



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

Civil Application 255 of 2009 (UR 177/09)

NAFTALI RUTHI KINYUA.....1ST
APPLICANT

PETER MWANGI MBUTHIA.....2ND
APPLICANT

AND

1. KENYA COMMERCIAL BANK LIMITED.....1ST
RESPONDENT

2. ELIZABETH NYAMBURA GICHERU

T/A MARLENE AUCTIONEERS.....2ND RESPONDENT

(Application for extension of time to appeal against the ruling and order of the High Court of Kenya at Milimani (Khaminwa, J) dated 11th June 2009

in

H.C.C.. NO. 394 OF 2006

RULING

This is a notice of motion under **rule 4** of the Court of Appeal Rules. The provisions of that rule are that:-

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

Under **rule 74(1)** a person who wishes to appeal to the Court against the decision of the superior court must first file a notice of appeal. **Rule 74(2)** then provides that the notice of appeal must be so filed within a period of fourteen days from the date the decision proposed to be appealed from is made.

On 11th June, 2005 Khaminwa, J made an order directing the two applicants, Naftali Ruthi Kinyua and Peter Mwangi Mbuthia, to pay the sum of Kshs. 615,832.20 cents as security for costs if the

applicants wanted to proceed with their case, i.e. HCCC No 394 of 2006 which the applicants had lodged against Kenya Commercial Bank Limited the 1st respondent and Elizabeth Nyambura Gicheru, t/a Marlene Auctioneers, the 2nd respondent. As far as I understand the position, the applicants had borrowed money from the first respondent and to secure the money so borrowed, land known as L.R. No 36/111/218, Eastleigh, Nairobi had been offered as security. As is not unusual in such matters, the loan was not repaid as had been agreed between the parties and the first applicant purported to exercise its power of sale conferred on it by the Registered Land Act, Chapter 300 of the Laws of Kenya. The second respondents are auctioneers as is obvious from their name and the first applicant instructed them to carry out the sale of the land. The two applicants as plaintiffs, then filed civil case no HCCC 394 of 2006, amongst previous other cases, challenging the validity of the sale. Amongst other cases which had been filed by the applicants was HCCC NO 653 of 2001. On 8th June 2004, a Deputy Registrar of the High Court had issued a certificate of taxation showing that costs had been taxed and allowed in the sum of Kshs. 615,832.20; that taxation was made upon a bill of costs which had been lodged in the High Court on 5th December, 2003. Again on 7th November, 2007, the parties signed a consent order of taxation showing that a bill of costs which had been lodged in the High Court on 10th August 2007 had been agreed and taxed in the sum of Kshs 28, 225/- all inclusive. It is thus clear from the material before me that there were two different bills of costs, the first one filed on 5th December, 2003 and taxed and allowed in the sum of Kshs. 615,832.20 and the second bill was filed on 10th August 2007 and was by consent taxed at Kshs. 28,225/-; the consent was entered into on 8th November, 2007. Mr. Kamunyoru for the respondents told me that the bill for Kshs 28,225/- has been fully paid. Mr Kariuki for the applicants contended that the bill taxed at Kshs 615,832.20 had been agreed and reduced to the Kshs 28,225. That does not appear to be supported by the consent order of 7th November, 2007 but I shall say no more on that point.

Some three years after HCCC NO 394 of 2006 had been filed the respondents filed a summons in chambers in which they asked the High Court to either:-

- (i) order the applicants provide security in the sum of Kshs. 1,000,000/- ; or**
- (ii) that the applicants be ordered to pay to the first respondent the taxed costs in the sum of Kshs 615,832.20 in respect of HCCC NO 653 of 2001 before being allowed to prosecute their current suit i.e. HCCC NO 394 of 2006.**

That is the summons which Khaminwa J heard and after the hearing, the learned Judge reserved her ruling to the 8th June, 2009. She was unable to deliver her ruling on the 8th but she did deliver it on 11th June, 2009, some three days later. According to Mr. Kariuki on 8th June, 2009, the Judge said she would deliver her ruling on notice; according to Mr. Kamunyoru, the Judge said she would deliver her ruling on 11th June, 2009. Mr. Kamunyoru was actually present before the Judge when the ruling was delivered. Mr Kariuki was absent. I asked both counsel if the Judge had made any entry in her record on 8th June, 2009; none of them was able to say anything on this one way or the other as the proceedings of the superior court are not part of the motion. Mr Kamunyoru, however, did agree before me that he did not subsequently inform the advocates for the applicants about the delivery of the ruling.

The applicants contend they only came to know about the ruling on 30th July, 2009, more than one month after it had been delivered. They did not file the present motion until the 20th August, 2009. They contend that this delay is not inordinate.

Under **rule 4**, my discretion is wholly unfettered and I am entitled to make such order or orders as will meet the justice of the case. In this respect, I must take into account the history of the litigation and the order against which it is proposed to appeal. There cannot be any doubt that various cases – Mr Kamunyoru put the number at eight-have been filed. In one such case costs in the sum of Kshs. 615,832 was ordered to be paid and thereafter the current suit was filed. The respondents say the applicants have not paid that sum; the applicants say it was reduced to Kshs. 28,225 which has been paid. I have expressed my doubts over this contention though I am not inclined to rule on it one way or the other. In

exercising my discretion, I wish to take all these matters into account. It may well be that the applicants only came to know about the ruling on 30th July, 2009 as they say and it may well be that the twenty other days they took before filing the motion was necessary to enable their advocate to contact them and then prepare the notice of motion. But these factors must be weighed against the fact that the applicants have been involved in filing various cases against the first respondent and the latter's fear regarding the ability of the applicants to pay costs is not unjustified. Accordingly, the orders that commend themselves to me and which I now make shall be as follows:-

- 1. I enlarge for the applicants the time within which to file and serve the notice of appeal. The notice shall be so filed and served within seven days of the date hereof.**
- 2. As a condition for that extension of time, the applicants shall deposit with the 1st respondent the sum of Kshs. 615,832.20 to be kept in an interest earning account in the joint names of the parties' respective advocates. The said sum is to be so deposited within thirty (30) days of the date hereof. If in the end the applicants succeed in their intended appeal, the money and the interest accruing thereon shall be refunded to the applicants.**
- 3. If the applicants shall fail to comply with condition (2) above, then in the event of such failure, the motion dated and lodged in the Court on 20th August, 2009 shall stand dismissed with the costs thereof to the respondents.**
- 4. In the meantime, the costs of the motion shall be in the intended appeal.**

These shall be my orders with regard to the said motion.

Dated and delivered at Nairobi this 9th day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR