



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA AT MALINDI
CIVIL APPLI 257 OF 2006

STEPHEN E.C. NGALA.....APPLICANT

AND

1 BURKA AHMED SALIM

2 SWALHA AHMED SALIM.....RESPONDENTS

(Application for extension of time to file and serve a Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time and Extension of time to apply for a copy of proceedings from the ruling and order of the High Court of Kenya at Mombasa (Maraga, J.) dated 16th November, 2004) In H.C.C.APPEAL NO 58 OF 1998

RULING

The applicant Stephen Ngala seeks extension of time under **Rule 4** of the Rules of this Court for:

- 1 filing and serving a notice of appeal**
- 2 filing and serving the memorandum of appeal and the record of appeal**
- 3 applying for a copy of uncertified proceedings in the superior court.**

The application is supported by both the affidavit of the applicant to which several documents are annexed and the affidavit of Japheth Asige, his advocate.

On June 1997 the applicant filed a suit against the respondents being civil suit NO. 2425 of 1997 before Chief Magistrate’s court Mombasa. He averred in the plaint that the respondent who owns plot No. Mombasa/Block XVIII/1288 which is adjacent to applicant’s plot No. Mombasa/Block XVII/1289 had trespassed on the applicant’s land and constructed a building on part of the applicant’s plot. The reliefs sought in the plaint were a permanent injunction to restrain the respondents from erecting and constructing and continuing to erect structures on part of the applicant’s plot and on the road reserve and a permanent injunction to compel the respondents to demolish and remove structures already erected on a portion of the applicant’s plot and on the road reserve. The respondent entered appearance but did not file a defence. The suit was thereafter fixed for formal proof and the respondent’s counsel served with a hearing notice. Neither the respondents nor their advocate extended the formal proof. The subordinate

court then heard the evidence of the applicant and entered judgment for the applicant on 25th March 1998. A subsequent application by the respondent to set aside the ex-part judgment was dismissed by the subordinate court on 7th August, 1998. The respondent being aggrieved by the order of dismissal filed civil appeal No. 58 of 1998 against the order dismissing the application to set aside. The appeal was however dismissed by the superior court (Sergon, J.) on 12th May 200. The respondent filed a notice of appeal indicating an intention to appeal against the decision of the superior court. On 18th August 2003 the respondent filed an application for review under **Order XLIV rule I** Civil Procedure Rules in superior court asking the superior court to review its decree dismissing the appeal on grounds *inter, alia* that the suit in the subordinate court being a boundary dispute was incompetent as the boundary had not been fixed and further that summons to enter appearance in that suit were a nullity as the summons gave the respondent less than 10 days to enter appearance. The review application was heard by the superior court (Maraga, J) and allowed on 16th November 2004 on the sole ground that as the summons to enter appearance gave the respondents less than the stipulated 10 days, the summons were a nullity and all subsequent proceedings were thus a nullity. The learned Judge in allowing the application said:

“A summons which does not comply with its mandatory provision and gives the respondent less than the required ten days is invalid and of no effect. It is a nullity. What then happens in a case in which the respondent purporting to comply with such summons has entered appearance filed a defence and the case has been heard and has even gone to appeal in this matter? In my view, all the proceedings and actions based on such summons are a nullity. They have no ground to stand on.”

The applicant filed civil Appeal No. 311 of 2004 against the decision of the superior court. The appeal was however struck out on application for omission of vital documents in the record of appeal. This was on 21st July, 2006. The present application was filed on 15th August 2006 less than one month after the appeal was struck out.

Before the Court can exercise its unfettered discretion to extend time, the applicant should satisfy the Court that the intended appeal is not frivolous, that the application has been filed without inordinate delay and that the respondents would not suffer any prejudice if the application is allowed.

I have studied the two affidavits in support of the application. I have also perused the grounds of appeal in the memorandum of appeal in civil Appeal No. 311 of 2004 already struck out. I am satisfied that the intended appeal raises important points of law which should be determined by this Court. The applicant had in fact filed an appeal which was struck out for procedural irregularity. The application was filed without delay and the respondents are not likely to suffer any prejudice if the application is allowed. Indeed, it would be beneficial to both parties if the long standing boundary dispute is conclusively determined by the court.

The respondents did not file a replying affidavit. At the hearing of the application, Mr Mazrui learned counsel for the respondents did not oppose the application.

In the circumstances, I am satisfied that the application is meritorious. In the result, I allow the application with costs to the respondents assessed at Kshs. 4,000 to be paid within 30 days from date hereof.

The applicant to file and serve the notice of appeal within 14 days. The applicant also to file and serve the record of appeal within a further 30 days from the date the notice of appeal is served.

Dated and delivered at Mombasa this 19th day of January, 2007.

E. M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR