REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION NAI 208 OF 2005

REPUBLIC ….……..……..……..….APPLICANT

AND

DISTRICT LAND REGISTRAR, KIAMBU …….....……..……. RESPONDENT

JOHN NJOROGE THAIYA ……..…….……...…...INTERESTED PARTY

EX PARTE ...……...……..……..GRACE WAITHIRA NJENGA

R U L I N G

On the 6th of June, 2004 Ransley J. dismissed an application for judicial review filed by Grace Waithira Njenga (hereinafter the "applicant") seeking an order of certiorari to quash a decision of the District Land Registrar, Kiambu made on 24.07.03 creating an access road of 15 feet width over L.R. No. Kiambaa/Kihara/2838 which belonged to her.

The application was dismissed; firstly, for being defective in that the facts in support thereof were not stated in a verifying affidavit but in the statement accompanying the application, contrary to the decision of this court in KRA v Owaki, Civil Appeal No. 45/00; and secondly, on the merits in that the Land Registrar had the power to determine the position of an uncertain or disputed boundary under Section 21(2) of the Registered Land Act. There was no notice of appeal filed to intimate dissatisfaction with that ruling.

More than one year later on 22.07.05 the applicant filed the notice of motion now before me seeking two orders under rule 4 of this Court's rules as follows: - "1. THAT the Honourable Court be pleased to grant leave to the ex-parte applicant to file and serve the Notice of Appeal out of time.

2. THAT the Honourable Court be pleased to grant leave to the affected party (sic) to file and serve her record of appeal out of time. AND for an order that the costs of and incidental to this application abide the said appeal." Although the discretion exercisable under rule 4 is in terms unfettered, it has to be exercised on reason, not caprice, and it must not be arbitrary or oppressive. As I said in Fakir Mohammed v Joseph Mugambi & 2 others Civil Application Nai. 332/04 (Nyr. 32/04) (ur):

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors:

See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil application. NAI. 8/2000 (ur) and Murai v. Wainaina (No. 4) [1982] KLR 38." This Court has also stated in Grindlays Bank International (K) Ltd v George Barbuor Civil Application NAI. 257/95 following the House of Lords in Ratman v Camarasamy [1964] 3 ALL ER 933: -

"The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

What has the applicant said and done towards compliance with those principles? She gave a general power of attorney to her son, David Kagunyi Njenga, who swore that three months before the ruling was delivered by Ransley, J. (i.e 10.03.04), an interested party in the judicial review application applied to have his mother committed to prison for alleged contempt of a court order. The applicant was then pre-occupied with defending that application until 17.06.05 when it was dismissed. One month later this application was filed. Before me in oral submissions, learned counsel for the applicant Mr. Kasamani, reiterated that ground as the sole reason for delay. He further submitted that the appeal was not frivolous as it will raise the issue of the Land Registrar's powers to interfere with boundaries.

At all events, he submitted, there would be no prejudice caused to the respondents if the application was granted. The respondents of course, and particularly the interested party before the superior court, found the delay inordinate and unexplained. Mr. Mbutua for him submitted that the filing of a notice of appeal is a mechanical and simple exercise. The dispute itself was on a road of access that was blocked by the applicant and was reopened by the Land Registrar who had the power to do so legally, and there was no appeal against the Land Registrar's decision.

Furthermore, there was no denial, and it was evident, that the application for judicial review was not supported by affidavit evidence and there can thus be no challenge to the findings of the superior court. On this, Mr. Mbugua was supported by Mr. Bitta for the Attorney General representing the Land Registrar, Kiambu. He submitted, and showed evidence for it, that the delay was not merely caused by pending proceedings for contempt of court. The applicant had, instead of taking steps to file the notice of appeal, applying for proceedings or extracting the decree, filed an application in the superior court on 08.07.04 seeking extension of time to file a notice of motion within the judicial review application determined one month earlier.

That application is still pending determination before the superior court. The information was not denied by the applicant although it was disclosed nowhere in the affidavit in support or in submissions of his counsel. Mr. Kasamani in reply simply said the application referred to was not serving any useful purpose. I am afraid the disclosure portrays the applicant as cagey and less than candid, which militates against favourable treatment by a court of equity. It confirms, as contended by the respondents, that the application now made is an afterthought which the sole excuse given for delay cannot cure.

As correctly pointed out by the respondents, the filing of a notice of appeal was a simple exercise and no reason has been given for failure to file one for over one year. Even after the judgment of the superior court, it took another month of unexplained laxity to make this application. As stated in the authorities cited above, there must be some basis upon which I can exercise my discretion. As for the merits of the intended appeal, I can only express a prima facie view of it since it is in the province of the full court.

On the face of it, the learned Judge had no choice but to comply with the decision of this Court on the procedure for institution of judicial review applications. Nonetheless he went further and considered the matter on merits and cited the law applicable on the facts placed before him. There must be an end to litigation. For those reasons I decline to exercise my discretion in favour of the applicant and I dismiss the notice of motion dated the 22nd July, 2005 with costs.

Dated and delivered at Nairobi this 11th day of November, 2005.

P.N. WAKI JUDGE OF APPEAL

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

DEPUTY REGISTRAR