REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 221 of 2008 (UR 140/2008)

SERAH NJERI *applying in her capacity as the Administrator*

***of the Estate of the late* JOHN MUNGAI MWOBI…….APPLICANT**

AND

JOHN KIMANI NJOROGE ……..…RESPONDENT

(An application for leave to file and serve a notice of appeal and appeal out of time against the judgment of the High Court of Kenya at Mombasa (Khaminwa, J) dated 8th February, 2007

in

H.C.C. C. NO. 90 OF 1999)

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R U L I N G

This is an application under ***rule 4*** of the Court of Appeal Rules for extension of time within which to lodge and serve a notice of appeal against the judgment of the superior court (Khaminwa J) delivered on 8th February, 2007.

The applicant relies on the grounds set out in body of the application and in the affidavit in support of the application which was sworn on 31st July 2008 by the applicant, the administrator of the estate of the late John Mungai Mwobi. In her affidavit Sarah Njeri depones that when the judgment the subject matter of the intended appeal was given against the estate on 8th February, 2007, she instructed the estate's advocates Messrs Odhiambo S. F. & Company to appeal against the judgment. The advocate filed a notice of appeal on 15th February 2007, well within the prescribed period. The advocates then filed a record of appeal on 9th July 2007 again, well within the stipulated period, but due to an error concerning the title of the process server's affidavit of service, both the notice of appeal and the record of appeal were struck out on 25th July 2008 by this Court. The process server had wrongly indicated in the affidavit that the case was Civil Appeal No. 16 of 2007 instead of HCCC No. 90 of 1999.

Mr. Odhiambo the learned counsel for the applicant submitted that after the striking out of the initial

notice of appeal and record of appeal on 25th July 2008 the application seeking extension of time to file a fresh notice was lodged in Court on 6th August, 2008 and that the delay of 12 days in filing the application was not inordinate in the circumstances. He further put forward the submission that the applicant, as is evident from the draft memorandum of appeal annexed to the application, has an arguable appeal, as the Judge who heard the matter, the subject matter of the intended appeal had previously recused herself after being prompted by counsel but all the same she subsequently heard the matter and this is clear from the judgment itself.

He concluded his submission by stating that the respondent would not suffer any prejudice if an order for extension was granted because the subject matter of the intended appeal is land which is currently being occupied by the respondent, whereas the title to the same land is in the name of the applicant. The learned counsel for the applicant stated that it will be in the interest of justice to have the appeal touching on land heard on merit.

On his part the learned counsel for the respondent Mr. Mabeya relied on the contents of a replying affidavit sworn by the respondent on 12th January 2009 and filed on 13th January 2009. In a nutshell Mr. Mabeya submitted that the earlier notice of appeal had not been served and that there were falsehoods in the affidavit of service and this is what led to the striking out of the notice of appeal and the record of appeal. Mr. Mabeya contended that the applicant had not demonstrated that she had an arguable appeal in that counsel had not objected to the learned Judge hearing the matter but sat on his client rights until the hearing had been finalized and judgment delivered.

On the issue of delay, Mr. Mabeya contended that there was unreasonable delay in bringing the application and further that the delay had not been satisfactorily explained. Finally, Mr. Mabeya stressed that the genesis of the litigation started way back in 1999 and that the respondent was now 77 years old and it was in the interest of justice that litigation must come to an end and that the apparent lack of finality since 1999 had inflicted on the respondent pain and uncertainty taking account that, even at his great age, the title deed to the disputed land was still not in his possession.

It is now trite law in an application under ***rule 4*** of the Court of Appeal Rules in order for an applicant to earn the Court's discretion he or she is required to show among other things; that the intended appeal has merit; that delay has not been inordinate; and that the extension of time will not cause undue prejudice to the respondent – see ***WASIKE v. SWALA*** [1984] KLR 591.

I have no doubt that although I have taken into account the above factors which over time, have had the backing of a line of authorities from this Court, at the end of the day the discretion conferred in the Court is to enable the Court to serve the cause of justice. In the exercise of the Court's discretion I have also reminded myself that this is a judicial discretion, and must therefore be exercised in a judicious manner taking into account the circumstances of each case I have no doubt that the list of factors for the exercise of the discretion are varied and infinite. Indeed the exercise of the discretion in any particular circumstances will always be a special challenge to the judge hearing any particular matter.

To my mind and without in any way expressing any final view on the point, it cannot be said that the point concerning the previous recusal or disqualification of the Judge who heard the matter in the superior court and the effect of her having heard the matter thereafter is frivolous: On the length of delay of 12 days, although no satisfactory explanation was given, all in all, I do not consider a delay of 12 days inordinate taking into account that one of the parties is represented by an administrator of the estate and the subject matter of the dispute is land.

As regards possible prejudice to the respondent, I agree with the applicant's counsel that the fact that the respondent is in possession of the land and at the same time, the applicant has the title means that both parties are on equal footing. This in turn calls for an early determination of the matter on merit and for this reason I find no undue prejudice to the respondent.

In the circumstances and for the above reasons, I am inclined to exercise my discretion in favour of granting an extension of time.

I allow the application on condition that the applicant files and serves a notice of appeal within 14 days from the date hereof. The costs of the application to abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Mombasa this 16th day of October, 2009.

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR