



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: GITHINJI, J,A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 129 OF 2004

BETWEEN

KIMEU KIMATU

MUSANGO KIMAT..... APPLICANTS

AND

KIEMA MAILI KASELYA RESPONDENTS

(An application for extension of time to file record of appeal out of time from

**the decision of High Court of Kenya (Mwera, J) dated 3rd June, 1999 in
H.C.C. NOL. 161 of 1997)**

R U L I N G

This is an application under **Rule 4** of the Court of Appeal Rules for orders:-

(a) THAT this Honourable Court do grant the applicants leave to file an appeal out of time.

(b) THAT costs of the application be provided for.

The application is supported by the affidavit of Musango Kimatu, the second applicant. The respondent did not file a replying affidavit though he attended the hearing of the application and opposed the application.

Before the Court can exercise its unfettered discretion in favour of the applicants, the applicants should satisfy the Court, inter alia, that there is merit in the intended appeal; that there has not been inordinate delay in lodging the application and that the respondent will suffer no undue prejudice if the applicants are allowed to lodge an appeal out of time – (see **Wasike V. Swala [1984] KLR 591**)

The applicants intend to appeal against the judgment of the superior court, Machakos given on 3/6/1999 in Civil Suit NO. 116 of 1997 wherein the superior court dismissed the suit filed by the applicants herein. The applicants have not filed a copy of the plaint in the suit but the following facts emerge from the judgment of the superior court.

The two applicants were awarded land parcels numbers Kisau/Mukimwani/574, 697 and 698 during the land adjudication and were registered as co-proprietors of each of the three parcels of land on 1/3/1995. The respondent, Kiema Mali Kaselya and one Kyumbule Kiyasio (deceased) appealed against the decision to the Minister under Section 29 (1) of the Land Adjudication Act. The Minister delegated his function to Special District Commissioner Makueni in accordance with the law (Act No. 16 of 1977). The Special District Commissioner heard the appeal and on 6th September, 1995 made the following decision:

“ORDER

(a) Land to be shared equally between all parties.

(b) Parcel Nos. 574, 697 and 698 to be combined and the land so sub-divided be given two new numbers.

(c) The appellants be awarded the northern part.

(d) The respondents be awarded the southern part.

(e) No order as to costs.

Signed. DISTRICT COMMISSIONER,

MAKUENI”.

On 26th June, 1997, the applicants filed the suit against Kiema Mali Kaselya seeking a declaration that the three parcels of land belonged to them exclusively and order for rectification of the Register. The respondent did not enter appearance or attend the hearing of the suit.

The superior court heard the suit *ex parte* and dismissed it on two main grounds, namely; (in my own words), that the suit was incompetent as the decision of the Special District Commissioner was final in law and that the court had no jurisdiction to impeach and overturn the decision of the Special District Commissioner. The applicants’ advocates filed a notice of appeal on 17th June, 1999 but did not take any further step to lodge the appeal. The present application was filed on 10th June, 2004.

Regarding the merits of the intended appeal, it is apparent from the judgment of the superior court that the suit was not decided on the merits. The applicants have filed a draft memorandum of appeal which shows that the appeal will be based on the merits of the decision. Those grounds of appeal cannot arise from the judgment of the superior court as the superior court did not decide on the matters referred to in the draft memorandum of appeal. It is doubtful that the person who drafted the memorandum of appeal (draft) had in fact read the judgment of the superior court. More importantly, the draft memorandum of appeal does not refer to the two legal issues on the basis of which the suit was dismissed.

The dispute was determined through the machinery set out in the Land Adjudication Act culminating in the decision of the Special District Commissioner of 6th September, 1995. By Section 29 (1) of the Land Adjudication Act, that decision “shall be final”. Thus the dispute would not be relitigated in court through the medium of a suit. The suit was *ex facie* incompetent.

In addition, the reliefs sought in the suit affected the proprietary rights to the suit land of one Kyumbule Kiyasio, who was deceased. The legal representative of Kyumbule Kiyasio was not made a party to the suit as defendant. It appears that there was a non joinder of a necessary party to the suit. *Prima facie*, because of that non joinder the applicants would not have obtained an effective relief and the suit was apparently incompetent. Thus the applicants have not shown that intended appeal is not frivolous. The applicants intend to appeal against a decision made over 5 years ago. The present application was filed 5 years after the decision. The applicants say that they instructed their lawyers to lodge an appeal and that they kept on inquiring from their advocates offices and the advocate’s clerk used to say that the advocate was sick and that the appeal has been lodged. That is a mere general allegation. There is no evidence,

documentary or otherwise, to support that allegation.

The applicants do not say on how many occasions they visited their advocates offices or give specific details of the visits. They do not say that they paid any money to their advocates for the lodging the appeal. The explanation given is not plausible or reasonable. It seems that the intention to appeal was prompted by the threat of execution of the decree and is an afterthought. The delay in bringing the application is inordinate and inexcusable.

It seems that this land dispute has been raging since about 1985. The decision of the Special District Commissioner in favour of the respondent was made about 10 years ago. The applicant has caused the suit land to be sub-divided in execution of the decree. The applicants say that they are in possession of the suit land. In the circumstances, the respondent will suffer undue prejudice if the applicants are belatedly allowed to appeal.

For the above reasons, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 14th day of April, 2005.

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR