



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 349 of 2004

DANIEL MURIITHI KAMONDEAPPLICANT

AND

MARY WANJIKU KAMONDE RESPONDENT

(An Application for extension of time to file & serve Notice and Record of Appeal from a Judgment and decree of the High Court of Kenya at Nyeri (Mitey, J) dated 22nd June, 2002

in

H.C.C.A No. 21 of 1994)

RULING

Before me is an application made under **rule 4** of the rules of this Court for extension of time within which to file and serve a notice of appeal and the record of appeal.

The background to the application is this: -

In a Succession Cause before the subordinate court in Nyeri, the applicant herein, **Daniel Muriithi Kamonde**, objected to confirmation of a grant of letters of administration issued to the Respondent, **Mary Wanjiku Kamonde**, the widow of one Stephano Kamonde Kubuta (Deceased). He claimed that he was one of the sons of the deceased and was entitled to a share of the estate in parity with two other sons of the deceased. After hearing oral evidence in the matter, the subordinate court agreed with the applicant and ordered that part of the deceased's three parcels of land be shared out to him. On appeal to the High Court the decision was reversed on the ground that the deceased had indicated during his lifetime how he would share out his land and had expressly left out the applicant as a beneficiary. The court said the wishes of the deceased should have been respected and allowed the appeal on 22nd June, 2002.

At the time of that decision the applicant was represented by counsel, one **Nyawira Gitonga** and he swears that he orally instructed her to prefer an appeal to this Court. He also swears that the advocate confirmed such instructions and advised him to go to his rural home in Kirinyaga and wait. From there he tried to contact the advocate on telephone without success and then he travelled on several occasions to Nyeri town where the advocate's offices were only to find the said offices closed. He thought it was only a temporary closure. But on 26th October 2004 he received notice of an application for eviction

filed by the respondent before the subordinate court. He travelled to Nyeri town again to seek his advocate's counsel but this time he found that the name-plate of the advocate was removed from the office block. Enquiring from the caretaker of the premises, he was informed that the advocate had moved out without leaving any forwarding address. He went to the Court registry to seek assistance and to peruse the Court file. It is there that he was informed that the advocate had migrated from Nyeri town to an unknown destination and that she had not filed any appeal on his behalf. He went looking for other advocates whom he instructed in the matter and they took out the application now before me.

The application was filed on 9th December 2004. That was about two and a half (2 ½) years since the decision was made by the superior court. His new advocate, Mr. Wambugu pleads that the omission of the applicant's erstwhile advocates should not be visited on the applicant who had explained sufficiently that he had given instructions for an appeal to be preferred. The matter in issue is a family one in which the applicant was disinherited despite evidence being tendered that he was one of the sons of the deceased. He has always been in possession of the land from which he is now in danger of being evicted.

The application is assailed on the main ground that the affidavit in support thereof is thin on details. Learned counsel for the respondent Mr. Ndirangu submitted that the failure to state specifically the dates on which the applicant visited his erstwhile advocates or the Court to find out what happened to the appeal is an indication that the applicant went to sleep until he was served with an eviction application. In January 2003 a letter was written to him asking him to quit the land but he made no response. He should have been put on notice at the time that there was no appeal pending. But he waited until October 2004 when he was served with the application for eviction. At any rate, Mr. Ndirangu submitted, there were no chances of the appeal succeeding since the deceased left a Will which excluded the applicant from his estate.

I have carefully considered the contentions made on both sides of this application. The discretion I have to exercise though unfettered must be based upon reason but not sympathy, whim or caprice. In **PAULA WAHETI MUCHINA V. HENRY WANJOHI MUCHINA** Civil Application NAI 178/2003 (UR), I considered a family dispute whose facts have an uncanny resemblance to this case and I stated:-

“ Each case stands on its own facts but they all have to be considered on the underlying principle of justice. As Lakha J.A. stated in Civil Appl. NAI 8/2000 Major Joseph Mweteri Igweta v. Mukira M’Ethare & Attorney General (UR):

“The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore the limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them.”

The length of delay here is not denied as it is a long one. The explanation for it is that Paula left it to her advocate to carry out her instructions and whenever she enquired she was assured that action had been taken. She herself has no knowledge of the intricacies of court procedures and all she knew was that she was challenging the court's decision. She pleaded ignorance but of course ignorance of the law cannot amount to a defence. It is the negligence of her counsel that stands out. On this Shah J.A. has had occasion to comment:-

..... “After all, the advocates for the applicants have acted, not mistakenly, but negligently and in a slovenly manner. The issue that therefore arises for consideration by me is: do the applicants suffer for the negligence of their advocates? It is a matter of concern for me that the applicants are not probably even aware of what is happening. If they are aware they do not know of intricacies of the procedure.

They have an undoubted right of appeal which they are unable to exercise because of their advocate's slovenliness. The matter involves land which is very dear to hearts of Kenyans. Should the applicants be deprived of the right of being heard by the highest court in the land? This factor has weighed on my mind and taking all matters into consideration I am inclined to give one last chance to the applicants. They will have no redress against their own advocates as generally no amount of damages (if the advocates are any good for payment of such damages) can compensate Kenyans for lost land.

See C. App. NAI. 340/1996 (32/96) Harrison Mberia Mbogo & Another. Vs. Mbutu Nguqi (UR).”

The delay in the **MUCHINA Case** was 10 years and I found it was in the interests of justice that the family land matter be resolved by the highest court in the land. In this matter the applicant, as correctly pointed out by counsel for the respondent, has given no dates on which he attempted to contact his erstwhile advocates. There is no denial however, that such advocate existed or that she made a disappearing act from her offices in Nyeri to an unknown destination. I am prepared to accept that a layman from a rural setting like the applicant here may not have anticipated such conduct from an advocate of this honourable court, and I give him the benefit of doubt. Any lapses on his part are atonable in costs. I do not find his claim frivolous (though it was vigorously opposed) that he was the son of the deceased and was therefore entitled to share in his estate. It is certainly arguable whether the deceased was entitled to disinherit the applicant, assuming he was his son or dependant, who evidently bore his name and occupied a portion of the land as he swears he has always done. A final settlement of such issues in the highest court would bring peace in the family and is an added reason for granting the application. Accordingly I make the following orders:-

- (a) The application dated 6th December, 2004 be and is hereby granted.
- (b) The applicant shall file a notice of appeal within seven (7) days of this ruling.
- (c) The memorandum of appeal and record of appeal shall be filed within fourteen (14) days of service of the notice of appeal.
- (d) The applicant shall bear the costs of the application assessed at Kshs.15,000/- payable within fourteen (14) days of this ruling . In default execution therefor shall issue.

Those shall be my orders.

Dated and delivered at Nyeri this 18th day of November, 2005

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR