



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM:GITHINJI JA)**

**CIVIL APPLICATION NO. NAI 248 OF 2003**

**BETWEEN**

**WASIKE.....APPLICANT**

**AND**

**KHISA & ANOTHER .....RESPONDENT**

**RULING**

This application is brought under rule 1(2), 4, 42 and 81 of the Court of Appeal Rules for orders:

1. That applicant be granted an extension of time not exceeding forty five days (45) to lodge a Memorandum of Appeal and the Record of Appeal.
2. That applicant be granted an extension of time to serve the Record of Appeal within seven (7) days of filing.

The application is supported by three affidavits. The first is the affidavit of the applicant sworn on 12th August, 2003. The second is the affidavit of Havon Wasike, the applicant's son, sworn on 12th August, 2003. The third affidavit is sworn by Mr Amolo, the applicant's advocate, on 13th August, 2003.

The starting point is the ruling of Shah, J A dated 21st March, 2003. By that ruling Shah JA

- (i) Deemed the notice of appeal lodged by applicant in the Superior Court on 14th July, 1999 to be served in time.
- (ii) Ordered that the record of appeal be lodged within 45 days of the date of the ruling.
- (iii) Directed the applicant to apply for the substitution of Risper Naliaka Khisa (deceased – 2nd respondents)
- (iv) Ordered the applicant to pay out of pocket expenses of Shs 3,500/= to first respondent within the next 45 days.

The applicant did not lodge the record of appeal within 45 days of the date of the ruling which 45 days expired on or about 5th May, 2003, hence the present application which was filed on 27th August, 2003.

By rule 4 of the Court of Appeal Rules, the Court has discretion, *inter alia*, to extend time limited by any decision of the Court for doing any act authorized or required by the rules whether before or after the doing of the act on such terms as court thinks just. This discretion is unfettered but must be exercised judicially. In exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension of time will cause undue prejudice to the respondent and the length of the delay – see *Wasike v Swala* [1984] KLR 591.

The applicant intends to appeal against the judgment and decree of Nambuye J dated 9th July 1999 in which it was decreed, *inter alia*, that applicant holds 5.3 acres of land in parcel No Bungoma/Naitiri/83 in trust for plaintiffs in the suit (that is, Benson Wamalwa Khisa and Naliaka Khisa). The full facts relating to the dispute are comprehensively stated in the judgment of the Superior Court. The plaintiffs in the Superior Court are the administrators of the estate of Joanes Khisa Warunga who was allotted land parcel No Bungoma/Naitiri/79 by Settlement Fund Trustees in 1965. The defendant in the suit (applicant in this application) is the widow of Peter Wasike who was also allotted land parcel No Bungoma/ Naitiri/83 by Settlement Fund Trustees in 1965. It appears that the two parcels of land are adjacent Joanes Khisa Warunga claimed that he was allocated 37.5 acres while Peter Wasike was allocated 37.2 acres. Joanes Khisa Warunga further claimed that his land in fact measured 32.3 acres as his 5.3 acres were incorporated in the title of Peter Wasike to increase by land of Peter Wasike to 42.5 acres. It appears that Peter Wasike fully developed the land including the portion of 5.3 acres claimed by the administrators of the estate of Joanes Khisa Warunga. The dispute about the 5.3 acres has been raging since 1972 and officers of Settlement Fund Trustees had on several occasions attempted to resolve the dispute but it was not satisfactorily resolved. The two original allottees are deceased. The suit to recover the 5.3 acres in dispute was filed in 1997 by the administrators of the estate of Joanes Khisa Warunga.

It was clear from the evidence that the applicants had used the disputed portion of the land for many years. In arriving at the decision the learned judge had to deal with various legal and factual issues including whether or not the applicant was registered as first registered owner; the powers of Settlement Fund Trustees after allocating land and whether or not applicant was registered as a trustee in respect of the 5.3 acres in dispute for the estate of Joanes Khisa Warunga.

It is apparent from that brief examination of the dispute which was before the Superior Court that the subject matter of the intended appeal is a land dispute about the ownership of 5.3 acres which applicant has been occupying for many years and that the intended appeal is not *prima facie* frivolous.

The applicant has explained why the appeal was not filed within the 45 day allowed by Shah JA. Firstly, an application had to be made to court to join the legal representative of Reispa Naliaka Khisa (deceased) in the suit as ordered by Shah JA which application was determined on 10<sup>th</sup> April, 2003. Secondly, it was discovered that some of the exhibits produced at the trial had been released and the applicant had to file an application in Court for exclusion of those exhibits from the Record of Appeal which application was allowed on 2nd May, 2003.

Mr Amolo explains in his affidavit that the Record for Appeal was indeed prepared and taken to Court of Appeal Registry at Nairobi but rejected by a registry clerk. The notes of the registry clerk specifying the irregularities are annexed to the application.

Mr Amolo has also explained that he was sick for some time and has annexed documents which show that he consulted Dr Anthony Were on 15th May, 2003; 24th May, 2003 and 30th May, 2003. Lastly, Mr Amolo explained that he was engaged in the High Court at Nyeri Election Petition No 1 of 2003. He has annexed the proceedings in the election petition which show that he attended the hearing of the petition on various days from 30th April, 2003 until 26th Jun, 2003 when the hearing was adjourned to 5th August, 2003.

The respondent opposes the application and has filed a replying affidavit. Mr Gicheru for the respondent addressed the Court at length. Mr Gicheru in particular submitted that the delay of 113 days from 5th May 2003 when the 45 days expired to 27th August, 2003 when the present application was filed, has not been satisfactorily explained. Further, Mr Gicheru, submitted that the delay of 47 days from 26th June, 2003

when the election petition was adjourned to 27th August, 2003 when the present application was filed has not been explained Mr Gicheru also pointed out that there were days when the hearing of the election petition was not going on and when Mr Amolo could have attended to this application.

The delay that the applicant in this case is accused of must be considered broadly and realistically taking all the circumstances of this case into account. A minute examination of every single act of delay in taking any appropriate step and a strict requirement that every such act of delay be satisfactorily explained before the applicant can be given the orders sought, the approach that the learned counsel for the respondent has in fact adopted in the application, would fetter the wide discretion of the Court to extend time under rule 4. Such a rigid approach to the application of the rule would herald the return to the bygone era before the amendment of rule 4 when a "sufficient reason" had to be shown before the Court could extend time.

It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable. And whether or not delay is unreasonable will largely depend on the circumstances of each case. In extending time Shah JA stated in the ruling dated 21st March, 2003 that:

"...the applicant has always manifested her desire to lodge an appeal against the judgment and decree of the Superior Court".

I am satisfied that the applicant has given a reasonable explanation for the delay between the date of the ruling and 26th June, 2003 when the election petition was adjourned to 5th August, 2003. The applicant had to make an application to court for substitution of a party. The applicant had also to make application to court for exclusion of exhibits which were missing from the Record of Appeal. The applicant's advocate was sick sometime in May, 2003 and the applicant's advocate was engaged in the election petition proceedings at Nyeri. The combination all these factors caused substantial delay which is excusable.

There was also delay between the time the hearing of the election petition was adjourned on 26th June, 2003 and 27th August, 2003 when the present application was filed. That delay is not specifically explained but it is apparent that the applicants counsel was still engaged in the election petition. Furthermore, that delay, in my view, is not unreasonable.

The respondent has not said that he will suffer any prejudice if the application is allowed.

It is true that Shah JA found in the ruling dated 21st March, 2003 that the decree has been executed. It appears that the respondent is now in possession of the land in dispute. He is therefore unlikely to suffer any prejudice if the application is allowed.

The applicant has paid the expenses awarded to the respondent in the previous application. In my view, again, costs will be adequate compensation to the respondent.

In the circumstances, it would be unjust to deny the applicant a chance to exercise her right of appeal.

Accordingly, I allow the application with costs to the respondent. I extend both the 45 days limited by order of Shah JA given on 21st March, 2003 by a further 45 days from date hereof and time for service by 7 days from date of filing.

**Dated and Delivered at Nakuru this 18th day of March 2004.**

**E.M.GITHINJI**

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**JUDGE OF APPEAL**