



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET
CIVIL APPLI 305 OF 2006

1. RAEI MUYAKA
2. HELINA NASIMIYU
3. WASIKE MUTAMBOCHI
4. DAVID SICHARANI
5. DICKSON SABUNI
6. FLORENCE NAMALWA
7. THOMAS SHIKUKU..... APPLICANTS

AND

WAITALUK LAND DISPUTES TRIBUNAL COMPRISING OF
MBOTO KIDAI
EZEKIEL KESSIO
HARUNI KIPSUGUT.....1ST RESPONDENT
ANNAH CHEPTOO MURSOI (SUBSTITUTED IN PLACE OF
SAMWEL MURSOI)..... 2ND RESPONDENT

(Application for extension of time to file and serve notice and record of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Kitale (Etyang, J) dated 18th December, 2001

in

H.C. Misc. Civil Application No. 102 of 2001)

RULING

I have before me an application by way of notice of motion dated 8th November, 2006 brought under **rule 4** of the Court of Appeal Rules (the Rules) in which the applicants, **Rael Muyaka and seven others** are seeking two orders namely:

“(a) That the time limited for filing and serving by the applicants of the notice of appeal as well as filing and serving the record of appeal be enlarged and the same be filed and served within such time the court shall deem fit.

(b) That the costs of and incidental to this application be borne by the applicants.”

The reasons for the application are four and they are:

(1) That the applicants had instituted Civil Appeal No. 354 of 2002 which was struck out by the Court on 13/10/2006 failing to incorporate an amended notice of motion in the record of appeal.

(2) The failure to attach the document was an inadvertent mistake committed by counsel which ought not be visited upon the applicants.

(3) The applicants have a good appeal arising from a decision of the Waitaluk Land Disputes Tribunal which decision was made without adhering to the provisions of the Land Disputes Tribunal Act No. 181 of 1990.

(4) That the 1st Respondent intends to execute the decree obtained from the decision of the tribunal and adopted as judgment in Kitale SPMCC Land Case No. 76 of 1999 on 11/4/2001 by evicting the applicants from land which they have occupied since 1975.”

Together with the grounds in support of the application, the application was also supported by an affidavit sworn by the fifth applicant, Dickson Sabuni in which the same applicant stated on behalf of the other applicants, *inter alia*, at paragraph 8, 9, 10, 11 and 12 as follows:

“8. That upon striking out the appeal we sought instructions from our advocate who advised us that it would be necessary to file an application for extension of time within which to file and serve the notice and record of appeal and this would only be done upon payment of the required legal and court fees.

9. That since I and my co-applicants are peasant farmers and have no fixed source of income, we went back home and made efforts to raise a little amount to facilitate the filing if (sic) this application.

10. That with the assistance of relatives, we made payments on 18.10.2006 and 21.10.2006 as shown by the annexed receipts marked DS 2.

11. That the short delay in filing the application is owing to non-availability of funds and also due to the fact that the court file in Civil Appeal No. 354 of 2002 could not be traced until 31.10.2006 when we paid for the ruling dated 13.10.06.

12. That the appeal raises substantial issues of law as per the attached intended memorandum of appeal marked DS 3.”

The respondents' learned counsel, Mr. Mzee Kirui at first intimated that he would oppose the appeal but later in the course of his submission relented and left the matter to the court. The respondents however did not file any affidavit in reply to the applicant's affidavit.

This application is brought, as I have stated, under **rule 4** of the Rules. The court, when considering an application under that rule, exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) and not upon the whims of the court, neither should the court act capriciously. The principles that guide the court in the exercise of the same discretion are now well documented and are settled. In the case of **Major Joseph Mweteri Igwate vs. Muhura M’Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported)** Lakha J.A (as he then was) made a summary of the same principles when he stated:

“The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among those factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them.”

The above factors are not in any way exhaustive. I agree with Waki J.A in his comments in the case of **Kagai Kimomori Watatua vs. Ngatia Kareko – Civil Application No. Nai. 77 of 2005** where he stated:

“The discretion under Rule 4 is unfettered and there is no limit to the number of factors that the court will consider.”

Indeed, if the number of factors were limited then the discretion would no longer be considered as unfettered.

In this matter before me, the delay period is the period between 13.10.2006 when the applicants’ appeal was struck out and 10th November 2006 when this application was filed. That is a period of 27 days. The applicants say they did not have money to mount a fresh application. They are peasant farmers and when they raised such money, the file got lost in the court registry and hence further delay. These allegations have not been disputed as the respondents did not file any replying affidavit challenging the same. They stand. Considering the time of the delay of 27 days, I cannot say the reason of lack of money and loss of file at the registry are matters that can be termed unreasonable explanation for that delay. I accept the explanation. I have seen the draft memorandum of appeal. I sat in the panel that struck out the original appeal. I cannot say the intended appeal is frivolous. No prejudice was alleged by the respondents as they filed no replying affidavit and they left the matter to me.

All in all, the application has merit. I do grant it. The applicants have **ten (10) days** from today to file and serve notice of appeal and **thirty (30) days** from the date that notice of appeal is filed to file the record of appeal. The applicants shall pay the costs of this application to the respondents in any event. Order accordingly.

Dated and delivered at Eldoret this 22nd day of February, 2007.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR