



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

Civ Appli 337 of 2006

NYANDURUA PROGRESSIVE AGENCIES LTD. APPLICANT

AND

GRACE WAMBUI NJOROGE RESPONDENT

(Application for extension of time within which to file a notice of appeal and record of appeal out of time from judgment and decree of the High Court of Kenya at Nakuru (Visram J) dated on 14th January, 2004

in

H.C.C.C. NO. 53 OF 1999)

RULING

The applicant seeks an order under **Rule 4** of the Court of Appeal Rules (Rules) that time for filing notice of appeal, memorandum and record of appeal be extended and that the Notice of Appeal lodged on the 8th November, 2006 be deemed as timeously filed.

The application is supported by the affidavit of Francis Wainaina Mugo, the Chairman of the applicant.

The applicant intends to appeal against the judgment and decree of the superior court (Visram J) dated 14th January, 2004 in *Nakuru H.C.C.C. No. 53 of 1999* whereby the superior court, inter alia, gave a declaratory judgment in favour of **GRACE WAMBUI NJOROGE**, the respondent herein, that, the respondent is the legal owner of land parcel known as Nyandurua Progressive Agencies plot Number1575.

The applicant filed a Notice of Appeal within the time prescribed by the Rules and proceeded to file *Civil Appeal No. 319 of 2005* on 18th November, 2005. The appeal was however filed seven (7) days out of time and on the application of the respondent, and, after the applicant acceded to the application, the appeal was struck out on 28th September, 2006. The present application was filed on 6th December, 2006 – nearly two and half months (2½) after the appeal was struck out.

The application is opposed mainly on three grounds, namely, that; the inordinate delay of 2½ months has not been explained; that the Notice of Appeal has not been served on the respondent in contravention of **Rule 76 (1)** and that the applicant has not placed sufficient material before the court to enable the court

to exercise its discretion.

In support of the last ground, Miss Kagundu, learned counsel for the respondent contended that the applicant has not demonstrated, that, *prima facie* the intended appeal has merit. On the question of the merits of the intended appeal Mr. Githui, learned counsel for the applicant countered that the question does not arise at this stage, as the court is not dealing with the merits of the appeal.

In ***Wasike vs. Swala*** [1984] KLR 591, this Court sitting as a full court held that in exercising its unfettered discretion to extend time under **Rule 4**, the applicant must show, in descending scale of importance, that there is merit in the appeal; that the extension time will not cause undue prejudice to the respondent and that the delay has not been inordinate.

This Court has held on previous occasions, that those factors are not exhaustive and that a single Judge is free to consider any other relevant circumstance in exercising his discretion. In ***Gatu vs. Muriuki*** [1986] KLR 211, a case cited by the applicant, this Court (Apaloo JA) held, among other things, that the court ought to be inclined to exercise its discretion to enlarge time to appeal where the applicant has shown *prima facie* that he has an arguable case for consideration by the court.

The principle has been stated vividly in the first holding in ***Kiramburi vs. Githinji*** [1986] KLR 405 paragraph 30, thus:

“As a general rule an applicant for extension of time should support his application with a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it in order to enable the court to determine whether or not a refusal of the application would appear to cause injustice. This is a salutary rule with which an advocate is advised to comply as failure to do so may well lead to the dismissal of the application”.

In that case however, the court exercised its discretion in favour of the applicant although there was scanty information in the supporting affidavit as to the nature of the case and reasons why the appeal was said to be meritorious. This is after the learned single Judge had: *“Gleaned sufficient information from the two lower court files to satisfy me that the appeal is not entirely without prospects of success”*. (See page 405 paragraph 35). (See also ***Bagajo vs. Christian Children Fund Inc.*** [2004] KLR 73.

It is manifest from the foregoing that, the *prima facie* merits of the intended appeal is one of the important considerations in the exercise of discretion to extend time and failure by the applicant to show that the intended appeal is indeed not frivolous may result in the dismissal of the application.

In the instant case, the applicant has not said either in the application or in the oral submissions that the intended appeal is arguable. Indeed, the applicant has not demonstrated *prima facie* that there is an arguable appeal for consideration by the Court. It seems to me that, failure to deal with the nature of the intended appeal was due to misapprehension of the law by the applicant’s counsel who genuinely, albeit erroneously believed that it is not in the province of a single Judge in an application for extension of time to have regard to the nature of the intended appeal in the exercise of discretion.

The applicant has nevertheless annexed a copy of the judgment of the superior court the subject matter of the intended appeal. It is apparent from the judgment that there is a serious dispute between the parties involving the ownership of the land in dispute. The respondent claim in the superior court was that the land in dispute was lawfully allocated to her by the applicant. The applicant, on the other hand, claimed that it had allocated the land to another person and that respondent, who was its employee, obtained the allocation by fraud. I have further taken into account the fact that the applicant had filed a previous appeal which was struck out by the Court.

In the circumstances, I deduce that the intended appeal is not *prima facie* frivolous.

It is apparent that the delay of seven days in lodging the appeal which was struck out was due to excusable mistake of the counsel who had been instructed to lodge the appeal.

The delay of slightly more than 2 months in the filing of the present application has not occasioned any hardship to the respondent or delay in the filing of the intended appeal having regard to the fact that the application was lodged before, and has been prosecuted in the first session of the Court at Nakuru after the appeal was struck out.

The respondent is still in possession of the land in dispute. Thus, she would not suffer any undue hardship if the application is allowed.

In the result, I allow the application. The Notice of Appeal lodged on 8th November, 2006 is deemed as timeously lodged. The said Notice of Appeal to be served within 7 days from the date hereof.

The memorandum and record of appeal to be filed within 30 days and served within 14 days thereafter. I give the costs of this application assessed at Shs.10,000/= to the respondent.

Dated and delivered at Nakuru this 28th day of February, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR