



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 38 of 2006**

**GEORGE ITOTIA NG'ANG'A.....APPLICANT**

**AND**

**MARY WANJIKU KIMARU.....RESPONDENT**

**(Application for extension of time to file and serve a Notice of Appeal and record of appeal out of time from the ruling and order of the High Court of Kenya At Nairobi (Martha kome J) dated 19<sup>th</sup> March, 2004 in H.C.SUC.C. NO. 520 OF 1992)**

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**RULING OF THE COURT**

This is a reference to the full court under *Rule 54 (1) (b)* of the Court of Appeal Rules from the decision of a single Judge dated 11<sup>th</sup> August, 2006 dismissing an application for extension of time for filing and serving the notice of appeal and record of appeal.

The applicant intends to appeal from the ruling of Koome J, dated 19<sup>th</sup> March, 2004 dismissing an application for review of the judgment of Rawal J dated 31<sup>st</sup> October, 2000.

The following facts are extracted from the ruling of Koome J. The applicant is a son of Justus Ng'ang'a Ruinge (deceased) who died in 1973 leaving two widows. Thamaru Njeri – first widow, the mother of the applicant and Salome Nyakirima – the second widow whose estate is in dispute. Upon the death of Justus Ng'ang'a Ruinge, succession cause was filed in the Magistrate's Court at Limuru and the estate was distributed. The applicant inherited from the house of his mother. The second widow Salome

Nyakirima inherited title No. Limuru/ Bibirioni/1402 and was registered as sole proprietor in 1978.

The applicant did not appeal against the distribution of the estate of his father by the Limuru court. Salome Nyakirima had only four married daughters. She left a written will bequeathing the land to her four daughters and upon her death, Mary Wanjiku Kimaru (respondent), the executor of the will filed a succession cause in High Court Nairobi. The applicant filed an objection to the grant of probate and after full hearing Rawal J granted probate to Mary Wanjiku Kimaru on 31<sup>st</sup> October, 2000.

It seems that the applicant's case in the superior court was that his deceased father had left an oral will that his estate be inherited by his four sons and that the married daughters of his step – mother, Salome Nyakirima, had no right to inherit.

The applicant did not immediately appeal against the ruling of Rawal J. However on 10<sup>th</sup> May, 2002 the applicant filed *Civil Application No. Nai. 115 of 2002* in this Court seeking extension of time to lodge a notice of appeal and record of appeal out of time. That application was dismissed by Shah, JA on 3<sup>rd</sup> October, 2002 on the ground that it was filed almost 14 months later. The applicant thereafter filed the review application in the superior court on 7<sup>th</sup> November, 2003 which was dismissed by Koome J. on 19<sup>th</sup> March, 2004. On 10<sup>th</sup> February, 2006 the applicant lodged application for extension of time for filing and serving the notice of appeal and the record of appeal. He disposed that he was unable to file the notice of appeal and the record of appeal due to bad health. He annexed to the application a letter from Kiambu Medical Centre signed by Dr. Muiru certifying that the applicant has been ill since 21<sup>st</sup> March, 2004 suffering from begin (sic) prostate hypertrophy and was being treated by Dr. Frank Kimani. Regarding the Medical Report, the learned single Judge stated:

*“There appears to be nothing in the medical report to suggest that the applicant has at any time been prevented by his condition from instructing an advocate to take up necessary steps to file a timeous appeal”.*

The single Judge dismissed the application on ground that the delay of almost 2 years in the filing application was not excusable.

The full court can only interfere with the exercise of the discretion by single Judge if it is shown that the single Judge did not exercise his discretion judicially either, *inter alia*, by failing to take into account a relevant matter or taking into account irrelevant matters or that he misapprehended the facts or the law or on the ground that the decision is plainly wrong.

The applicant who is not represented, did not show that the learned single Judge did not exercise his discretion judicially. He maintained that he was sick and implored us to allow him to appeal regardless of the long delay in filing the application.

The delay of almost 2 years before filing the application for extension of time was inordinate. The letter from Kiambu Medical Centre was not sufficient in the absence of treatment cards or other concrete evidence to show that the applicant's condition could not allow him to file a notice of appeal or a record of appeal in time or the application for extension of time without unreasonable delay. It is apparent that he was not admitted in hospital.

The conduct of the applicant was consistent with his previous conduct when he filed the application for extension of time to appeal against the ruling of Rawal, J over 14 months after the decision. He also filed the review application on 17<sup>th</sup> November, 2003 one year after Shah, JA had dismissed the application for extension of time on 3<sup>rd</sup> October, 2002.

As a consequence of the inordinate delay the estate (suit land), as the respondent has deposed, has been distributed to the four beneficiaries three of whom are not parties to this application. The respondent annexed four copies of Title Deeds showing that suit land was subdivided sometime in 2003 and separate Title Deeds issued to the beneficiaries. Thus, the application could not have been allowed without

occasioning undue prejudice to the beneficiaries.

Lastly, Shah JA found that the appeal which the applicant intended to file against the decision of Rawal J was not arguable. The applicant did not demonstrate before the single Judge that the intended appeal is not frivolous. Having regard to the fact that the applicant did not challenge the title of Salome Nyakirima for 28 years from 1978 when she was registered until her death, the intended appeal in our view, is frivolous.

In the circumstances we are satisfied that the learned single Judge exercised his discretion according to law. Accordingly the reference is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25<sup>th</sup> day of May, 2007.

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**