



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CIVIL APPLI 345 OF 2005**

**JOHN FRANCIS MUYODI.....APPLICANT**

**AND**

**BUSIA COUNTY COUNCIL**

**RAPHAEL OJWANG – CHAIRMAN**

**BOB MUNIALO – CLERK**

**JACKSON AMUKE - TREASURER..... RESPONDENTS**

**(Application for extension of time to file the notice of appeal and the record of appeal from the judgment of the High Court of Kenya at Bungoma (Mitey, J.) dated 8<sup>th</sup> May, 2003**

**in**

**H.C.C.Suit No. 108 of 2000 (O.S.)**

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**RULING OF THE COURT**

This is a reference to full Court under **Rule 54 (1) (b)** of the Court of Appeal Rules from the ruling of a single Judge (Aganyanya, J.A.) dated 22<sup>nd</sup> May, 2008 dismissing an application under **Rule 4** of the Court of Appeal Rules for extension of time for filing both the Notice of Appeal and the Record of Appeal.

The applicant intends to appeal against the decision of the superior court, Mitey, J dated 8<sup>th</sup> May, 2003 dismissing the applicant's suit *H.C.C.C. No. 108 of 2000 (O.S.)* on the ground that the applicant had no capacity to bring the suit as he had not obtained a grant of letters of administration to the estate of his deceased father **Lawrence Ongoma Makokha**.

By the suit, the applicant sought to recover land parcel No. Marachi/ Elukhari/944 comprising of 0.487 Hectare on which Butula market stands which respondents allegedly grabbed. The applicant claimed that his deceased father was authorized by Busia County Council to establish Butula Market on his said land “*in reciprocation for 50 acres of his family land that he donated to the Government*”.

The learned single Judge has in his long Ruling narrated the subsequent events after the dismissal of the suit by the superior court.

Firstly, the applicant filed a constitutional application on 11<sup>th</sup> July, 2003 essentially seeking to reverse the decision of the

superior court dismissing the application and applied to the High Court to refer the constitutional application to the Chief Justice to constitute a constitutional court for hearing the application. However the High Court (Sergon, J.) dismissed the application on 21<sup>st</sup> January, 2005.

The applicant next filed an application in the High Court under **section 7** of the Appellate Jurisdiction Act for extension of time, within which to give a notice of appeal against the decision of Mitey, J. dated 8<sup>th</sup> May, 2003. That application was again dismissed by the High Court (Sergon, J) on 30<sup>th</sup> September, 2005 saying that there was unreasonable delay in filing the notice of appeal.

Thirdly, the applicant filed the application for extension of time in this Court on 21<sup>st</sup> December, 2005.

The single Judge considered all those events and concluded:

**“When the applicant’s application was struck out by Honourable Justice Mitey which he was aggrieved with he should have lodged a notice of appeal to this Court straight away but since he opted to make an application to the High Court to place the file before the Honourable the Chief Justice to constitute court to determine his complaint, he abandoned the initial process and took the complaint before a different form of jurisdiction and hence lost the opportunity to appeal in the first chance.**

**His action to move from this Court to another was the cause for the delay in filing the notice of appeal but not a good reason to grant an extension of time”.**

This being a reference we are not concerned with whether the learned single Judge reached the correct decision on the merits of the application. Rather, we are only concerned with whether the learned single Judge exercised his discretion judicially. The principles upon which this Court can interfere with the exercise of a discretion by a judge are well settled. (See Mbogo v. Shah [1968]EA 93; The Fancois Vieljeut [1984] KLR 1 and Mrao Limited, First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.

The applicant who appears in person filed written submissions. He relied on the written submissions and did not address the Court. We have studied the written submission.

The applicant in the written submissions merely refers to the merits of the suit which was dismissed by Mitey, J, the merits of the various applications which he previously made in the superior court and the merits of the intended appeal. He does not refer to the manner in which the learned single Judge exercised his discretion.

He does not show for instance that the single Judge in reaching his decision failed to take into account any relevant matters or that he considered any irrelevant matter or that the learned single Judge erred in principle in dismissing the application.

The application for extension of time was filed over 2½ years after the Ruling of Mitey, J. This was a long and inexcusable delay. We are satisfied that the single Judge exercised his discretion judicially in the circumstances of this case.

Lastly, the application for extension for time was itself incompetent since the applicant had not obtained grant of letters of administration authorizing him to institute suit on behalf of the estate of his deceased father.

Indeed he obtained the grant on 12<sup>th</sup> February, 2009. The grant does not in law relate back to the date of the institution of the application.

For those reasons, the reference has no merit. We dismiss it with no orders as to costs.

**Dated and delivered at Eldoret this 23<sup>rd</sup> day of October, 2009.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR