined by the District Land Registrar in accordance with the consent order and **section 21(2)** of the Registered Land Act. Moreover, after the determination of the boundary dispute, the applicant's claims that the respondent was a trespasser or for damages for trespass, mesne profits, and permanent injunction fell by the wayside.

In my view, having regard solely to the fact that the District Land Registrar actually ascertained and fixed the disputed boundary and the legal consequences of such action, I am not satisfied that the intended appeal is arguable.

*Mr. Joseph Momanyi Aunga*, the applicant's previous advocate has explained the delay in *paragraphs 12-18* of the replying affidavit. According to Mr. Momanyi, the first application for leave to file notice of appeal out of time was filed on *22<sup>nd</sup> July, 2008* but was withdrawn on *22<sup>nd</sup> December, 2008* on account of incurable defects. That was over two weeks after the date of delivery of impugned ruling.

Mr. Momanyi has further explained that the scheduled meeting between him and the applicant before *11<sup>th</sup> December, 2008* aborted and that thereafter, he closed his offices between *11<sup>th</sup> December, 2008* and *12<sup>th</sup> January, 2009*. He explained further that the applicant came to his office on *12<sup>th</sup> January, 2009* to give him instructions to file another application and returned to his office again on *23<sup>rd</sup> January, 2009*. That is after about 2 weeks after the meeting of *January, 2009*. This application was filed on *23<sup>rd</sup> February, 2009*, a month after the meeting of *23<sup>rd</sup> January, 2009*. I have also considered the explanation for delay given by the applicant in *paragraphs 23-35* of his affidavit. The respondent deposes, among other things, that the delay is inordinate and that the applicant has not exercised due diligence for the reasons given in the replying affidavit. The applicant deposes that the present application was precipitated by his advocate's letter of *February, 2009* to the applicant's advocates seeking the approval of the draft decree.

I have considered the contents of the two supporting affidavits and the replying affidavit.

The applicant did not file a notice of appeal within the *14 days* of the delivery of the ruling of the superior court as prescribed by the Rules.

After the expiry of the fourteen days, the first application for leave to file the notice of appeal out of time was filed on *22<sup>nd</sup> July, 2008* - over three weeks after the expiry of the *14 days*.

The application which was filed was admittedly incurably defective and was withdrawn on *22<sup>nd</sup> December, 2008*. The applicant's previous advocate has not explained why he did not withdraw the application as soon as possible instead of waiting until the date of hearing.

There is further no reasonable application why a fresh application was not immediately filed after the first application was withdrawn on *22<sup>nd</sup> December, 2008*. The period between *3<sup>rd</sup> December, 2008* and *23<sup>rd</sup> February* is inordinate and no reasonable explanation has been given for this long delay. All in all, the applicant is guilty of various delays which are cumulatively inordinate and inexcusable. It is probable as the respondent deposes that it is his advocate's letter seeking the approval of a draft decree that prompted the applicant to file the present application.

The respondent will suffer undue prejudice if the application is allowed. The boundary dispute has been raging for over **twelve years**. The Land Registrars have visited the disputed boundary on about six occasions. It is just that this litigation should hopefully come to an end.

For those reasons, I dismiss the application with costs to the respondent.

*Dated and delivered at Kisumu this 25<sup>th</sup> day of June, 2009.*

***E.M. GITHINJI***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**