REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPLI. NAI 192 OF 2006 (KSM. 29/2006)

GEDION MWANDO UJIJI …….... APPLICANT

AND

JUSTIUS AMUNGA AMBUKA ……..…… RESPONDENT

(An application for leave to file Notice and Record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Kakamega (Tanui J) dated 29th October, 1997

in

H.C.C.C. NO. 176 OF 1991 (O.S.)

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R U L I N G

In amended Originating Summons dated 8th December 1992, the respondent in this application **JUSTUS AMUNGA AMBUKA** sued the applicant **GIDEON MWANDO UJIJI** seeking the court's order to award the respondent the whole of land parcel No. WEST BUNYORE/ESSABA/ 1744 as since land adjudication took place in the relevant area in the late 1960s, the respondent had been entitled to the said land parcel by virtue of adverse possession. He sought a declaration that he was the owner of the whole of the subject land and sought an order that the applicant do transfer the whole of the subject land parcel to him. In default of transferring the same land to him voluntarily by the applicant, the court do make an order authorizing the Deputy Registrar to sign all the necessary documents to effect the transfer. It is not clear from the record that that originating summons was supported by an affidavit for none is annexed in the record. However, reading the record there are orders on Directions entered by superior court (Tanui J) that the originating summons plus supporting affidavit were to constitute a plaint, whereas thee replying affidavit was to be deemed defence, and the dispute was determined by oral evidence. The matter came up for hearing as a suit originated by plaint pursuant to the orders of Tanui J. I have mentioned. After full hearing, in a judgment delivered on 29th October 1997, the learned Judge allowed the claim by the respondent and granted reliefs sought, namely:

"**(a) A declaration that by adverse possession the respondent had acquired title to the suit land.**

(b) A declaration that the applicant holds title to the suit land in trust of the respondent.

(c) An order directing the applicant to transfer the suit land into the name of the respondent.

(d) The respondent would have the costs of the suit."

The applicant felt aggrieved by that decision and sought to appeal to this Court against the decision. He was represented in the superior court by Khakula & Co. Advocates but immediately after the judgment was delivered on 27th October, 1997, he says he instructed James J. Nyamori, Advocate (now deceased) to represent him in his appeal to this Court. James J. Nyamori filed Notice of Appeal dated 5th November, 1997 on 10th November 1997. That was timeous, but thereafter there was no action taken on the intended appeal till 5th July 2006, close to nine years later. This application before me was filed on 5th July 2006.

It is brought under **Rule 4** of the Court of Appeal Rules and it seeks:

"**(a) That the time limited for service of the Notice of Appeal and filing and service of the record of Appeal be extended.**

(b) That costs of and incidental to this application do abide the outcome of the intended appeal".

There are four grounds in support of the application. These are:

"**(a) The applicant gave instruction to his advocates to appeal well within time.**

(b) The failure to institute the appeal is as a result of the applicant's previous advocates.

(c) The applicant's appeal is arguable and meritorious.

(d) No prejudice shall be occasioned to the respondent".

In the supporting affidavit sworn by the applicant, he gives a narrative account of what took place from the date the superior court delivered judgment ordering him to transfer the suit land to the respondent upto 22nd June 2006 when he retrieved his file and presumably gave it to his present advocates – Messrs K'owinoh & Co. Advocates. A summary of the same is necessary.

Immediately after judgment was delivered against him, he instructed James J. Nyamori, Advocate to represent him. Nyamori only lodged the Notice of Appeal on 10th November 1997. The applicant was assured by the said Advocate that that Notice of Appeal had been lodged and served and that the record of Appeal had also been lodged and served so that only the hearing date remained to be fixed. Nyamori, urged him to exercise patience. He made various payments to the said advocates all of which were in respect of drawing and filing Notice of Appeal and Record of Appeal. He was given receipts for the same which he annexed to that affidavit. Thereafter he made various visits to the advocate between the years 1997 and 2004. On all those occasions, he was assured by Nyamori, Advocate, that the Court of Appeal Registry would fix a hearing date for his appeal which had been filed. In the month of September 2004, he saw Nyamori and he (Nyamori) informed him that his appeal might come up for hearing in late February 2005. That was the last he saw Nyamori alive. On 28th February 2005, he travelled to Kisumu to find out if the appeal had been heard or if indeed it had been fixed for hearing. He found the offices of his advocate closed. On inquiry, he received information that his advocate had passed on sometimes in early October, 2004. Nobody knew the whereabouts of his files. The applicant kept on tracing the relatives of his former advocate, but was unsuccessful till 12th June 2006 when he managed to trace Nyamori's home after a clerk at Kisumu Law Courts directed him. At Nyamori's home, he met one Jane, Nyamori's daughter, who directed him to Nyamori's son who was working at Kenyatta Sports Ground. That lady also gave him Nyamori's Funeral Programme. On 15th June 2006, he went to the offices where Nyamori's son was working but he (Nyamori's son) had gone to Nairobi and would be back on 19th June 2006. On 21st June 2006, he went back to Kisumu and this time found Nyamori's son. Nyamori's son

asked for time till 22nd June 2006. On that day, the applicant got the file and to his consternation, the Notice of Appeal was not served and record of appeal was never filed. The only document that Nyamori had lodged was the Notice of Appeal, lodged on 10th November 1997 and nothing more was done on the matter. Thus, his reason for the delay of close to 9 years in serving the Notice of Appeal and filing the record of appeal was that he was badly let down by his former advocate, James J. Nyamori upon whom he had trust and had paid professional fees. He was not aware that no record of appeal had been filed neither was he aware that the Notice of Appeal had not been served. He ends that affidavit by stating that he honestly believes that he has an arguable appeal with very good prospects of success.

The respondent opposed the application. He did not file replying affidavit, but Mr. Kasamani, the learned counsel for him submitted first that the application itself is defective as the supporting affidavit of the originating motion was not included in the record before me and thus the record is incomplete and inaccurate as full record has not been supplied. Similarly, the motion is defective as on the heading of the record it says that it is an application for leave to extend time to serve Notice of Appeal out of time and file record of Appeal out of time whereas in the main application, time to serve the record of appeal is also sought. Thirdly, the delay is about 9 years and that is too long. In his view, if the applicant was shrewd enough to hire the services of an advocate and to make payments for processing the intended appeal, he could have obtained a copy of the documents that he claimed his former advocates alleged to have filed in court. He invited me not to believe the applicant as in any event, the applicant has not given any explanation as to why Nyamori did not serve Notice of Appeal in time and what was in the file when it was handed over to him by Nyamori's son. Mr. Kasamani's submission on the arguability of the intended appeal is that the intended appeal has no chance of success as the learned Judge of the superior court considered every aspect of the case and came to a right decision. Lastly, Mr. Kasamani contended that the respondent has been on the land all along and there is peace in the area so, the application should be rejected so that the same peace may continue to prevail.

I have anxiously considered the application, the supporting affidavit, the record, the submissions of both learned counsel, and the law. The law as regards the court's powers when considering an application brought under **rule 4** of the Court's Rules is now well settled. It is discretionary and unfettered. However, like all discretionary powers, it must be exercised upon reasons and not capriciously or upon the whims of the court. Nor should it be exercised on sympathy. In order that the court may so exercise the same discretion judicially, there are now well established principles that guide the courts. This Court has pronounced these principles in several decided cases. One such case will suffice. That is the case of **Major Joseph Mweteri Igweta vs. Mukira M'Ethare & Another**, *Civil Application No. Nai. 8 of 2000* in which Lakha, JA. (as he then was), faced with a similar matter particularly on long delay in respect of an intended appeal on a matter involving land addressed himself, thus:

"**The subject matter of this litigation relates to twelve acres of land situated in Meru District. 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 betaken into account. Among these 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 compliance with time limits bearing in mind that they were there 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 with them."**

The above principles cannot by any stretch of imagination be considered to be the only principles to be considered when dealing with a matter under **rule 4** of this Court's Rules. There may still be other matters to be considered and the above are only some of the guidelines when considering such an application but are not to be considered exhaustive of the principles. The correct legal principle in my mind is that whereas the above and others need to be considered as guidelines, each case must fall or stand on its own facts and complexities.

The case before me as was the case before Lakha, J.A (as he then was) involved a claim of rights on land. The applicant intends to appeal against a decision which was made on 29th October, 1997. This application was filed on 5th July, 2006. The Notice of Appeal was filed on 10th November, 1997. Pursuant to **rule 76 (1)** of this Court's Rules, it should have been served latest by 17th November, 1997. The record of appeal should have been filed within 60 days of the date the Notice was filed unless provisions of the proviso to **rule 81** of the Court's Rules were invoked. All in all, the delay is by any standard hopelessly inordinate. We are talking of a delay of over eight (8) years. The applicant blames all that period on his former advocate, who is now deceased, Mr. James J. Nyamori. Unfortunately, his lengthy affidavit narrating step by step the acts he took to ensure his appeal was processed within the law, has not solicited any challenge as the respondent filed no replying affidavit. Thus, the contents of the affidavit in support of the Notice of Motion stand. These are first, that immediately after the judgment was delivered against him by the superior court, the applicant instructed James J. Nyamori, Esq. Advocate to lodge appeal for him. He paid for the same and there are seventeen receipts annexed to the record witnessing payments by installments to his advocate. Some payments were made for Memo of Appeal, some for disbursements, some as professional fees, some for preparation of bundles and some for traveling to Kakamega. It would be difficult to fault the applicant when he says all those payments were made for purposes of processing, filing and conducting his appeal by the advocate. The receipts were all in his name as the payee and all payments were to James J. Nyamori Advocate. To crown it all, the same advocate did indeed file Notice of Appeal timeseously. The appellant says further that, thereafter, he put his trust on the advocate who told him that the appeal had been filed and only hearing date remained to be fixed. At one time, the advocate even told him that his appeal would come up for hearing in the month of February 2005. He was told that in September 2004. Come end of February 2005, he went to check the situation only to find that his advocate had passed on. Thereafter, he embarked on tracing the advocate's office as the one he knew was closed. That took him sometime. Eventually he had to trace the advocates home. That was on 12th June 2006. After tracing the home and ascertaining that Nyamori had indeed died, he had to trace his relevant relatives and he got his son who eventually gave him the relevant file on 22nd June 2006. He had to settle for another advocate to represent him. He got the firm of K'owinoh & Co., Advocates who filed this application on 5th July 2006, about thirteen days after the applicant had retrieved his file from Nyamori's son.

The above, is the explanation given for that inordinate delay. As I have stated, that explanation was not challenged as to facts and it stands. I agree with Mr. Kasamani, that that delay was long. However, that explanation which is unchallenged is in my humble opinion, reasonable. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. As to delay between 22nd June 2006 when the applicant retrieved the file and 5th July 2006 when this application was filed, I do not find that inordinate. In any event, I put in mind that after the applicant retrieved the file, he needed time to consider next action, next advocates and for that next advocate to compile the record. All that had to take time and the court cannot close its eyes to those practical aspects. I take judicial notice of them and I find thirteen days for all that is not inordinate.

Is the intended appeal arguable? As I have stated, this is a matter involving land – a rather sensitive matter in the country. It began in the superior court by way of Originating Summons. The parties have not had time to test the trial court's decision on appeal as this would be the first and the last appeal. It involves acquisition of land by adverse possession. I have seen the draft Grounds of Appeal. I cannot say the matters raised therein are frivolous. In the case of **Joseph Barasa Boiyo vs. Sophia Nafula Joram – Civil Application No. Nai. 170 of 2001 (unreported)**, this Court sitting on a reference from decision of a single Judge in similar circumstances, stated:

"**The matter in issue relates to land to which both parties make claim. It is in the best interest of justice that the dispute be canvassed before this court so as to bring the matter to its final end".**

And in the case of **Edward Kamau Kirori and Another vs. Kirori Kirite**, *Civil Application No. Nai. 112 of 2002*, Tunoi JA. considering a similar matter stated:

"**The dispute is between father and his sons over land. It appears protracted. The applicants wish**

to have the matter resolved once and for all by the highest court on the land. Opportunity to them should be afforded to do so. The interests of justice, so demand. I exercise my discretion in the favour of the applicants and allow the application as prayed".

Mr. Kasamani's one of the grounds of objection is that the Notice of Motion is defective as the affidavit that supported Originating Summons in the superior court was omitted from the record before me and that the prayer in the Notice of Motion is different from what is stated on the face of the application record. My answer to the first complaint is that as a single Judge, I cannot deal with the defect of the Notice of Motion regarding the missing parts of what should have been in the record as considering that would mean considering the validity of the Notice of Motion and if not valid the striking it out which only a full bench can do and not a single Judge. Furthermore, the matter was eventually heard as a matter originated by way of a plaint by the consent of all parties. On the second complaint, I see no problem as what is at the face of the record is not an entry upon which the Court acts. The court acts on the prayers sought in the Notice of Motion. Mr. Kasamani also raised the question of the delay which he rightly said is inordinate. I have dealt with that aspect here above. I have also dealt with his complaint on the arguability or otherwise of the intended appeal.

Would the respondent suffer prejudice if this application is allowed? The learned counsel for both parties agreed that the status quo before the bearing of the suit in the superior court is still maintained. Parties are peacefully living as they were before the decision of the superior court. That in effect means that the respondent has not taken any action pursuant to the superior court's decision that the hearing and determination of the intended appeal might unsettle to the prejudice of the respondent. Under these circumstances, it is in my mind proper that the parties get a final determination of the issue so that in future, everlasting peace may prevail.

In conclusion, much as I do appreciate that the delay was long and clearly inordinate, the explanation that this was because of the inaction of the applicant's former advocate who was instructed in time, paid professional fees to process the appeal, but never acted except filing the Notice of Appeal which he never served upon the respondent in time and kept on misleading the applicant that his appeal had been filed and was due for hearing any time, coupled with the death of the same advocate and the closure of his office subsequent to his death which resulted in time taken to search for the whereabouts of the relevant file, I do accept that the explanation given for the delay, the which explanation was not challenged, is acceptable. I also accept that the intended appeal is not frivolous and as it involves land and is a first and last appeal, justice demands that the applicant be heard on it. Finally, no prejudice has been demonstrated by the respondent to him if the application is allowed.

The Notice of Motion dated 3rd July 2006 is allowed. The applicant has seven days from the date hereof to serve Notice of Appeal dated 5th day of November 1997 and filed on 10th November 1997. He also has Thirty (30) days from the date hereof to file and serve Record of Appeal. The applicant shall pay to the respondent costs of the Notice of Motion in any event. Orders accordingly.

Dated and delivered at Nairobi this 13th day of July, 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