



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal (Appli) 114 of 2005

MICHAEL MWANGI THUO (As Legal Representative of
JORAM THUO WAIREGI (Deceased) APPLICANT/APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Application for extension of time to file record of appeal out of time in an appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts (Emukule, J) dated 5th November, 2004

in

H.C.C.C No. 898 of 1999)

R U L I N G

This is an application under **rule 4** of the Court of Appeal Rules (the Rules). The applicant is the legal representative of the estate of Joram Thuo Wairegi (the deceased). The deceased brought action in 1999, against Kenya Commercial Bank Limited, the respondent, on the main for an injunction to restrain the respondent from exercising its statutory right of sale of land known as L.R. No. 4885/2, Kiambu. The property had been given as security to secure repayment of a loan the respondent had lent him.

The power of the Court in an application under **rule 4**, aforesaid, is discretionary, which discretion is unfettered and judicial. For an applicant to succeed he has to explain the delay in taking the essential step within the stipulated period. Secondly, that the delay was not inordinate, and no prejudice would be caused to the respondent if the extension of time is granted. Thirdly, that the applicant acted promptly in bringing the application for the extension of time. Finally, and possibly, that the appeal or intended appeal has some merit. (See **Wasike v. Khisa & Another [2004] 1 KLR 197**).

Civil Appeal No. 114 of 2005 was filed in breach of the clear provisions of **rule 83(1)** of the Rules, which provides:

“83(1) An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.”

Notwithstanding the foregoing provision, the applicant, Michael Mwangi Thuo, prays, in his

application dated 12th July 2004, and filed on 15th July 2004, that he be granted an extension of time to lodge a record of appeal, and further that the record of appeal which was filed on 20th May 2005, slightly over two months after the death of the deceased be deemed as having been regularly filed. As stated earlier, the appeal was filed in breach of **rule 83(1)** of the Rules. The applicant's counsel, Paul Amuga, in an affidavit in support of that application, deposes that it was because of a mistake on his part that the appeal was irregularly filed, and seeks this Court's discretion to excuse the mistake, extend the time, and deem the record of appeal as having been regularly filed.

The respondent through its advocate, Martin Munyu, swore a replying affidavit to the effect that the record of appeal having been filed in breach of **rule 83(1)**, aforesaid, is incurably defective and as a result no extension of time can cure the defect.

The applicant was made a party in the deceased's appeal pursuant to the provision of **rule 96** of the Rules. The order making him a party was made on 28th February, 2006, and was recorded in the following terms:-

“The application is brought timeously. Under the circumstances, I do allow the application and order that Michael Mwangi Thuo is hereby made a party to this appeal in place of Joram Thuo Wairegi who is deceased.”

Onyango Otieno J.A, made the order, but it would appear to me that **rule 83(1)** of the Rules was not brought to his attention. It is my view, and I so hold, that had the provision been brought to the attention of the learned Judge, most likely he would have declined substitution. The appeal was incompetent from inception in view of **rule 83(1)**, above. To the extent that the applicant wants the appeal validated I find it a futile exercise to extend time as such an extension might not give the appeal any life.

In **Morjaria v. Abdalla [1984] KLR 490**, this Court relying on an earlier decision of the Court in **Gurbaksh Singh and Others v. Bank of Credit and Commerce International – Civil Appeal Nos. 52 and 53 of 1982**, held that only a person appointed legal representative can be substituted under **rule 96**, of the Rules. But **rule 96** presupposes that the appeal is competent and was filed in accordance with the relevant provisions of the Rules. The Court in the above suit, then continued to render itself thus:

“To hold otherwise would mean that an incompetent person might be appointed a party to appeal as might have happened, for instance, in Gurbaksh Singh's case, where the fifth appellant, who was an executor, had been temporarily of unsound mind.”

By analogy, no action should be taken on behalf of the estate of a deceased intending appellant by an incompetent person, nor should such action be made to bind his estate without proper authority under the law. Civil Appeal No. 144 of 2005 was filed after the deceased had died. No legal representative had been appointed by then. When the applicant was eventually appointed, his appointment was not backdated. Consequently, the filing of the appeal was not validated, nor could it in view of the clear provisions of **rule 83(1)** above. The wording of that sub-rule appears to me to exclude any validation by way of extension of time.

Besides, the applicant did not explain how the mistake leading to the filing of the incompetent appeal came about. It is not enough to state that it was by mistake that the appeal was filed. Facts and circumstances as to how the mistake relied upon came about needed to be proffered, but none were given.

Having come to the foregoing conclusions, I cannot but decline to exercise my discretion in favour of the applicant. In the result, I dismiss the applicant's application dated 12th July 2005, with costs.

As counsel appearing for the parties requested that the results of this matter also apply to the application dated and filed on 3rd March 2006 in **Civil Appeal No. 115 of 2005**, that application, which is also brought under **rule 4** of the Rules, is also dismissed with costs.

Dated and delivered at Nairobi this 10th day of November, 2006.

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR