REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 319 of 2008 (UR 212/08)

CLIFF ONGERI .....1ST APPLICANT

ISAAC ONGUBO KIBWAGE ..... 2ND APPLICANT

AND

JOSEPH MUTUA KYENZE .....RESPONDENT

(An application for leave to file notice and memorandum of appeal out of time from an intended appeal from the ruling of the High court of Kenya at Nairobi (Ang'awa, J.) dated 31st July, 2007

in

H.C.C.S. NO. 1113 OF 2004)

****

RULING

This is an application under ***rule 4*** of the rules of this court for "*leave to file a Notice of appeal and a Memorandum of Appeal out of time"*. The applicants are ***Cliff Ongeri*** and ***Isaac Ongubo Kibwage*** who were the first two defendants in the superior court. A third defendant, one ***Joseph Kalunde***, never responded to the suit and did not take part in the trial. They were all sued by ***Joseph Mutua Kyenze***, the respondent before me, in the year 2004.

The claim by the respondent before the superior court was that he was the lawful owner of a plot of land in Syokimau Farm, in Athi River area, otherwise known as **LR. NO. 12715/321**, **I.R Number 44738**. In 1997 however, the two applicants colluded with the 3rd defendant and fraudulently transferred and registered their names under the Title. He sought orders for revocation of the names from the Title and reversion to his name. He also sought *mesne* profits for wrongful user and damages. The applicants filed their joint defence denying that the transfer was fraudulent asserting that they had lawfully purchased the portion of land. The matter fell before Ang'awa J for hearing on 30th July, 2007 and both parties were represented by learned counsel. The two applicants were not in court, however, and had not complied with an order issued by the learned Judge for payment of "*getting up fees"*. The hearing proceeded in the absence of the two applicants but in the presence of their counsel and judgment was delivered on 31st July, 2007 in favour of the respondent. Orders were issued for revocation of the applicants names from the Title and substitution of the respondent's name. The decree was issued on 16th

October, 2008.

The applicants were not satisfied with the decision of Ang'awa J. and so they filed, through their advocates, a notice of appeal on 6th of August, 2007. The filing was timeous under the rules of this Court. For some reason, the applicants then returned before the superior court and took out an application dated 4th April, 2008 seeking an order for setting aside the judgment of 31st July, 2007 and for hearing of the suit afresh. The matter again fell before Ang'awa J for hearing and determination. On 30th April, 2008 Ang'awa J dismissed that application holding that the judgment sought to be set aside was not *ex parte* and could not therefore be set aside by the same Judge. Matters then appear to have rested there until the application now before me was filed on 11th December, 2008-almost 1 ½ years after the judgment sought to be impugned.

I have unfettered discretion to exercise in considering the application but there are principles which must guide me as I consider it. Without consideration of those principles the exercise of my discretion would be whimsical and injudicious. I take them from **Fakir Mohamed v Joseph Mugambi & R 2 others**, **Civil Application No. Nai. 332/04 (unreported)** where the Court stated:

"**The exercise of this Court's discretion under *Rule 4* has followed a well-beaten path since the stricture of "*sufficient reason*" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38."**

Learned counsel for the applicants Mr. Abogi Begi was conscious that the long period of delay needed to be explained even before consideration of other relevant factors. In his submission, the delay was caused by numerous advocates who acted for the applicants at various stages and misadvised their clients. The advocates, for example, who filed the notice of appeal soon after the judgment did not ensure that it was a valid notice. It was not signed by the Deputy Registrar and therefore the applicants just ignored it. The other example is the advocates who filed the application for setting aside the judgment instead of appealing. Mr. Begi pleaded with me not to visit the mistakes of those advocates on the applicants. He further pointed out that the subject matter of the intended appeal was land and that the applicants had been condemned unheard before the superior court. Finally Mr. Begi submitted that there would be no prejudice caused to the respondent if the orders were granted since he will participate in the appeal and, if successful, will still enjoy the fruits of his judgment. The intended appeal, in his view, was meritorious.

On the other hand, Mr. Arimi Kimathi, learned counsel who has appeared for the respondent throughout, submitted that the applicants were guilty of laches and had not offered any reasons for the inordinate delay. The excuse that there was misadvise by counsel has a remedy in pursuing the advocates. He further submitted that there was a notice of appeal on record which was timeously filed and has neither been withdrawn with the leave of the court nor struck out of the record. The prayers for filing another notice of appeal did not therefore lie. Furthermore, he submitted, the application has in any event been overtaken by events since execution of the decree has been completed and taxed costs have already been paid by the applicants. Indeed, after obtaining the Title Deed in his name, the respondent proceeded to sell the property and there is now a third party who has acquired interest therein. In his submission, there would be grave prejudice on the respondent if the application was allowed at this late stage. The application should therefore be dismissed.

I have considered the application, the affidavits on record the submissions of counsel and the applicable law. There is no doubt that the applicants here were represented by various advocates along

the way and that fact was noted by Ang'awa J who stated in the ruling dated 30th April, 2008:

"**The 1st and 2nd defendant entered appearance on 9th June, 2005 through M/s. Kili Kori and Associates. A notice of change was filed on 24th July, 2007 by M/S. Kipsang Murugi Mugo and Co. Advocates and finally after judgment the firm of M/S. Kelly and Co. Advocates came on record on 26th October, 2007."**

She however found and noted that one "*M.S . Meto appeared for* the *firm of M/S. Kipsang Murugi Mugo and also M/S. Kelly & Company Advocates. At all times he had conduct of this suit before, during and* after *trial."* There was also a notice of change of advocates filed by M/S. Kenani & Company, Advocates on 5th September, 2008, the advocates who filed the current motion before me on 11th December, 2008. One thing is clear: the several advocates on record were instructed by the applicants and it must be taken that they were in constant touch with each other. The applicants are however loud on the faults of the advocates without explaining any steps they took themselves in mitigating the delay occasioned in this matter. It is not every mistake that is committed by an advocate which will avail the client. Mere inaction by advocates after instructions are given to them has never qualified as excusable mistake and the remedy of the client is against the advocate. I do not have on record any affidavit from the advocates pleading innocence or even negligent performance of their duties which I may consider towards explanation for the delay, which is by no means lengthy. In the absence of explanation I refuse to look at the delay favorably and find in fact that it was inordinate.

Even if I had found the delay reasonable, there are other factors which militate against favourable consideration of the application before me.

Firstly, it is not denied that there is a notice of appeal filed to challenge the same judgment which the notice of appeal sought to be filed in the application before me will challenge. There is nothing to show that the notice of appeal has been withdrawn or struck out. It was in fact an issue before the superior court but no proof was supplied by the applicants that there was no notice of appeal in existence. As Onyango Otieno JA stated in the authority relied on by the applicants' counsel in a similar situation:

"**I am being asked to extend time to file a notice of appeal and record of appeal from the judgment of Ransley J. in Civil Case No. 4569 of 1990 in the superior court. On 7th May, 2004, a notice of appeal had been filed against the same judgment. The notice of appeal, whether valid or not, is still in the record. There is no order of the court either striking it out or marking it as withdrawn. It is still extant. The law as regards such a scenario is now well settled. In the case of <u>Paul Kanyi and another vs. George Mbugua Njoroge & another</u> – Civil Application No. Nai. 288 of 2001, Kwach J.A (as he then was) dealing with a similar situation stated, *inter alia*, as follows:**

"***I must reject that submission as misconceived because this Court has stated in a number of decisions that a notice of appeal cannot be deemed to have been withdrawn under rule 82 of the Rules, except with the order of the Court.***

The position in this case therefore is that the notice of appeal filed on 26th July, 2001, is still alive and well and as long as it is still extant, there is no room for making an order for filing a second notice of appeal. For this reason, this application must fail and it is hereby dismissed with costs."

- see **<u>Ngoima Wa Mwaura v James Njuguna Kihuna & Another</u> Civil Appl**. **NAI. 155/04 (ur)** .

In the same vein, I cannot grant the prayer for filing a notice of appeal when there is one in existence.

Secondly, there is affidavit evidence, which is not rebutted, that the decree of the superior court has been executed and that the disputed property has been alienated through sale to a third party. Apart from prejudicing the third party who may well be an innocent purchaser for value, the respondent will suffer prejudice too if the litigation is reopened at this late stage for no good reasons. There must be an end to litigation. This litigation commenced 5 years ago and there should be a strong reason for prolonging the

agony of the parties beyond that period. That the subject matter is land would not make it exceptional to the public policy that there must be an end to litigation. A similar plea was made in the same authority relied on by the applicants' counsel, ***Ngoima Wa Mwaura*** (supra), where Onyango Otieno JA stated:

"**Dr. Khaminwa has urged me to consider that this is a land matter and to seriously consider the rights of the applicant. To that effect, he has referred me to the book International Law of Human Rights in Africa – Article 7 and he emphasizes that his client, the applicant, has a right of appeal. I agree. He has a right of appeal. The constitution recognizes that right and our laws are never silent on the rights of any person in Kenya. It is to that extent that laws are enacted to regulate the exercise of those rights so that both parties to a suit may be certain, not only of their rights but also of the extent to which such rights would be exercised. That is done to ensure that human beings live and carry out their activities in an orderly manner. In this application, rule 4 of this Court's Rules confers upon the court the discretionary powers to regulate the manner in which those who are late in the exercise of their right to appeal (if the right is granted by law or if the court allows it) can approach the Court. Under the doctrine of precedent, courts have interpreted what are required for the exercise of such rights and the guidelines are as I have spelt out above in the decisions, parts of which I have reproduced. The right applies to all and so in applying the law, the respondents' rights cannot be ignored in pursuit of the applicant's right. In any case, it is upto the applicant to show that it has taken such actions as would confer such rights upon him. Land matter is a serious matter to both parties and not only to the applicant. I cannot ignore the rights and interests of either party. I must consider the same with law as my guide. I had done so."**

I agree.

Those views apply with equal force to the matter before me. Whether or not the intended appeal has any chances of success is a factor I may possibly consider. I find it unnecessary to do so in view of the circumstances of the case adumbrated above.

In the end, I decline to exercise my discretion in favour of the applicants and I order that the application be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 12th day of July, 2009.

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR