



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, TUNOI & GITHINJI, JJ.A.)

Civil Application NAI 280 of 2004 (UR. 141/2004)

BETWEEN

GEORGE CHEGE KAMAU..... APPLICANT

AND

ESTHER WANJIRA KAMAU..... RESPONDENT

(An application for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from the Ruling and Order of the High Court of Kenya at Nakuru (Rimita J) dated 8 day of May, 2001

in

H.C.C.C. NO. 415 OF 1998)

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RULING OF THE COURT ON REFERENCE TO FULL COURT:

*George Chege Kamau*, the applicant herein, is asking us under **Rule 54 (1) (b)** of the Court's Rules, that the decision of a single Judge of this Court made on 19th April, 2005 pursuant to **Rule 4** ought to be varied, discharged or reversed. The applicant, by his notice of motion dated 5th November, 2004 and lodged in the Court on 8th November, 2004, had asked the single Judge to extend for him the time to file a notice of appeal out of time in respect of the decision of the superior court dated 8th May, 2001. Way back on 28th June, 1998, Mr. Justice Rimita of the superior court had entered a judgment against the applicant and in favour of Esther Wanjiru Kamau, the respondent herein. The dispute between the parties was over property known as L.R. No. Dondori/Miroreni Block 2/56 measuring some ten acres. By the judgment, Rimita J ordered that the land be sub-divided into two equal portions and the applicant in whose name the whole land was registered was ordered to transfer one portion to the respondent. The applicant attempted to appeal against that judgment but it appears that the appeal was at some stage abandoned. After some two or so years the applicant went back to Rimita J. asking him to review his judgment of 28th June, 1999. The learned Judge heard the application for review and dismissed it on 8th May, 2001. The applicant wanted to appeal against the decision dismissing his application for review and he filed a notice of appeal on the same day the decision was made. It appears that after the notice of appeal was filed, nothing else was done and the applicant told the learned single Judge of the Court that after filing the notice of appeal, he left everything in the hands of his lawyers, Messrs Muriithi & Co. Advocates. Apart from the notice of appeal, nothing else appears to have been done by anybody to show that the applicant intended to appeal. No letters applying for proceedings, for example, was shown to the single Judge and the applicant did not tell the single Judge that he, the applicant, had made payment to the advocates for the process of appeal and what he himself had done to ensure that the proposed appeal was being processed. Nothing relevant in respect of processing the intended appeal was shown until 8th November, 2004, some three years from the date of the decision to be appealed from, when the present motion was filed. The only relevant explanation which the applicant offered for the delay of over three years is to be found in paragraph 24 of his affidavit in support of the notice of motion where he stated:

***"That according to my knowledge and believe (sic) my then Advocate Muriithi & Company Advocates was only tricking me right from the beginning as even when the hearing date of the application was only one week to go, I could not find him in his office so it is my ultimate believe (sic) that Mr. Muriithi my then lawyer was tricking by neglecting the whole case with a continuous hindrance all throughout the matter andtime'***

The learned single Judge looked at this explanation. He looked at the previous delay of over two years before the application for review was brought. He also looked at the subsequent delay of over three years and the explanation given for that delay, namely, the trickery of the applicant's advocate. Apart from the mere averment of trickery, there was absolutely no evidence to support it and the applicant did not say why he thought his lawyer would trick him. Having looked at these matters, the learned single Judge concluded as follows:

***"I consider that the length of delay is certainly inordinate and no adequate reasons have been given for such delay. While it is possible that an appeal would have succeeded that is by no means certain and I do not consider that this aspect is sufficiently strong factor to cause me to exercise my discretion in favour of an extension of such magnitude. Furthermore, there would inevitably be prejudice suffered by the respondent arising from such a lengthy delay in finalizing this litigation. For these reasons the applicant's application is dismissed with costs':***

Contrary to Mr. Wandabwa's submissions on behalf of the applicant, this passage clearly shows that the learned single Judge had the correct principles in his mind when dealing with the application. The learned single Judge found the delay of three years inordinate. Mr. Wandabwa did not contest that position. The Judge also found the reason offered for the delay, namely the trickery by the advocate, to be inadequate. It is to be remembered that the learned single Judge was exercising an unfettered discretion so that even if the full Court were to think the reason offered was adequate, that would not, by itself, entitle us to substitute our discretion for that of the single Judge. We are satisfied that on the material placed before him, the learned single Judge exercised his discretion correctly and that being our position on the matter the reference by the applicant must fail. We order that the reference be and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nakuru this 30th day of September, 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**