



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: OMOLO, TUNOI & GITHINJI, JJ.A)
CIVIL APPLICATION NO. NAI. 35 OF 2004 (NYR.1/2004)

BETWEEN

MACHARIA NJOROGE.....APPLICANT

AND

GAKURE KURIA.....RESPONDENT

**(Application for extension of time to file notice and record of appeal out of
time in an intended Appeal from the Ruling of the High Court of Kenya**

at Nyeri (Juma, J.) dated 25.02.2002

in

H.C.C.C NO. 12 OF 1999)

RULING OF THE COURT

MACHARIA NJOROGE, hereinafter referred to as the “*applicant*”, sought a reference to the full court from the decision of a learned single Judge of this Court, the Honourable the Chief Justice, made on 4th November, 2004 whereby the learned single Judge refused to grant an application made by the applicant for extension of time within which to file a notice of appeal and subsequent thereto a record of appeal to challenge the ruling and order ensuing from the decision of the High Court of Kenya at Nyeri (*Juma, J.*) delivered on 25th February, 2003.

It is trite, but we reiterate here, that under *rule 4* of the Rules of this Court the learned single Judge was mandated to exercise judicially a discretion, which was whether or not by his order he should extend the time within which to lodge an appeal and, if he decided to do so, on what terms he should do so. It is a wide discretion and almost unfettered, for the only constraint imposed by the rule is that the terms should be just. It is a difficult one to exercise because it must embrace all the circumstances of the case and the rights of the parties - See **ATTORNEY-GENERAL V THEURI [1985] KLR 160**.

The records laid before us demonstrate that the learned single Judge painstakingly and conscientiously heard the parties and gave a well-considered decision. However, as it is common with unsuccessful litigants and especially in land cases, the aggrieved party has made a reference before the full court, citing

rightly or wrongly facts and instances favourable to him and which he believes the learned single Judge ignored.

. **Rule 54(1)(b)** of this Court's rules entitles a party who is dissatisfied with the decision of a single Judge to make a reference to the full court for variation, discharge or reversal of such decision. Technically it is not an appeal but it is in the nature of an appeal. By a 1995 amendment to **sub-rule (2)**, no additional evidence may be adduced. As to the circumstances in which the full court should interfere with the discretion of a Judge, this Court in C. App. NAI. 255/97 **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI** (UR) cited with approval, **MBOGO vs. SHAH [1968] EA 93** per

Sir Clement De Lestang, V.P. at page 94 thus: -

“.....I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

And **SIR CHARLES NEWBOLD P.** at page 96: -

“.....a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”

It is therefore those principles that we shall apply in considering this reference. What is the genesis of the dispute which has culminated in this reference? The applicant and the respondent are step-brothers. Their deceased father died intestate. The main issue in the dispute are two parcels of land measuring approximately 30 acres or thereabouts. Also involved in the dispute as parties are others of their relatives. **Succession Cause NO. 341 of 1994** was determined by the Magistrate's Court at Nyeri but it gave rise to **Nyeri H. C. Civil Appeal No. 12 of 1999** which, on 22nd February, 2001 dismissed the applicant's appeal. Undeterred, the applicant moved to the superior court for review under **Order 44 Rules 1,2 and 6** of the **Civil Procedure Rules and under section 80 of Civil Procedure Act**. This move proved futile for the application was also dismissed on 25th February, 2002.

About a month later on 25th March, 2002, the applicant through his counsel, **Mr. Okeyo, of Messrs. Ochieng Okeyo & Co.** lodged a notice of appeal but this was struck out by this Court on 16th May, 2003. The attempt to validate it by way of an application for extension of time within which to lodge an appeal was the subject matter before the learned single Judge and subsequently of this reference.

It is not in dispute that the application to seek extension of time to lodge an appeal was lodged 8 months after the date the applicant's notice of appeal was struck out. The reason given for this lapse was because the applicant and his counsel became sickly soon after the ruling intended to be appealed from. The applicant presented before the learned single Judge medical reports to show that he suffered from ill-health necessitating frequent treatment. **Mr. Gichuki**, counsel for the respondent, further concedes that **Mr. Okeyo** was involved in a serious accident and had suffered grave injuries as a result of which he was mostly out of his office for the greater part of the second half of 2003. It is the contention of the applicant, an elderly and semi-illiterate person, that his nagging illhealth and the incapacitation of **Mr. Okeyo** greatly compounded the delay. The learned single Judge of this Court held: -

“Apart from deponing that soon after the ruling intended to be appealed from he became sickly, his so called medical report annexed to his supporting affidavit indicates that he was treated at Amani Clinic on 27th February, 2002 for low blood pressure and given 2 weeks rest. He subsequently visited the clinic for further examination on 13th and 24th March; 18th April and 25th May, 2002 and was therefore in good health. There is no explanation

given for the 8 months delay after his first Notice of Appeal was struck out on 16th May, 2003. This delay is inordinate and inexcusable”.

With the greatest respect to the learned single Judge with whom we differ, we would think that had he taken into account the illness of the applicant’s counsel as well, he would have found that the applicant had given a sufficient and reasonable explanation for the delay sufficient enough for the learned single Judge to exercise his discretion in favour of the applicant.

Also, we think that it cannot be gainsaid that as the matter in dispute herein is family land to which both parties make rival claims, the particular circumstances of this case and interests of justice demand that the dispute be canvassed before this Court so as to bring the matter to its finality. Moreover, the applicant who has not been guilty of any laches has persistently shown a desire to appeal. These obvious facts which manifested themselves in the material presented before the learned single Judge were regrettably not taken into account when considering the merits of the application.

We do not perceive any prejudice likely to be suffered by the respondent, but if any, for example in the nature of the delay occasioned in enjoyment of the fruits of the judgment would be compensable in costs.

In our view, we think that the learned single Judge had exercised his discretion wrongly by refusing to grant the application.

Consequently, the reference is allowed. The refusal for extension by the learned single Judge is set aside and the applicant’s application for extension of time to lodge the appeal is allowed.

The notice of appeal shall be filed within 14 days hereof and the record of appeal shall be lodged within 21 days thereafter. The costs occasioned by this application shall be in the appeal.

Dated and delivered at Nyeri this 10th day of June, 2005.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR