



IN THE COURT OF APPEAL

AT NYERI

CIV APPLI 29 OF 2006

ANTHONY CHUMA GOITI.....APPLICANT

AND

KIERU GOITI.....1ST RESPONDENT

MAGU GOITI.....2ND RESPONDENT

(Application for extension of time to file and serve Record of Appeal from the judgment of the high Court of Kenya (Okwengu, j) dated 21st October, 2004)

in

H.C.C.A. NO. 49 of 2001)

RULING

This is an application by way of notice of motion brought under **Rules 4 and 54** of the Court of Appeal Rules (the Rules). In this application the applicant Antony Chuma Goiti seeks an order that:-

“1 The Honourable Court be pleased to extend time within which the applicant may lodge a Notice to the Registrar indicating his dissatisfaction with the ruling of a single Judge and praying for the said ruling to be reversed.

2 Costs of this application be provided for.”

This application is brought upon the following grounds:-

“ (a) That ruling of application dated 10/11/2005 was delivered on 18th day of May 2006.

(b) That the letter informing the applicant the outcome of the application got to him on 30/6/2006.

(c) That it is on receipt of said letter that applicant informed his advocate that he was desirous of appealing against the above said orders.

(d) That by 30th June 2006 time granted to give registrar a notice of dissatisfaction with the

ruling had lapsed.

(e) That the court has discretion Under Rule 4 to grant leave and applicant craves for leave to be exercised in his favour.

(f) That the applicant had over six times traveled to his lawyer's office to persuade him to make this application of reference but all the time he could not get him.

(g) That the High court erroneously considered and based its judgment on the wrong non-existence evidence that the applicant got the land from his father and as such he held it in trust for his mother and brother (Respondents).

(h) That the applicant, his father and brothers were each given land by clan and as such both mother (the 1st Respondent) should inherit from her husband and the brother (2nd Respondent) should inherit from their father not from son/brother which is against Succession Act.

(i) That the applicant's land is first registration and as such the title cannot be impeached.

(j) That this court in rejecting applicant's application, took into consideration a wrong period of delay that is 3 months when it was actually 2 months.

(k) That the Applicant's advocate assigned the applicant's work to a Nairobi advocate who carelessly prepared the applicant's application a fact or error for which the applicant should not be blamed.

(m) That the day from 10th November to 14th January 2005 when the said advocate filed the application can only be explained by the lawyer as the applicant was not aware of this.

(n) That this is a very sensitive acrimonious land dispute between mother and son and the parties will not be satisfied till they are heard interparties.

(o) That the Honourable Court be pleased to give the applicant a chance to air his views than chasing him away from seat of justice for errors committed by court and by a lawyer who had NO instructions from the applicant."

When this application came up for hearing before me in chambers, Mr. Mugo appeared for the applicant while Mrs Rika appeared for the respondents.

In his submissions Mr Mugo pointed out that the learned single Judge said that there was a delay of three months but taking into account the Rules as relates to court vacation the delay was actually of one month. It was further submitted that the dispute related to a piece of land and hence the applicant should be allowed to file an application for a reference to full court. Mr Mugo explained that the learned single Judge delivered his ruling on 18th May, 2006 and that this application was filed on 25th June, 2006. He pointed out that his client lived upcountry and so he got the letter from the advocate on 30th June 2006 which was too late to file a reference.

Mrs. Rika opposed the application on the ground that when the ruling was delivered all the parties were present in court and that the learned single Judge drew the applicant's advocate to the provision of **rule 54**. It was Mrs. Rika's view that the delay has not been adequately explained.

The brief background to this application is that the applicant herein filed a notice of motion pursuant to **rule 4** of the Rules seeking an order that he be granted leave to lodge and serve the record of appeal out of time. That application was dated 10th November 2005 and came up for hearing before a single Judge (Omolo, J.A) on 18th May, 2006. In a ruling delivered on that same day the learned single Judge declined to grant leave to the applicant as requested. The applicant was dissatisfied with that order dismissing his

application and hence what was open to him was to file reference to full court.

Rule 54(1) of the Rules provides:

“54(1) Where under the proviso to section 5 of the Court of Appeal for East Africa Act, any person being dissatisfied with the decision of a single Judge-

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied discharged or reversed by the Court, he may apply therefore informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.”

In the present application it would appear that the applicant did not apply informally to the Judge at the time the ruling was delivered on 18th May, 2006. The applicant was however required to apply in writing to the Registrar within seven days. He did not do so within the seven days hence this application.

It must be made very clear that what the applicant is asking me is the extension of the seven days so that he may write to the Registrar seeking reference to full court. This the applicant has chosen to do pursuant to **Rule 4** of the Rules which provides:-

“The Court may on such terms as it thinks just by order extend the time limited by these Rules, or by any decision of the Court or of the superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of that act, and a reference in these Rules to any such time shall be construed as reference to that time is extended.”

From the material placed before me, it would appear that the dispute relates to land, an emotive issue in most parts of this country. The applicant failed to persuade a single Judge of this Court to grant him an extension in which to lodge his appeal. The applicant now wishes to make a reference to full court but is unable to do so since the seven days period granted by the rules has expired. He asks me to exercise my discretion under **rule 4** so that he may be allowed to seek a reference out of seven days period.

I have considered the submission by counsel appearing for the parties herein. It is now settled that an application vide **rule 4** of this Court's Rules a single Judge is called upon to exercise his unfettered discretion but like any other judicial discretion that discretion must be exercised with reason. Although this application relates to extension of time in which the applicant may write to the Registrar for a reference to full court, the conditions to be considered are similar to those for extension of time in which to file notice of appeal or lodge record of appeal. The principles are the same so that the authorities cited by Mr. Mugo would be relevant.

In **PATEL V WAWERU AND 2 OTHERS [2003] KLR 361 at pp. 362-3** this Court had the following to say in respect of **rule 4** of the Rules:-

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single Judge exercise his discretion? In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application no. NAI. 251 of 1997 this Court stated:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted”

In this reference it has been shown that a delay of almost fifteen months was not explained to the satisfaction of the learned single Judge. We asked Mr. Goswami severally to explain to us the delay

but he failed to do so. The Rules of the Court must be complied with. As was said in RATMAN V. CAMARASAMY [1964] 3 ALL ER 933 by Lord Guest at p. 935:-

The rules of Court must prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The foregoing sets out the manner in which this Court is to consider application brought under **Rule 4** of the Rules.

In the present application the applicant failed to apply for a reference within seven days. It has been found that there was a delay of about one month. It has been explained that the applicant thought of filing a reference well after the seven days period. It was submitted that the applicant lived upcountry and hence it took some time before the applicant and his counsel could decide on the next step. It would appear that the applicant is determined to pursue this litigation to the end.

I have considered the long history of this matter and bearing in mind the efforts made by the applicant it is only fair that the applicant be allowed to file a reference to full court. For these reasons, this application is allowed and the applicant is granted leave to file a letter seeking for a reference within seven (7) days from the date hereof. Costs of this application which I assess at Kshs, 5,000/- to be paid to the respondents within 30 days from the date hereof and in default execution to issue.

Dated and delivered at Nyeri this 27th day of October 2006.

E. O. O’KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR