



IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civ Appli 124 of 2006

ECHFAN MWARIRI KAMAU APPLICANT

AND

JAMES TOBIAS OKONJO 1ST RESPONDENT

JOSEPH ODINGO AGOLA..... 2ND RESPONDENT

KENYA COMMERCIAL BANK LTD 3RD RESPONDENT

(Application for extension of time to file and serve a Notice of Appeal from a judgement of the High Court of Kenya at Nakuru (D. Musinga J.)dated the 30th of September, 2005

in

H.C.C.C NO.64 OF 2003)

R U L I N G

This is an application under **rule 4** of the Rules of this Court for an order that time within which the Notice of Appeal may be filed and served be extended.

The applicant intends to appeal against the judgement of Musinga J. dated 30th September, 2005 in **High Court Nakuru Civil Appeal No.64 of 2003**. The applicant did not annex the judgment to the application. Indeed the applicant placed no material on record which would guide the court to understand the nature of the litigation. A copy of the judgment has however been annexed to the replying affidavit to the 3rd respondent. It seems from the copy of the judgment that the applicant bought 5 acres of land out of 33 acres comprised in L.R. NO. Rongai/Lengenet Block 2/12 from James Tobias Okonjo (1st respondent) as an administrator of the estate of Michael Okonjo. Later the administrator of the estate of Michael Okonjo sold the entire land which belonged to the estate to Joseph Odingo Ogola, the 3rd respondent. The 3rd respondent obtained a title deed in respect of the land he had bought which included the portion of 5 acres sold to the applicant. The 3rd respondent later charged the land to the bank to secure a loan. He defaulted in the payment of the loan and the 3rd respondent sold the entire land in exercise of its statutory on 15/10/92. The purchaser of the land is not a party in this appeal. The applicant filed a suit in the subordinate Court in February 2003. The precise nature of the suit is not clear because the applicant had not annexed the pleadings. It is however clear from the judgment of Musinga J. that in the same suit the applicant filed an interlocutory application for an order of injunction to restrain the respondents herein from selling or transferring the suit land pending the hearing of the suit.

A preliminary objection was raised in that application that the suit was time barred having been filed over 12 years since the applicant bought the land. The application was also resisted on the ground that the suit land was not in existence as the bank had already sold and transferred the land. The preliminary objection was upheld and the interlocutory application for injunction was dismissed. The applicant filed an appeal against the dismissal of the application being **Civil Appeal No. 64 of 2006**. The appeal was dismissed by Musinga J. on 30/9/2005. The superior court agreed that the suit was time barred. The second reason for dismissing the appeal was in the words of the learned Judge : “**secondly the suit premises having been lawfully disposed of by the 3rd respondent prior to the hearing date, the application was doomed to fail. The court has also been informed that the appellant had already been evicted from the suit land.**”

I have taken into account the principles upon which this court exercises its unfettered discretion under **rule 4** as stated in **Wasike v. Swala** [1984] KLR 591.

Firstly, the applicant has not endeavoured to show that the intended appeal has merit. Mr Wamaasa for the 3rd respondent submitted that the court should not act in vain. The applicant intends to appeal against the decision of the superior court which dismissed an appeal against an order dismissing an application for interlocutory injunction. The order of injunction was sought to restrain the respondents from selling or transferring the land, which, indisputably is not registered in the name of either of three respondents. There is no contention that the land that the applicant is pursuing is registered in the name of another person who was not a party to the suit in the subordinate court or in the appeal in the superior court.

The applicant has not, in my view, shown on prima basis that the intended appeal is not frivolous.

Secondly, the applicant had filed a notice of appeal dated 17th October, 2005. That Notice of Appeal was however withdrawn in December 2005. The present application was filed on 26/4/2006. The applicant has not explained the delay of about 5 months in filing the application, which is inordinate, having regard to the fact that an application for extension of time is a simple application which can be prepared and lodged within a few days.

For those reasons I am not satisfied that the applicant deserves the exercise of the court’s discretion in his favour.

In the result the application is dismissed with costs to the 2nd and 3rd respondents. The 1st respondent supported the application and is not therefore entitled to the costs of the application.

Dated and delivered at Nakuru this 28th day of September, 2006.

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR