



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, J.A (IN CHAMBERS))

Civil Application Nai 300 of 2004 (NYR 21/2004)

BETWEEN

JAMES GAKONO NGUNGIAPPLICANT

AND

JANE NJOKI NGUNGI1ST RESPONDENT

VERONICA MUTHONI NGUNGI 2ND RESPONDENT

An Application for leave to file Notice of Appeal and Record of Appeal out of time from the rejection of Appeal of the High Court at Embu (Omwitsa C.A.) dated 7th June 2001

in

H.C.C. Appeal No. 25 of 1999)

RULING

The applicant James Gakono Ngungi prays for leave under **Rule 4 of** the Court of Appeal Rules to file both the Notice of Appeal and the Records of Appeal out of time

The applicant is aggrieved by the order of C.A. Omwitsa, the learned Commissioner of Assize dated **7th June 2001** rejecting **Civil Appeal No. 25 of 1999** filed by the applicant at the High Court of Kenya, Embu Registry. That appeal emanated from the decision of the Provincial Land Disputes Appeal Tribunal Nyeri in Land Dispute Appeal **Kirinyaga No. 135/99 – dated 13th October 1999**. In that Appeal the Provincial Land Disputes Appeals Tribunal dismissed an appeal by the applicant from the decision of Gichugu Land Disputes Tribunal, which on 25th June 1999 awarded a portion of two acres to Jane Njoki Ngungi from land title No. **Baragwi/Kariru/128** registered in the name of the applicant.

There was evidence in the two Tribunals that the applicant was registered on first registration as proprietor, of land title No. **Baragwi/Kariru/128** comprising of about 7.12 acres in or about 1958. The respondents, however, claimed that the applicant was registered as a trustee to hold the land for the family of Ngungi Gachiuri (deceased). The respondents further claimed that Ngungi Gachiuri had two wives – namely, Wakabari Ngungi who was the mother of the respondents and Keru Ngungi who is the mother of

the applicant. The respondents asserted that the applicant as the only son of Ngungi Gachiuri was registered as trustee also for the house of Wakabari Ngungi and claimed half share of the Land. The Gichugu Land Disputes Tribunal agreed with the respondents and awarded Jane Njoki Ngungi, the first respondent 2 acres and 5.12 acres to the applicant. The applicant appealed to the Provincial Land Disputes Appeals Tribunal against that decision. The Provincial Appeals Tribunal, as stated before, dismissed the appeal hence the H.C. Civil Appeal No. 25 of 1999.

The Court has unfettered discretion to extend time. However, before the discretion is exercised in favour of the applicant, the applicant has to satisfy the Court, among other things, that, there is merit in the intended appeal, or appeal, that the extension of time will not cause undue prejudice to the respondent and that the delay has not been inordinate (see *Wasike v. Swala* [1984] KLR 591.

As to the merits of the intended appeal, the applicant intends to appeal against the decision of the Commissioner of Assize rejecting the appeal summarily. Section 8(9) of the Land Disputes Tribunal Act, Act No. 18 of 1990 (Act) provides,

“8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of; provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved”

The order of learned Commissioner of Assize rejecting the appeal apparently under the proviso to **section 8(9)** of the Act is akin to a summary rejection of appeal from a subordinate court to the High Court under **section 79 B** of the Civil Procedure Act. However, the appeal which was rejected was from a tribunal created by a statute and not from a subordinate court. It seems to me that the learned Commissioner of Assize rejected the appeal under powers implicitly given by proviso to section 8 (9) of the Act. That Act does not specifically give a right of appeal against the rejection of the appeal by the High Court. Does an appeal lie as of right to this Court against a decision of the High Court refusing under proviso to **section 8(9)** of the Act to certify that an appeal raises an issue of law fit for an appeal? OR is such a decision appealable with leave of the High Court?

The issue of the right of appeal has not been raised either by Joe Kathungu for the applicant or by Kahiga for the respondents. The question of the right of appeal under section 8(9) of the Act recently arose in *Joseph Muriithi Njiru v. Teresia Wanja Raymond* Civil Application No. NAI. 255 of 2002. After considering section 8(9) of the Act, Omolo, JA, sitting as a single Judge said;

“Then section 8(9) provides for appeals to the High Court on matters of law and as I have pointed out, that section does not specifically provide that a decision of the High Court on any question of law shall be final. Could decisions of the High Court on points of law be appealable to the Court under the provisions of section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules? As I have said, I am not prepared to decide those issues as a single Judge and I am not prepared to refuse the applicant the extension which he seeks on the basis that he has no right of appeal.”

I would respectfully adopt the same approach. It is sufficient to say that on the grounds contained in the draft memorandum of appeal, I am satisfied that the intended appeal is not frivolous.

On the question of delay, I have considered the explanation given by Joe Kathungu in **paragraphs 6-13** of the supporting affidavit. I have also considered the rival contentions in **paragraphs 5 -8** of the replying affidavit of Jane Njoki Ngungi. The explanation that the applicant’s counsel was not aware that the appeal had been rejected until sometime in late **September 2004** is credible. There is no evidence that the High Court informed the applicant’s counsel or the respondents’ counsel at any time that the appeal has been rejected. The fact that the applicant’s counsel had on 4th March 2004 filed an application seeking directions in the appeal and had thereafter by a letter dated 28th September, 2004 informed the applicant of the fact of the rejection of the appeal verify that the applicant’s counsel was not aware of the rejection of the appeal until late **September, 2004**. The present application was filed on **14th October, 2004** –

within a month after the applicant's counsel became aware of the decision of the court. In the circumstances, I am satisfied that the application has been brought without any appreciable delay.

The respondents do not say that they have ever attempted to execute the decision of the Gichugu Land Disputes Tribunal or that they will suffer undue prejudice if the application is allowed. It has not therefore been shown that the respondents would suffer undue prejudice if the application is allowed. The applicant has offered to pay the costs of this application.

This is a land dispute apparently among family members and it is just that the applicant should be given access to the last Court.

For those reasons, I allow the application. The applicant to pay the costs of the application to the respondents, which I assess at Kshs.10,000/-. The applicant to file and serve the Notice of Appeal within 7 days from date hereof and file and serve the record of Appeal within 21 days from the date the Notice of Appeal is lodged in Court.

Dated and delivered at Nyeri this 16th day of May, 2005.

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.