IN THE COURT OF APPEAL

AT NAKURU

Civil Appli 173 of 2009

MIRIAM WANGUI KIMANI

SAMMY MAINA KIMANI (suing as the administrators

of the estate of JESSE KIMANI NYUKUI …..APPLICANTS

And

MARIGI GACHEHA MACHARIA ………..…..RESPONDENT

(An application for extension of time to file notice of appeal and to lodge memorandum and record of appeal out of time from the ruling of the High Court of Kenya at Nakuru (Maraga, J.) dated 25th September, 2008

in

H.C.C.C. NO. 35 OF 2006)

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RULING

This is an application under ***rule 4*** of the Court of Appeal Rules for extension of time to file a notice of appeal and a record of appeal out of time. It is however, stated on the face of the application, and is conceded by the respondent, that a notice of appeal was timeously filed and served. The understanding of learned counsel for the applicant, Mr. Nyachoti, is that the notice of appeal was only valid for 60 days and expired when the appeal was not filed within time. Mr. Nyachoti did not refer me to any order of the Court striking out the notice of appeal nor did he refer to any of the rules of the Court which provide for expiry of a notice of appeal. I must therefore find, and I now do so, that his submission had no substance in law. The prayer for extension of time to file a notice of appeal is unnecessary and is struck out.

The prayer for filing the memorandum of appeal and record of appeal is supported by an affidavit of the 2nd applicant who narrated the history of the case before the superior court after the ruling intended to be impugned was delivered on 25th September, 2008. After the filing of the notice of appeal the applicant's counsel timeously applied for certified copies of the proceedings and judgment. That was on 3rd October, 2008 but the letter bespeaking the copies was not copied to the respondent's advocates and, according to the applicants' counsel, it was not sent to those advocates. I shall revert to this aspect of the matter shortly. I may also mention in passing that certified copies were not necessary for purposes of the appeal and therefore any delay caused by the certification process would fall for explanation by the applicant.

The applicant swears that the copies applied for in October 2008 were not ready for collection until 21st April 2009 and his erstwhile advocates informed him about this on 9th May 2009. He instructed new advocates who filed the application now before me on 5th June 2009. That was about one month after obtaining the necessary copies.

In his submissions, Mr. Nyachoti pleaded that there was no inordinate delay in filing the application after the copies of proceedings were received from the Court; that the delay in issuing the said copies was caused by the Court itself which issued a certificate of delay; that there were serious issues of law to be considered in the intended appeal; that the appeal relates to land, and that there will be no prejudice to the respondent who is in occupation of the disputed land.

The main opposition to the application is that it was premature and an abuse of the Court process. In a replying affidavit the respondent's advocate on record, Mr. Karanja, depones that the applicant was still within time to file the intended appeal between the time the copies of proceedings and judgment were availed in April 2009 and the filing of this application in June 2009. Explaining that deposition, Mr. Kibet who argued the application, submitted that the letter bespeaking copies of proceedings was sent to them, in which event, time stopped running until the copies were received in terms of the proviso to ***rule 81 (1)*** and ***81 (2)*** of the Court of Appeal Rules. That particular submission, however, was not supported by any deposition in the replying affidavit and Mr. Kibet was therefore testifying from the bar. I reject the submission in view of the letter exhibited on record which was ostensibly not copied to the respondent. It follows that the applicant could not rely on the proviso to ***rule 81 (1)*** and ***81 (2)*** of the Rules and must explain the period of delay before the application was filed.

I have considered the application and the submissions of counsel. The guiding principles as stated in many decisions of this Court, some of which were cited by counsel, are clear. I take them from ***Fakir Mohamed vs. Joseph Mugambi and 2 others*** Civil Application Nai. 332/04 (Ur):-

"*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 Application Nai. 8/2000 (Ur) and Murai v. Wainaina (No.4) [1982] KLR 38.*"

The parties in this matter raised issues of delay, merits of the intended appeal, and prejudice. I am satisfied from the affidavit in support and the documents annexed thereto that the period between October 2008 and April 2009 was taken by the Court in preparation of the copies applied for. The certificate of delay issued by the Deputy Registrar on 22nd April 2009 is not challenged and I accept it. The only delay worth considering was between April and June 2009 when the application was filed and I am satisfied that it is not inordinate and is explained. In any event the respondent did not contend that it was inordinate, his contention being that there was no delay at all since the applicant was within time to file his appeal.

As for the merits of the intended appeal, there is no obligation for a single Judge to embark on any substantial discussion, since that is the province of the full court. There will be cases however when (possibly) as stated in the authority cited above, that consideration will be made to prevent frivolous appeals from being filed. This is not one of them as I consider that the issues raised are substantial ones in law. Finally, it is not disputed that the matter involves land, although that, *per se*, is not a compelling reason to allow the application, but the respondent is in possession of the land and the only prejudice he may suffer is to await the final determination of the intended appeal, thus restricting his unhindered use of the land. I think in the interests of justice the applicant ought to be allowed to agitate the issues of law relating to the intended appeal.

In the result, I allow the application. Time is hereby extended for the applicant to file the record of appeal. The record of appeal shall be filed and served within the next 14 days of this ruling. Costs of the application shall abide the result of the intended appeal.

Dated and delivered at Nakuru this 6th day of November, 2009.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR