REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 185 of 2006

MRS. ROSEMARY MAKENA MWANGI ……..….. 1ST APPLICANT

SIMON MURAYA ……..……. 2ND APPLICANT

AND

MWANGI HARUN ……..…..…….. 1ST RESPONDENT

FLORA KABURA CHEGE (the administrator of the estate of

JOHN CHEGE ……...…...…. 2ND RESPONDENT

(An application for extension of time to file and serve a notice and record of

appeal out of time from the judgment of the High Court of Kenya at Nairobi (Muli, J) dated 22nd May, 1981

in

H.C. Misc. Civil Suit No. 31. 1978)

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RULING OF THE COURT

This is a reference to the full court under rule 54 of the Rules of this Court from the decision of Aluoch, JA sitting as a single judge of this Court delivered on 4th July, 2008. The learned single judge exercised her discretion under rule 4 of this Court's Rules by dismissing the applicant's application for extension of time within which to seek leave to appeal against the decision of the superior court (Muli, J) given on 22nd May, 1981.

In dismissing the applicant's application the learned single judge expressed herself thus:

"***The length of the delay in this case is about 28 years. The reason given for the delay is "mistakes of lawyers", though the only correspondence from the applicant's lawyer then, annexed is dated 5th July, 1985. The decision made by the learned Judge 28 years ago, was confirmed by the first respondent Mwangi Harun, in his submissions before me, that indeed he sold Plot No. 6B Chuka market to John Chege (now deceased). In these circumstances, what possible considerations of the appeal succeeding are there? Over and above the reasons given above, I feel inclined to take into consideration other relevant facts, such as the ages of the parties to this dispute as they have the evidence of what happened. Further, that some of them namely, John Chege has since died, a fact that might affect the continued litigation in this matter though he has been substituted by his wife. Both the first applicant and the first respondent are well advanced in age, i.e. 90 and 83 years old, respectively. Is it really proper that they should continue with litigation which started on 18th September, 1978? I think not. There is also the possibility of prejudice to Flora, the 2nd respondent who has lived on the suit premises since the judgment was granted in favour of her late husband."***

When this matter came up for hearing before us, Mr E. Ondieki, learned counsel for the applicant conceded that the learned single judge had given sufficient reasons to decline the application, but submitted that there were extra-ordinary circumstances here to tilt the discretion in favour of the applicant, namely that she was old and illiterate, and may have been misled by her advocates. He relied on the case ***Murai vs Wainaina (1982) KLR 38*** where the court took into account the mistake of a lawyer.

In opposing the application, Mr G. Mwangi, learned counsel for the respondent submitted that the delay herein of 28 years was inordinate; that his clients, too, were old and illiterate, and re-opening this matter would be highly prejudicial to the respondents who have lived and built on the suit land for almost three decades.

This is a matter in which the learned single judge was called upon to exercise her unfettered discretion under rule 4 of the Rules of this Court. It was necessary for the applicant to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his or her discretion? In ***Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*** this Court stated:

"***It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted".***

This Court has also stated that the factors which may be considered are not exhaustive, so long as they are relevant – See ***Mwangi vs Kenya Airways Ltd (2003) KLR 486***. In the same case, this Court expressed itself on the circumstances under which the Court may interfere with the exercise of the discretionary power of a single Judge, thus:

"***Before a full court can interfere with the exercise of a single judge's discretion it would have to be satisfied that in coming to his decision the single judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong".***

In this reference it has been shown that a delay of almost 28 years was not explained to the satisfaction of the learned single judge. It was not explained satisfactorily to this court either. In fact, we find no good and discernible reasons for this extremely inordinate delay in pursuing this intended appeal. All litigation must come to an end at some point.

We have carefully considered the submissions of counsel appearing for both parties and having regard to what was before the learned single judge and bearing in mind the principles set down in the ***Mwangi case (supra)*** we have come to the conclusion that there was no misdirection on the part of the learned single judge in the manner she exercised her unfettered discretion. The upshot of the foregoing is that this reference fails and is dismissed with costs.

Dated and delivered at Nairobi this 5th day of June, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

…….

JUDGE OF APPEAL

ALNASHIR VISRAM

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR