



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: ONYANGO OTIENO, AG. J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 357 OF 2003

(Application for extension of time to lodge notice & record of appeal from the judgment of the High Court of Kenya at Nakuru (Rimita J) dated 10th March, 2002

in

H. C. C.C. NO. 282 OF 1989)

MWANGI KIMENYI MUGWE APPLICANT

AND

A. H. KAMAU RESPONDENT

RULING

I have before me an application brought under Rules 4 and 42 of the Court of Appeal Rules. It is seeking the following orders:

- “1. THAT this Honourable Court be pleased to extend the time within which the Applicant may lodge the appeal as wells as the time within which record of appeal may be filed and served.
- 2. THAT the costs of this application do abide the outcome of the appeal.”

The application is premised on two grounds namely:

- “1. That delay in filing the appeal was occasioned by factors beyond the control of the applicants.
- 2. That specifically, the said delay was occasioned by lateness in preparation of a proper decree of the High Court since an initial decree had been inadvertently issued by the Court without compliance with the provisions of the Civil Procedure.”

The same application is also supported by an affidavit sworn by Mr Kahiga Waitindi, who though does not specifically state that he is counsel for the applicant, states that he has the consent and authority of the applicant to make the affidavit. In that affidavit, the applicant states that the judgment the applicant seeks

to appeal against was delivered on 10th March, 2000 and the applicant through his advocates lodged a notice of appeal on 16th March, 2000. On 20th April, 2000, the applicant applied for certified copies of proceedings; that as the applicant's advocates were preparing the record of appeal, they discovered that the decree was not properly issued and they had to apply for proper decree and they did so vide their letter dated 22nd September, 2003 which interestingly seems to have been received at the High Court Registry on 30th September, 2003. The proper decree was issued on 2nd October, 2003 and that, to the applicant, explains the delay in not filing the record of appeal within the time allowed by the rules. The applicant, however, states further that he has an arguable appeal as he wishes to raise several matters to challenge the judgment of the superior court.

The respondent has not filed any affidavit in reply but his counsel opposed the application arguing that there has been an undue delay; that the improper decree was issued on 22nd October, 2001, yet applicant's letter seeking to rectify the same decree is dated 22nd September, 2003, nearly 2 years after the first decree was issued; that no explanation has been given for the delay or why it took two years to write to the court to rectify the decree. He contended further that there is no evidence to support arguability of the intended appeal as no draft memorandum of appeal has been annexed; that there is no evidence that record of appeal has been filed as respondent has not been served with any record of appeal and no certificate of delay has been attached.

I have anxiously considered the application. It is now settled law that the court has wide discretion under Rule 4 of the Court's rules. However, like all discretions, the same discretion must be exercised upon reason. That in effect means that the applicant must explain to my satisfaction what led to delay and must also bring to the court's attention compelling aspects that would enable him to benefit from the court's discretion.

In this application, the main explanation put forward for seeking the exercise of my discretion in favour of the applicant is that there was a mistake, possibly by the court as well as the applicant in that a decree was extracted without the draft having been first approved by the respondent. This meant that the exercise had to be repeated again so as to obtain a proper decree as that first decree would not have been of any benefit to the applicant in the appeal. It is clear to me from the reading of the exhibit KW3 annexed by the applicant that the same first decree which was faulty was issued on 22nd October, 2001. The effect of that is that the applicant was supposed to have obtained it on that date or immediately thereafter. The applicant has not stated when it was discovered that it would not be a valid decree but as it was required for appeal purposes, and time was of essence, one cannot accept that it took the applicant twenty-three months (from 22nd October, 2001 when it was issued to 22nd September, 2003 when they applied for fresh decree) to discover that the decree they would use for appeal was not valid. Whatever happened, that gap has not been explained to my satisfaction. Further, even after receipt of the fresh decree which was issued on 2nd October, 2003, the applicant did nothing towards taking any move to have the appeal filed and this application before me which was dated 17th November, 2003 was not filed till 28th November, 2003, some fifty seven days after the issuance of the valid decree. Again, no attempt has been made to explain that inordinate delay. Under these circumstances, can it be true that the delay in filing the appeal was occasioned by factors beyond the applicant's control? And can it be true that the delay was specifically occasioned by lateness in the preparation of a proper decree of the High Court since an initial decree had been inadvertently issued by the court without compliance with the provisions of the Civil Procedure? The answer to both questions above which reflect the main reason for filing this application must with respect be NO. The delay is clearly in the hands of the applicant and his advocates. Further, the applicant states in the affidavit sworn by his counsel that the intended appeal is arguable, yet no draft memorandum of appeal was annexed with the application to enable the court know what legal and factual points would be raised on appeal. This was even more important in a matter such as the one before me where no proceedings were annexed, as reading the judgment alone would not enable the court to appreciate the salient aspects of the case.

I do agree that matters relating to land in Kenya and particularly cases relating to land must be carefully handled and parties need to be afforded opportunity upto the highest court in the land to put forward their grievances. To that extent, I do fully endorse the sentiments of Justice O'Kubasu, JA, in the case of **PETER KAMAU NJUGUNA V STEPHEN MAGICHU & 3 ORS**, Civil Application No NAI 53

of 2000 (unreported). However, in that case as he rightly found there was sufficient explanation as regards the delay and he found that the applicant could not be faulted for delay. My understanding is that courts have a duty to ensure justice to all parties. In order to do so, rules of procedure are in place for every party to follow in order to realise his rights in law. It would in my view be wrong for anybody to sleep on his rights and expect courts to exercise discretion to their benefit simply because their cases relate to land matters. It must be appreciated that each party to a land matter expects justice and fair play and none should expect rules to be trampled underfoot simply to get them out of a quagmire created by their own indolence. Undoubtedly in cases of few days delay which would be treated as not constituting inordinate delay, the court may when considering land matters and other weighty or public matters bend over backwards in favour of substantive justice but certainly not in cases where a party decides to do nothing for a period inordinately long and then seek favours of the court on grounds of the sensitivity of the matter like has happened in this case.

I decline to exercise my discretion in favour of the applicant in this application as indeed I have no explanation before me for the delay of 23 months to seek valid decree so as to put in motion steps to appeal and I have no explanation for the delay of 57 days from the date valid decree was issued to the date this application was filed.

The application is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 23rd day of September, 2004.

J. W. ONYANGO OTIENO

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR