

IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appli. Nai 300 of 2007 (NYR 14/2007)

PETER WARUI MUCHIRI APPLICANT

AND

JANE WAMBUI MURIITHI RESPONDENT

(Application for extension of time within which to file and serve a notice of appeal and record of appeal from a Ruling of the High Court of Kenya at Nyeri (Makhandia, J) dated 21st July, 2007)

RULING

Peter Warui Muchiri, “the applicant” hereinafter, asks me under **Rule 4** of the Court’s Rules to exercise my unfettered discretion in his favour and to enlarge for him:-

(i) the time within which to file and serve a notice of appeal upon Jane Wambui Muriithi, “the respondent” hereinafter;

and

(ii) the time within which to file and serve a record of appeal upon the Respondent.

The basic underlying facts behind the motion – are not quite clear from the record of application, but what I gathered from Mr. Nderi, learned counsel for the applicant, is that on 3rd September, 1999, approximately eight years ago, the applicant applied to the superior court for an order to revoke some grant or letters of administration which had been made or granted to the applicant. The application to revoke the same somehow stayed on until 25th June, 2007 when it was dismissed for want of prosecution following an application by the respondent for its dismissal. The application to dismiss for want of prosecution had been filed by the respondent on 30th May, 2007. On 25th June, 2007 when the summons for revocation was dismissed for want of prosecution both the applicant and the respondent were present in court. The applicant says he then had Mr. Wachira Kibanya as his advocate. The applicant also says Mr. Kibanya was not present in court on 25th June, 2007 and that was because the application to dismiss for want of prosecution had not been served on Mr. Kibanya. The important point, however, is that the applicant was himself present in court when the dismissal occurred. He does not appear to have gone to Mr. Kibanya to explain to him what had happened in court. He waited until 19th July, 2007, nearly one month later when he went to consult his present advocate. The present motion was not filed until 5th October, 2007 and when I asked Mr. Nderi the cause of the delay between 19th July, 2007 and 5th October, 2007, his answer was that he still needed to peruse the Kerugoya court file in order to decide what to do and that the applicant did not have money to instruct him to proceed. Under those circumstances, Mr. Nderi pleaded with me that the matter involves a piece of land and I should give the applicant a chance to bring his appeal.

The respondent who appeared before me in person strenuously opposed the application contending that she and the applicant have always attended the court together but that when they go back home, the applicant would go to an advocate and file one application or the other.

In deciding how to exercise my discretion in the matter, I must take into account the fact that the grant sought to be revoked must have been made either in or before 1999. The summons to revoke it was filed by the applicant on 3rd September, 1999 and on the facts before me the summons dragged on until 30th

May, 2007 when the respondent applied for its dismissal for want of prosecution. Makhandia, J was satisfied that the applicant had failed to prosecute his application and dismissed it on 25th June 2007. The applicant was present in court and he then waited until 19th July, 2007, when he went to see Mr. Nderi. Again from 19th July, 2007 to 5th October, 2007, the matter was held in abeyance and it appears to me that the applicant's main problem must have been lack of resources to instruct his advocates. He does not explain why he abandoned Mr. Kibanya for Mr. Nderi and even after instructing the latter, this motion was not brought until over two months later. I accept the plea of the respondent that litigation must come to an end and that the applicant ought not to be allowed to "disturb" her for ever. I am not, on the facts as presented to me, satisfied that I should exercise my discretion in favour of the applicant. He has delayed, or failed to show diligence at every stage of the matter, thus causing wholly unjustified delays to the conclusion of the dispute. That being my view of the matter, I order that the applicant's notice of motion dated 1st October, 2007 and lodged in Court on 5th October, 2007 be and is hereby dismissed with the costs thereof to the respondent.

Dated and signed by me at Nyeri this 22nd day of May, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

Delivered by O'Kubasu, J.A at Nyeri this 23rd day of May, 2008.

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

DEPUTY REGISTRAR.