



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 226 OF 2007

MARGARET NJERI NJOROGE (the Administratrix and the beneficiary of the Estate of NDUA THIONGO APPLICANT

AND

HANNA WAMBUI KIBE NJOROGE (the administratrix and the beneficiary of the Estate of JOHN KIBE RAGAERESPONDENT

(Application for extension of the time to file notice and record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Osiero J) dated 20th May, 2007

in

H.C.C.C. NO. 2474 OF 1998 (O.S.)

RULING

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time within which to file and serve both the notice of appeal and the record of appeal.

The applicant intends to appeal against the judgment of the superior court (Osiero J) dated on 20th May, 2007 whereby the superior court declared the respondent as proprietor of land title No. Dagoretti/Riruta/2291 measuring 0.1 HA through adverse possession.

The suit land was originally registered in the name of **Ndua Thiongo** the deceased husband of the applicant and upon the death of her husband the applicant was registered as proprietor on 20th August, 1992. The superior court accepted the evidence of the respondent that she and her deceased husband took possession of the suit land in 1976 and that thereafter they extensively developed the land and constructed a two-storey building containing 25 rooms and a bar and also constructed a dwelling house on the land. The applicant in the replying affidavit filed in the superior court in answer to the originating summons admitted that the respondent was in possession but asserted that the respondent and her husband encroached on the suit land between 1990 and 1992. The judgment of the superior court however, shows that the applicant admitted that the respondent took possession of the suit land in 1976 and that the respondent and her husband had extensively developed the land. The superior court said in part:

“She also conceded that her late husband had sold the suit land to the late husband of the plaintiff and

that they took possession in 1976 and the plaintiff has been in possession since then, continuously and without interruption and has done extensive development most of them being commercial: when asked if she was willing to transfer the suit land to the plaintiff she said she would have to consult her children”.

Before the court can exercise its unfettered discretion to extend time in favour of the applicant, the applicant has to show, among other things, that the appeal or the intended appeal is not frivolous; that the application has been brought without inordinate delay and that the respondent would not suffer undue prejudice if the application is allowed (see Wasike v Swala [1984] KLR 591).

The applicant deposes, among other things, that, after the judgment was delivered she informed her advocate that she would file the appeal in person but instructed him to prepare the relevant appeal papers for her; that on 14th June, 2007 she took a letter requesting proceedings to which a notice of appeal was annexed to court; that in July 2007 she instructed another lawyer to take over the matter; that she forgot to give the copy of the letter bespeaking proceedings to her new advocate; that her advocate was unable to trace the court file as the copy of the ruling supplied to him had the wrong case number and that the failure to file notice of appeal was due to inadvertence and excusable mistake.

Mr. Mboroki, learned counsel for the respondent deposes that the delay in not filing the notice of appeal is unreasonable and inexcusable.

It is a common ground that although the judgment is dated 20th May, 2007, it was infact delivered on 22nd May, 2007. The 14 days prescribed by the rules for filing the notice of appeal elapsed on or about 5th June, 2007. The applicant explained that she filed a letter bespeaking the proceedings to which a notice of appeal was annexed on 14th June, 2007. That was 9 days after the expiry of the time allowed for filing the notice of appeal. The explanation given by the applicant that she took the notice of appeal to the court on 14th June, 2007 and was under a honest but mistaken belief that she had filed the notice of appeal is not credible. The copy of the notice of appeal annexed to the application is neither dated nor signed by her advocate. Furthermore, the applicant does not claim to have paid the filing fees.

The present application was filed on 29th October, 2007 – five months after the judgment was delivered. The applicant’s advocates did not file an affidavit to verify that he was unable to trace the court file until 30th August, 2007. Even if that were so, there is no explanation at all why no action was taken between 31st August, 2007 and 28th October, 2007. Considering that a notice of appeal is a simple document, there is no excusable reason for failing to file it within the time prescribed. Furthermore, the delay of 5 months in filing the present application is inordinate and inexcusable in the circumstances of this case.

I have considered the draft grounds of appeal stated in the application and in the draft memorandum of appeal. I am not satisfied that the intended appeal prima facie has merit in view of the admissions by the applicant contained in the judgment that the respondent and her deceased husband has been in possession of the suit land since 1976 and that they have constructed a commercial and a residential building on the suit land.

It is apparent that the respondent will be prejudiced if the application is allowed as there will be prolonged uncertainty about the ownership of the suit land on which the respondent has heavily invested.

I appreciate that the application relates to a land dispute and that it is just that a party should normally be allowed to pursue his claim to land to the highest court. However, in the circumstances of this case, it would be unjust to prolong the dispute.

For those reasons, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 14th day of March, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR