



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

CIVIL APPLI 243 OF 2007

JOHN OBWOGE NYABWARI APPLICANT

AND

ANDREW ONDITI OBWAGE 1ST RESPONDENT

JOSHUA NYAKERIGA 2ND RESPONDENT

SUSAN OERI OBWOGE 3RD RESPONDENT

HEZEKIA JOHN MAKORI 4TH RESPONDENT

(Application for extension of time to serve notice of appeal and lodge record of appeal out of time from the ruling and orders of the High Court of Kenya at Kisii (Kaburu Bauni, J.)

delivered on 29th September, 2005

in

H.C.C.C. NO. 131 OF 1997)

R U L I N G

Notice of motion dated 20th September, 2007 and filed on the same date is seeking orders that:-

- (a) *there be extension of time to serve Notice of Appeal and lodge Record of Appeal out of time.*
- (b) *Costs of the application to abide the outcome of the intended appeal.”*

The application is grounded on the following grounds to wit:-

“(i) *I became destitute as a result of an act of arson of one of the respondents.*

(ii) *I was charged and convicted of assault.*

(iii) *Failure to appeal was occasioned by circumstances beyond the applicant.*

(iv) *The applicant's appeal is arguable and meritorious."*

The affidavit in support of the application is sworn by the applicant. It states inter alia that the ruling the applicant intends to appeal against was delivered on 29th September, 2005; that he lodged notice of appeal in time, as he intended to appeal against the ruling; but that his house was burnt down by his adversaries in the subject suit; and all his household properties were burnt together with the house; that during the ensuing confusion, he was also arrested, charged and convicted of the offence of assault against one of the respondents and consequently put on probation; thus the cumulative effect of all those aspects rendered him destitute and unable to act with the urgency required to have the Notice of Appeal served within the time required and to file Record of Appeal timeously. He ends that affidavit by stating that the dispute concerns family land and has generated a lot of animosity which can only be settled by this Courts final decision.

The first, second and fourth respondents, namely **Andrew Onditi Obwage**, **Joshua Nyakeriga** and **Hezekiah John Makori** respectively opposed the application through their learned Counsel **Jeremiah Onsare Soire** who swore a replying affidavit filed on 16th November, 2007, stating that the application is an exercise in futility as the applicant had not applied for and obtained leave to file an appeal against the subject ruling, a necessary prerequisite; that the application is unmerited as it was brought after a delay of almost two years, which delay has not been explained adequately; that the subject ruling was delivered on 29th September, 2005 and the applicant was put on probation on 19th October, 2005, and that probation was due to expire on 18th October, 2006, so there is thus no explanation as to why he could not file application for extension of time earlier; that the record of the Notice of Motion does not comply with the Court of Appeal Rules, and that the issue of family land does not arise. The third respondent, **Susan Oeri Obwoye**, though served with the hearing Notice did not appear on the date this application was argued, neither has she made any indication by way of an affidavit or otherwise that she is opposing the application.

The applicant appeared before me in person and urged the application, adding that as a result of the torching of his house and other houses, by his opponents, and his conviction for assault, he fled the area of dispute and ran to Meru from where he was visiting Keroka Court during his probation, and so he was not able to serve the Notice of Appeal he had filed and he was not able to prepare his appeal and serve it in time upon the respondents. Mr. Anyona held Mr. Soire's brief and argued that the application had no merits as the Notice of Appeal purportedly filed is not signed and the applicant needed leave to appeal against the ruling pursuant to **section 75** of the **Civil Procedure Act Chapter 21 Laws of Kenya**, which he had not obtained. He further submitted that the burning of the applicant's house cannot be held as explanation of the delay to serve the Notice of Appeal in time nor can it be a ground for failure to file the Record of Appeal as the house was allegedly burnt in July 2005, about two months before the ruling he intended to appeal from was delivered on 29th September, 2005. In any case, Mr. Anyona, contended, the conviction and probation of the applicant was in place after the ruling had been delivered and so the applicant had time to serve the Notice of Appeal before the probation ended. He opposed the application in its entirety.

Although the rule under which the application was brought into the Court is not stated in the Notice of Motion, it is clearly stated that it is an "*application for extension of time to serve Notice of Appeal and lodge Record of Appeal out of time from the Ruling and Orders of the High Court of Kenya by Hon. Mr. Justice Kaburu Bauni at Kisii on 29th September, 2005 in H.C.C.C. No. 131 of 1997.*" It is clear to me that the application is brought pursuant to **Rule 4** of this Courts Rules. The Court, in considering an application under that rule exercises unfettered discretionary jurisdiction. Like in all cases where discretionary jurisdiction is exercised, such jurisdiction must be exercised judiciously and must not be exercised capriciously nor upon the whims of the Court. To ensure that such jurisdiction is exercised upon reasons, this Court has in several decisions, laid down matters that the Court takes into

consideration in such an application. These matters are the length of the delay; the explanation of such a delay; whether or not the appeal or the intended appeal, as the case may be, is arguable but without conducting a mini-trial, and the prejudice that the respondent may suffer if the application for extension is allowed. Those matters cannot be exhausted and the list I have set out above is only reflecting some of the more important and commonplace matters that the Court will look at but the door is not shut and an applicant seeking extension is at liberty to advance any other reasons so long as by doing so, the Court is persuaded to consider the same. In the case of ***MWANGI V. KENYA AIRWAYS LTD (2003) KLR 486 at p.488*** this Court stated as follows:-

*“Over the years, this Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in ***LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI, (Civil Application No. NAI 255 of 1997)*** (unreported), the court expressed itself thus:-*

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

*These, in general, are the things a judge exercising the discretion under **Rule 4** will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that is clear from the use of the words “in general”.*

Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, the Judge must be perfectly entitled to consider any other factors outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the form set out in the paragraph would be to fetter the discretion of a single Judge as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

In this application, it is conceded that the ruling sought to be appealed from was delivered on 29th September, 2005. Apparently, this was about two months after there had been physical confrontation over the property in issue ending in the applicant's houses being burnt down and the applicant being charged with criminal offence of assault against some of the respondents and later after the ruling, being convicted, and put on probation. He says that as a result of all these circumstances he was unable to serve the notice of appeal he had lodged against the respondent and he could not prepare the record of appeal. He has not stated whether he had applied for proceedings and if he had, whether he had received the same proceedings. He says he had to attend court and make report during his probation from outside the area in which the land in dispute is situate. The respondent says that the applicant needed leave for the appeal but as the evidence he allegedly relied on to show that the appeal required leave to be lodged in this Court were actually not annexed in the affidavit of Mr. Soire, contrary to what he says in **paragraph 5** of the affidavit, I am unable to have an informed view of that submission. In any event it is not mine at this stage to decide on the competency or otherwise of the intended appeal. The respondent's counsel conceded that a copy of the application upon which Bauni, J made the decision was not enclosed and thus in this case I am unable, without reading the ruling above to say the order and rule under which it was made. Hence, my decision above that I cannot decide whether the intended appeal requires leave or not to proceed.

It is true that there were occasions when the applicant could have served notice of appeal and record of appeal. It is also true that the delay of close to two years was apparently inordinate. However, I must also consider the circumstances prevailing at the relevant time most of which have not been disputed. These are first that, the applicant said that he had no money to mount an appeal as early as possible as his house was burnt down in the dispute and all his property burnt in the house. Secondly, he was also facing a criminal prosecution, which though on his own instigation, made it difficult for him to concentrate on the appeal. Thirdly, I cannot ignore the fact that there was hostility, between the parties which could have made it difficult for the applicant to serve the respondent and even their advocates particularly as he was

acting in person. Lastly, this is a matter concerning land. I have seen the draft Memorandum of Appeal. It raises pertinent issues worthy of this Courts decision.

It would appear that it is generating explosive emotions in the family of the applicant and the respondents. Those emotions have resulted in houses being burnt down and people being assaulted and others being taken to court for criminal offences.

Considering all these circumstances, I do feel persuaded to exercise my discretion in favour of the applicant. I was not addressed on whether the respondents would be prejudiced if this application is granted. I make no decision on that.

The application is allowed. The applicant is granted extension of time to serve notice of appeal dated 7th October, 2005. The same notice of appeal to be served through the respondent's advocates on record within seven days of the date hereof. As to the third respondent, **Susan Oeri Obwoye**, let it be served upon her within that same time. The applicant has leave to file and serve record of appeal within **forty (40) days** from the date hereof upon the respondents through the advocates for the first, second and fourth respondents. The same record of appeal to be served upon the third respondent, *Susan Oeri Obwoye*, within the same time specified herein for service upon all the other respondents. Costs will be in the intended appeal.

Dated and delivered at Kisumu this 5th day of December, 2008.

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR