IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 348 of 2005

FRANCIS KARIU GAKUMBI…………………….……..…1ST APPLICANT

EDWARD MWANGI NGURE ……….……………………..2ND APPLICANT

AND

PILISKA NJOKI MAINA …………………………......……. RESPONDENT

(Application for extension of time to lodge and serve a notice of appeal and record of appeal out of time from the order of the High Court of Kenya at Nyeri (Juma J.) dated 13th March, 2001

in

H.C.C.C. NO. 167 OF 1983)

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RULING OF THE COURT

On *15th May 2006* **Omolo J.A.**, sitting as a single Judge dismissed an application under rule 4 of the Court of Appeal Rules in which Francis Gakumbi and Edward Mwangi Ngure (the applicants) had applied for extension of time within which to lodge and serve a notice of appeal and a record of appeal against the order of the superior court made by Juma J. (as he then was) on *13th March 2001*. Following the refusal to extend the time, the applicants requested and they were allowed to refer that decision to the full court under rule 54 of the court's Rules.

The application for extension of time was supported by an affidavit jointly sworn by both applicants, which affidavit sets out the background facts to the application. The applicants were the defendants in **Nyeri High Court Civil Case No. 167 of 1983**. The matters in dispute between the parties in that suit were referred to arbitration by elders. An award was filed in court and was read on *4th December, 1998*. The applicants deponed in their joint affidavit that the award was read in their absence and also in the absence of their advocate then on record. Time for challenging the award expired before any application was made in that regard.

An application was lodged in the Superior Court on *18th May 1999*, in which these applicants sought an extension of time within which to challenge the award, which application was heard by Juma J. who, on 13th March 2001 dismissed it. It is against that decision, that the applicants intend to lodge an appeal to this Court. By dint of the provisions of **rules 74** and **76** of this Court's rules an intending appellant is required to lodge a notice of appeal within 14 days of the decision against which an appeal is intended

and to serve the same within 7 days thereafter. The applicants did not comply with that provision and hence their application dated *2nd November, 2005*. It is that application which a single Judge of this Court dismissed as earlier on stated.

In their joint affidavit, the applicants have deposed that they were not able to lodge a notice of appeal within the time stipulated because their advocate did not notify them of the superior court's decision in time; that they were "***trying to have the judgment entered in terms of the arbitration ward on 15th June, 1991, reviewed and set aside."***

Omolo J.A heard Miss Mwai for the applicants and Mr. A.T. Ghadialy for the respondent in the application for extension of time. In his ruling after introducing what the matter he was seised of was all about, the learned Judge expressed himself thus regarding the joint swearing of an affidavit:

"***I do not know that two different people can swear one oath at the same time. An affidavit is sworn evidence and that being so each party ought to swear a separate affidavit even if the facts on which they are swearing the affidavits are the same. The practice of the people swearing and signing one affidavit must stop and if the motion had been opposed on the ground that it was not supported by a competent affidavit, I might well have struck it out on that basis."***

Notwithstanding the grim view the learned Judge took of the applicants' affidavit he nonetheless considered its contents in coming to a decision, which was that he was not persuaded that the applicants deserved the exercise of his unfettered discretion in their favour. In conclusion the learned Judge rendered himself as follows:

"***I agree land is a "sensitive" issue but litigation, even on land must come to an end. It would be unjust to the respondent to reopen the litigation some eight years from the date when the award of the elders was read to the parties in the presence of their advocates."***

In her submissions before us Miss Mwai attacked the learned single Judge's aforequoted two sets of remarks. It was her submission that in view of Form No. 11 of the 1st schedule of the Law of Succession Act, the learned Judge was biased against the applicants. In her view, the learned Judge having ruled at the inception of his ruling that the applicant's affidavit was defective, he would not thereafter be dispassionate in his consideration of their affidavit. Beside, she said, this court has consistently adopted a lenient approach when dealing with issues relating to land. In her view the learned Judge instead of continuing with that approach, adopted a strict approach and thus prejudiced the applicant's case. She cited three decisions of this Court to wit ***Macharia Njoroge v. Gakuru Kuria*** *Nairobi Civil Appeal (Application) No. 35 of 2004*; ***Jerusha Wairimu Kamau v. Josephat Mburu Mondothi*** *Civil Application No. NAI. 303 of 2005* and ***Gichuki Gathaara Kimiti v. Ndirangu Njogu & Another*** *Civil Application No. NAI. 23 of 2006 (NYR. 2/06)* in support of her view regarding the approach of the court in land matters.

Piliska Njoki Maina, the respondent, was unrepresented before us. She opposed the reference arguing that a decision had been reached by the superior court, which she supported, she is old being aged over 80 years, has no children to support her and that this matter has taken too long.

Section 18 of the ***Oaths and Statutory Declarations Act, Cap 15*** Law of Kenya provides that:

"***18. All oaths made under section 17 of this Act or section 51 of the Criminal Procedure Code be administered according to such forms as the Chief Justice may by rules of court prescribe, and until any such forms are so prescribed such oaths shall be administered according to such forms now in use."***

Section 17 of the Oaths and Statutory Declarations Act, makes provision as to persons by whom oaths and affirmations are to be made; and **section 151** CPC provides that every witness in a criminal case is required to take an oath before giving evidence unless he be a child of tender age whose evidence is receivable as provided in section 19 of the Oaths and Statutory Declarations Act.

Order XVIII of the Civil Procedure Rules has rules of court prescribed pursuant to the provisions of **sections 18** and **6** of the same Act as read with **section 82** of the Civil Procedure Act. **O.XVIII rule 5** of the Civil Procedure Rules provides that:

"***Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject**."*

The learned single Judge must have had this provision in mind when he remarked that he was unaware of circumstances when two different people can swear one oath at the same time. As rightly pointed out by the learned single Judge an affidavit is evidence. A person states under oath about the truth or falsity of a certain matter. It has to be on some specific portion, not a general statement on the state of affairs. So a deponent must specifically direct his collective mind to each paragraph in the affidavit and accordingly affirm the truth thereof. Whether two or more people can do this is what the learned single Judge wondered about.

But Miss Mwai pointed out Form No. 11 of the 1st Schedule of the ***Law of Succession Act, Cap 160 Laws of Kenya****,* which appear to State otherwise and which as material provides as follow:

*"**FORM 11***

AFFIIDAVIT OF JUSTIFICATION OF PROPOSED SURETIES

We, GN of ……………… and JK of …………………… jointly and severally make oath and say as follows:-

1. We are the proposed sureties on behalf of CD the intended administrator (with Will (and Codicil) annexed) of the estate of the above named AB in the sum of Kenya Shillings ………… (Kshs ………………

2. I, GH, for myself say that I am after payment of all my just debts and having taken into account all my liabilities, well and truly worth ….

3. I, JK , for myself say that I am after payment of all my just debts and having taken into account all my liabilities well and truly worth net of such debts and liabilities……………

4. The facts herein deposed (continue as in Form 2)"

FORM No. 2 concludes thus:

"**The facts herein deposed to are known to me of my personal knowledge save that (set out any matters falling within the proviso to O.XVIII rule 3(1) of the Civil Procedure Rules)."**

O.XVIII rule 3 (1) of the Civil Procedure Rules makes provision as to matters to which affidavits shall be confined, namely "*such facts as the deponent is able of his own knowledge to prove"* except in interlocutory applications when an affidavit may contain statements of information and belief, but showing sources and grounds thereof.

In view of the foregoing Miss Mwai's submission that an affidavit may be sworn by two or more persons is not without merit. Support for that proposition can also be found in **O.19 rule 7** of the Indian Code of Civil Procedure (Allahabad), and The Supreme Court Practice 1997, **O.41 rule 2**. The latter provides that:

"***2. Where an affidavit is made by two or more deponents the names of the persons making the affidavit must be inserted in the jurat except that, if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that it was sworn by both (or all) of the "above named deponents."***

The English practice appears to permit deponents to swear generally, but the Indian practice is stricter. **O.19 rule7**, aforesaid provides that:

"***Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge; and such facts shall be stated in separate paragraphs."***

Form No. 11, part of which we reproduced earlier, appear to be couched in the terms of the Indian practice. This to us appear to lend credence to what the learned single Judge of this Court was complaining about. On that we have no basis for faulting him. He however fell into error when he expressed the view that he doubted whether two people can swear one oath at the same time. He expressed himself too widely on that aspect because as we have shown above certain common law jurisdictions freely allow two or more people to swear one affidavit at the same time.

We still have to deal with Miss Mwai's submission that the learned single Judge's remarks, in effect, affected the exercise of his judicial discretion in this matter. In her view the remarks made him approach the applicants'' motion in a biased manner and thus inclined himself towards disallowing the application.

This is a reference and not an appeal. Our jurisdiction is confined to considering whether the learned single Judge properly exercised his unfettered discretion under ***rule 4*** of the Court' rules or that he was plainly wrong. (see **Murai v. Wainaina** ***(No. 4) [1982] KLR 38.***

Notwithstanding the fact that the learned Judge ruled that the affidavit in support of the application was defective, he did not expunge it from the record. He relied on it in coming to the decision under attack. He rendered himself thus:

"***The practice of two people swearing and signing one affidavit must stop and if the motion had been opposed on the ground that it was not supported by a competent affidavit, I might well have struck it out on that basis.***

Be that as it may, I think it would be an abuse of my discretion if I granted to the applicants the orders which seek."

He then proceeded to consider the background facts and the merits or otherwise of the application. It has not been alleged that there is a matter he failed to consider or that he took into account matters he should not have considered. The allegation of bias is unjustified in the circumstances and we hope that it was not raised to annoy the learned Judge.

Regarding the submission that the learned Judge adopted a strict approach to a dispute over land in contradistinction to an alleged softer approach the court has adopted before we say this. The policy of the law is that each case has to be decided on the basis of its peculiar facts and circumstances. It was unfair for learned counsel to accuse the learned single Judge of both bias and harsh approach to her clients' application. The earlier decisions of this Court on disputes relating to land were not decided the way they were merely because they concerned land. In each case the court considered the merits of each application and was on the whole satisfied that it had merit before adding the additional factor that the dispute concerned land. The fact that a dispute concerns land is only one of the factors the courts takes into account in an application under rule 4, above. The learned single Judge bore it in mind in coming to a decision. Hence his conclusion that:

"***I agree land is a 'sensitive' issue but litigation, even on land must come to an end."***

The learned Judge was satisfied that there were other factors which weighed more heavily than the issue of land being a sensitive matter.

We have no basis for interfering with learned Judge's exercise of his discretion under rule 4, aforesaid, and we accordingly dismiss the reference with costs to the respondent ***Piliska Njoki Maina***, which we assess at ***Kshs.2,000/=***. It is ordered.

Dated and delivered at Nyeri this 6th day of June 2008.

S.E.O. BOSIRE

…………………….

JUDGE OF APPEAL

E.M. GITHINJI

…………………………..

JUDGE OF APPEAL

J. ALUOCH

………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR