



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA APPEAL
AT ELDORET
CIVIL APPLI 267 OF 2002

GICHANA GATHUKU APPLICANT

AND

DAVID KOMU

KINYANJUI WATHIARI

KANGETHE GACHEGE

MUTURI MUIRU.....RESPONDENTS

*(An application for extension of time to file and serve record of appeal out of time in
an intended appeal from the judgment and decree of the High Court of Kenya*

Nairobi (Owuor, J.) dated 27th May, 1998

in

H.C.C.C. NO. 105 OF 1993)

RULING

The cause of action pleaded when this matter made its debut in the courts in 1992, arose some 42 years ago in 1965. It is no wonder therefore that the respondents here plead, rather passionately, that there must be an end to the litigation. Is it time to put a stop to it?

Gichana Gathuku (Gichana) is the applicant before me. His notice of motion dated 20th September, 2002 and filed on 24th September, 2002 seeks an order under *rule 4* of the rules of this Court (*"the rules"*) that: -

“1. The Honourable court be pleased to grant the applicant leave to file and serve Record of appeal out of time in an intended appeal against the judgment and decree of the High Court of Kenya at Nairobi (Lady Justice Effie Owuor) delivered on 27th May 1998 in High court civil appeal No. 105 of 1993 between David Komu & others versus Gichana Gathuku.”

Another order which was not elaborated on, and which I consider superfluous and misdirected, is also sought, that: -

“The applicant be at liberty to apply for further orders and/or directions as the honourable court may deem fit and just to grant.”

The underlying facts, as far as I can gather them from the record before me, are as follows: -

Gichana claims that he became the registered proprietor of all that parcel of land in Githunguri, Kiambu, known as **LR. No. Githunguri/Ikinu/657 (Plot 657)**, in 1958. According to him, in 1965, **David Komu, Kinyanjui Wathairi, Kangethe Chege and Muturi Muiru** (the respondents) fraudulently had their names included in the Title as co-owners of the parcel of land. It would appear that there were some legal skirmishes relating to the land, such as **RMCC 120 of 1973** when the respondents sued Gichana for transfer to them of the one acre they claimed he had sold to them. However, they withdrew the suit in 1991 saying they had found it unnecessary to seek such transfer through the court when the Land Registrar could do it. Then there was Gichana's own complaint in court in 1988 where he wanted the respondents to account for proceeds of the coffee they were harvesting from the land and selling it. That suit was dismissed, the court holding that the respondents were rightfully on the land. It is not clear when it was dismissed. Nothing further seems to have been done to pursue those skirmishes. Gichana then went before Kiambu SRM's Court in 1992 and filed **Suit No. 170/92** seeking an order for rectification of the Land register by removing the names of the respondents and he succeeded in that effort. The respondents however preferred an appeal to the High Court being **HCCA No. 105/93**. The appeal was determined by Owuor, J. (as she then was) on 27th May, 1998 when she allowed it on the ground that Gichana was legally time-barred in bringing the suit in the Magistrate's court. She stated: -

“What is clear is that the fraud that is the cause of action has been pleaded as having been committed as far back as “1965”, when the four Defendants/Appellants got themselves registered as co-proprietors to the suit premises. The mere fact that there were other suits going on in Courts did not by itself extend the period of limitation. What is clear is that the plaintiff has kept on changing the cause of action and in the whole process run out of time.”

It is that decision which is the subject matter of the application before me. Gichana was aggrieved by it and he sought to appeal to this Court by filing a notice of appeal timeously on 4th June 1998. The notice of appeal was however not served on the respondents or their counsel on record M/S. Kanyi Kogi & Co. Advocates, as required under the rules. At the time, Gichana was represented by M/S. Wanjao & Wanjao Advocates. Those advocates timeously applied for copies of proceedings and were still waiting for them when the respondents applied to have the notice of appeal struck out for want of service. It was struck out by this Court on 8th February, 2000. Soon after, Gichana applied for extension of time to file a fresh notice of appeal and record of appeal, and Shah J.A allowed him to do so on 13th July, 2000. At that time, Gichana was represented by M/S. Omotii & Co. Advocates (Omotii). Shah JA's order was in these words:

“I allow this application and grant leave to the applicant to lodge his notice of appeal on or before 23rd July, 2000. I direct the superior court registry to supply a copy of proceedings to the applicant's advocates as soon as possible. The record

of appeal may be filed within 60 days of the receipt of the copy of proceedings.”

Gichana bore the costs of that application. I may pause there and remark that the issues relating to delays or other non-compliance with the rules before 13th July, 2000 were absolved and therefore do not fall for consideration before me. I need only consider whether there was compliance with the order of Shah J.A.

The record shows that Omotii for Gichana complied with the deadline for filing the notice of appeal and therefore no issue arises there. It was filed on 24th July, 2000. It is the second part of the order which has become problematic; partly because it is unhappily worded. I consider, however, that the use of the permissive word “MAY” did not give an unlimited choice to Gichana to file the appeal beyond the requirements of the rules. The reasonable construction is that the appeal should have been filed within 60 days of receipt of the proceedings applied for. The other problem arose from a tussle between the court registry and Gichana’s Advocates, Omotii.

The advocates had written to the Deputy Registrar on 19th July, 2000 reminding him that the copies applied for by M/S. Wanjao & Wanjao in June 1998 had not been supplied. On 28th July, 2000, the Deputy Registrar addressed a letter to M/S. Wanjao & Wanjao, Advocates informing them that the copies were ready for collection upon payment of copying charges. They were not collected and nothing happened in the next seven months until 27th February, 2001 when Omotii complained to the Deputy Registrar that they had made fruitless efforts to collect the copies but the court file had gone missing. On 26th March, 2001, they complained further and drew the attention of the Chief Justice (Chunga, C.J) about the missing file and the Chief Justice intervened on 5th April, 2001. The file then appears to have resurfaced and a certificate of delay was drafted by Omotii shifting the blame for the delay on the Deputy Registrar. The certificate specifically stated that the notification that the copies were ready was made on 27th April, 2001 and they were paid for and collected on 16th May, 2001. The delay between 28th June, 1998 and 27th April, 2001 (in excess of 1933 days) was thus blameable on the court registry. The Deputy Registrar rejected that draft, insisting that the applicant’s advocates were informed on 28th July, 2000 about the proceedings and should have paid and collected them immediately. The delay between 28th July, 2000 and 27th April, 2001 when they were paid for and collected was therefore due to the inactivity of the applicant’s advocates. There was a stalemate and therefore Omotii sought the mention of the case before court on 31st July, 2001 to resolve the issue. There is no record about what transpired on that day or subsequent thereto until the application before me was filed on 24th September, 2002, which is about 14 months. Gichana put it this way in his affidavit, citing information from Omotii:

“ iii) That in view of the new development, the said Advocates attempted to apply for a certificate of delay but the draft Certificate issued by the Registrar was completely unfavourable as it blamed the present applicant for a long delay in filing record of appeal.

iv) That since they were unable to secure a favourable Certificate of delay, the said Advocates were apparently at a loss as to how to proceed further and have since taken no additional steps in relation to the matter.

8) That now shown to me and produced is a bundle of relevant correspondences (sic) marked as exhibit “GG-7”.

9) That the main reason why I have now hired a new firm to take over this matter on my behalf is because I am anxious to prosecute this matter which involves my family land that is at risk of being lost to the Respondents under unjustifiable circumstances.

10) That as the proceedings in High Court Civil Application No. 105 of 1993 are now available, I am ready and willing to pursue my intended appeal. A true copy of the said

proceedings is now shown to me and produced as exhibit marked "GG-8".

In response, the respondents state in their affidavit in reply that Gichana had no intention of filing any appeal in this matter and merely wanted to delay it and abuse the court process. On 19th July, 2002, after waiting for a period of about two years since the order of Shah JA, they filed another notice of motion seeking to strike out the notice of appeal filed on 19th July, 2000 for the reason that no appeal had been filed thereafter despite the proceedings having been obtained by the applicants advocates on 10th May, 2001. That application has yet to be heard but the contention is that Gichana was awoken from his slumber after service of the application. Even then, it took him another two months before filing this application. Learned counsel for them, Mr. Kanyi, submitted that the applicant is not deserving of any further indulgence by this court, having enjoyed previous favours which he has abused. This application was itself at first dismissed for non-attendance by the applicants on the hearing date but it was reinstated for hearing after considerable delay.

For his part, Mr. Otieno, learned counsel who held brief for M/S. Wachira Mburu Mwangi & Co. Advocates who filed the application, merely referred me to the affidavit in support of the application and asked me to extend time since the subject matter is land.

The principles upon which an application under **rule 4** is considered are now fairly well settled. I take it from this court's decision in **Fakir Mohamed v Joseph Mugambi & 2 others Civil Appli. No. NAI. 332/04** (ur) which was a reference to the full court: -

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38."

Those principles shall apply in all matters including land matters, which although widely acknowledged as sensitive, do not attract exceptional or special treatment. At the end of the day each case will depend on its own special facts and circumstances, and the aim of the court is to do justice between the parties.

As I stated earlier, in examining the period of delay, I need not consider the period before July, 2000 which was covered in the ruling of Shah JA. There was obviously considerable delay occasioned in obtaining copies of proceedings and I am inclined to excuse the delay occasioned between 19th July, 2000 when Omotii sent a reminder to the Deputy Registrar, and 27th April, 2001 when they were notified that the copies were ready for collection and paid for them. It would appear that the copies were in fact collected on 10th May, 2001. I extend this indulgence because it seems from the exchange of correspondence between Omotii, the Deputy Registrar and the Chief Justice, that there was a problem with the availability of the court file. According to the order of Shah JA, the appeal, if any, ought to have been filed within 60 days of obtaining the copies; that is before 9th July, 2001. It was not filed and therefore there was a breach of the order. Is there any explanation for the delay between 9th July, 2001 and 24th September, 2002 when this application was filed?

The only explanation is for the period up to 31st July, 2001 when Omotii sought a mention

date of the case but nothing is said about the outcome. At any rate it is difficult to see what purpose the certificate of delay was serving when the order of Shah JA gave 60 days to file the appeal after obtaining copies of proceedings. The applicant already, had copies of the judgment since 1998 and there was nothing to prevent them from filing the record. Be that as it may, there is total inaction after July 2001 and the affidavit of Gichana adds no value as it is silent on the reasons for delay. Inaction by counsel, as this Court has repeatedly stated, does not qualify as excusable mistake of counsel which would not normally be visited on the client. As there is no explanation therefore, there is no basis for exercise of my discretion. I cannot proceed on whim, caprice or sympathy.

As stated earlier, the matter may involve land, and in a proper case, I may well have extended time. But the parties here have been in and out of court for the last 15 years for a cause of action which allegedly arose more than forty years ago. I think in all the circumstances, the question I posed initially, whether it was time this dispute was put to a stop, should be answered in the affirmative. The respondents have now been in occupation of the disputed portion of land since 1965 and it would be prejudicial to disturb the *status quo* without exceptional reasons, which I do not find in this matter.

In the result, I decline to allow the application and I order that it shall be, and is hereby dismissed with costs.

Dated and delivered at Nairobi this 28th day of June, 2007.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR