



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

Civil Appli 157 of 2007

RICHARD AKWESERA ONDITIAPPLICANT

AND

KENYA COMMERCIAL FINANCE CO. LTD.....RESPONDENT

(An application for extension of time following a ruling of the High Court of Kenya at Kakamega (Mr. Justice Tanui) dated 1st December, 2006

in

H.C.C.C. NO. 65 OF 1993)

R U L I N G

This is an application by Notice of Motion dated 15th June 2007 being Civil Application No. NAI.157 of 2007 for extension of time under **rule 4** of the Court of Appeal Rules, hereinafter "**the Rules**". The applicant is **Richard Akwasera Onditi**, hereinafter referred to as **Onditi** or "**the Applicant**".

In order to understand the back ground to the application it is necessary to summarise some of the history of the previous events:-

On 1st December 2007 **Onyango Otieno JA** delivered his ruling in Civil application **No. 146 of 2006**. The latter application dated 17th May 2006 was for, firstly, extension of time to appeal against the decisions of Tanui J. dated 18th September 2001, secondly, leave to file a further Notice of Appeal against that decision and thirdly, the applicant also sought extension of a stay of execution which had been granted on 31st March 2006 pending the hearing and determination of the appeal which appeal record was stated to be ready.

Onyango Otieno JA, after reciting the principles upon which the discretion to extend time should be exercised, had no hesitation in dismissing the application for leave to file a further Notice of Appeal. He pointed out that the original Notice of Appeal had not been struck out and that he, as a single judge, had no jurisdiction to strike it out.

The Judge went on to dismiss the application seeking the stay of execution granted on 31st March 2006 rightly stating that he had no jurisdiction to grant such a stay as a single Judge.

The learned Judge went on to allow the prayer for extension of time to file the record of appeal within fifteen days of the date of his ruling being 1st December 2006 and ordered that the costs of the application be in the intended appeal.

The application 157 of 2007 next came for hearing before **Tunoi JA** nearly a year later on 29th November 2007 when the Applicant, appearing in person, requested leave to file a further supporting affidavit to which Mr. Mwinamo, counsel for the respondent stated he had no objection. **Tunoi JA** then made the following Order:-

“The appellant has omitted to incorporate in the record of the Motion the most vital documents— pleadings and judgment/ruling or even the proceedings. As such I will not be able to make out what the matter in dispute is all about. In the result, this application is taken out of today’s cause list and stood over to the next session.

The Applicant shall have leave to file a supplementary record to include the relevant documents.

I award the costs occasioned by this adjournment to the respondent.

Made at Kisumu this 29th day of November, 2007.”

The **Supplementary Record for which leave to file was granted by Tunoi JA** was filed by the applicant on **20th February 2008**. The Supplementary Record document included 24 additional documents covering 101 pages. The first document in the Supplementary Record was headed **Pleadings** and read as follows:-

- 1. That I am the applicant/appellant, hence, competent and authorised to plead in my own behalf.***
- 2. That I sued Kenya Commercial Finance Company Limited on March 8, 1993 for unlawful charge on my properties: LR. No. KAKAMEGA/CHAKALINI/780,781, & 783.***
- 3. That the charge on the said properties at paragraph 2 herein above contravenes the Registered Land Act, Cap. 300 section 82 (a) and (b) Laws of Kenya.***
- 4. That the same charge contravenes the Limitation of Actions Act, Cap.22 section 23 (2) Laws of Kenya.***
- 5. That the counterclaim brought in court on May 31, 1999 contravenes the Limitation of Actions Act, Cap. 22: sections 4 (1)(a) and (c), 19 (4(i) and now section 19 (1).***
- 6. That the delay by the respondent to discharge the charge on LR No. KAKAMEGA/CHEKALINI/416 to facilitate the sub division and sale of 10 acres for Early Repayment mode agreed mutually in its own Letter of Commitment at paragraph No. 4 dated the 12th day of November, 1984 was a breach of conditions contrary to the Law of Contract Act, Cap. 23 Laws of Kenya.***
- 7. That the Applicant/Appellant performed all the conditions agreed in the Letter of Commitment hurdles placed in its way not withstanding.***
- 8. That the respondent contravened the Registered Land Act, Cap. 300 section 72 (3) to have performed on the discharge (sic) 72 weeks or 18 months late instead of the prescribed period of 12 weeks or 3 months.***
- 9. That the Respondent has denied the Applicant/Appellant the equity of redemption pursuant to Limitation of Actions Act, Cap.22 section 23(2) and the Registered Land Act, Cap. 300 section 72(1) after payment of a total of Kshs. 250,511.35 by the 11th day of October, 1990.***

10. *That the Respondent has intimidated, oppressed and coerced the Applicant/Appellant for 20 (twenty) years now.*

11. *That in the above premises, the Applicant/Appellant pleads to this Highest Court in Kenya to allow Further Extension of Time as the respondent will suffer no prejudice – to proceed to the substantive appeal.*

Dated at Kisumu this 8th day of February 2008.

Richard Akwesera Onditi

Applicant/Appellant

Drawn & Filed by:-

Richard Akwesera Onditi

P.O. Box 24—5024,

KIPKAREN RIVER.

It is clear that this document described by the applicant as “*Pleadings*” does not include a *plaint* or an *Originating Summons* or any other “*Pleadings*”.

The reliefs sought by the Applicant do appear from the judgment of B.K. Tanui J. as do the reliefs sought by the Defendant in its counterclaim but the facts pleaded in support of those reliefs are not disclosed.

The *Orders* sought in the application before me are:-

1. *That the Applicant/Appellant be and is hereby granted further Extension of time on the basis of the Ruling of this Court delivered and dated at Kisumu on 1st December 2006.*
2. *That the costs for this application be in the appeal.*

There are then set out 7 grounds for the application of which the following may be of some relevance:-

- “1. *THAT the Ruling of this court delivered and dated 1st day of December 2006, was obeyed to the letter — the Civil Appeal No. NAI. 314 of 2006 was filed within 15 days as per the Ruling.*
3. *THAT on 21st day of March 2007 the said appeal could not proceed for hearing because the Respondent had lodged a Notice of Motion to strike out the same Appeal being Civil Application No 3 of 2007.*
4. *THAT during the intervening period i.e. between the 21st day of March and 9th day of May 2007, the Applicant/Appellant discovered some mistakes which could render the said appeal incompetent.*
5. *THAT the Applicant/Appellant withdrew the Civil Appeal No. NAI 314 of 2006 on the 9th day of May 2007.*
6. *THAT without delay, the Applicant/Appellant has filed this application for further Extension of time.”*

The ruling referred to in ground 1 above was that of *Onyango Otieno JA.* in which the learned Judge of Appeal allowed the prayer for extension of time to file the record of appeal and granted the applicant leave to file the record of appeal within fifteen days of 1st December,2006.

Instead of filing the record of appeal, the applicant decided to withdraw the appeal No **NAI. 314 of 2006** and **now seeks** a further extension of time within which to file a fresh appeal.

I have come to the conclusion that despite the Order of Tunoi JA dated 29th November 2007, while the applicant has now incorporated, in the record of the application, the judgment of Tanui J. and the copy of the proceedings in the superior court, the applicant has not incorporated, in that record, copies of the pleadings in the superior court as required in the Order of Tunoi JA.

In these circumstances I hereby order that the application No. NAI. 157 of 2007 be stood over to the next session in Kisumu to enable this omission to be rectified.

I award the costs occasioned by this adjournment to the respondent.

Dated at Nairobi this 24th day of April, 2008.

W. S. DEVERELL

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JUDGE OF APPEAL

Delivered at Kisumu this 25th day of April, 2008 by:

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR