



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 141 OF 2004

BETWEEN

WALTER AWUOTH AYUGI APPLICANT

AND

HESBORN SULE OKOTH RESPONDENT

**(Application for leave to file and serve notice and record of appeal out
of time in an intended appeal from the ruling and orders of the High Court
of Kenya at Kisumu (Tanui, J) dated 11th November, 2003**

in

H.C. Misc. C. Case No. 70 of 2003)

RULING

Though the notice of motion before me was very vigorously contested, the issue for me to determine is really very narrow. The applicant, Walter Awuoth Ayugi, wishes to appeal against the orders of Tanui, J made on 11th November, 2003. By those orders, the learned Judge quashed the decision of a Special District Commissioner made in favour of the applicant on 2nd October, 2002. One thing is certain from the record before me, and that is that the applicant has always wanted to appeal against the orders of Tanui, J. The desire to appeal is understandable in view of the fact that the subject matter at the centre of the dispute between the applicant and Hesborn Sule who is the real respondent to the applicant's motion, are land parcel **Nos. Kisumu/Kasule/106 and 973**. The order of Tanui, J effectively gave that land to Hesborn Sule who had earlier on in 1986 been awarded those pieces of land by another Special District Commissioner exercising the appellate powers of the Minister delegated to him (D.C) under **section 29(4) of the Land Adjudication Act, Chapter 264 Laws of Kenya**. The decision of the Minister on such appeals is final. The applicant had previously tried to challenge that decision in court; he had failed in that attempt. Then it appears that out of the blue, the Minister ordered a rehearing of the appeal and another District Commissioner was given the power to hear that appeal. The hearing went on and this time round, the applicant won. It is this latter decision that the respondent, Sule, asked Tanui, J. to bring before his

court by way of certiorari and have the same quashed. The learned Judge issued an order of certiorari and the second decision was quashed. It is against that order that the applicant wishes to appeal and as I have said, the applicant has always wanted to appeal.

The applicant had a lawyer called J.O. Ongele of Ongele and Company Advocates of Kisumu. The applicant swears that he instructed Mr. Ongele to appeal on his behalf but that the lawyer advised him that he (the applicant) could not appeal and only the Attorney General could lodge a competent appeal. This contention by the applicant appears to be justified by Ongele's letter of 4th December, 2003 written to the State Counsel at Kisumu in which Ongele states, among other things:

“You may appeal on the ground that the decision by the Special District Commissioner was and is incapable of implementation as it gave both parties the disputed land.”

This letter was written barely one month after the decision of Tanui, J and in my view, it confirms the applicant's assertion that Ongele told the applicant that only the Attorney General could appeal on his behalf. That is what would explain the letter, part of which I have set out hereinabove.

The advice of Ongele that only the Attorney General could appeal on the applicant's behalf was, of course, clearly erroneous. The question that I asked both Mr. Ouma, for the applicant, and Mr. Mwamu, for the respondent, is whether a mistake of law by counsel can amount to such a mistake as would entitle the Court to exercise its unfettered discretion under rule 4 and extend time on behalf of an applicant such as the one before me. In MURAI V. WAINAINA (NO 3) [1982] KLR 33, LAW, J.A held that –

“An advocate's bona fide mistake, but not inordinate delay on the advocate's part, may amount to sufficient cause The only delay was due to the advocate's bona fide but mistaken view that a formal order was not necessary.”

This case was decided under the old regime when a party was required to show sufficient cause so as to obtain an extension, which is no longer the case, but the principle set out remains valid, namely that a bona fide mistake on the part of the advocate entitles a court to exercise its discretion in favour of an applicant. In that case, it appears the mistake was on some kind of law, namely whether or not a formal order was necessary in the record of appeal.

An analogy may also be drawn from the area of reinstating proceedings which have been determined, that is setting aside of orders already made. In the case of SHABIR DIN V. RAM PRAKASH ANAND cited in MAINA V. MUGIRIA [1983] KLR 78, this statement is to be found at **page 94**:

“the mistake or misunderstanding of the plaintiff's legal adviser, even though negligent, may be accepted as a proper ground for granting relief under Order IX rule 20 the discretion of the court being perfectly free”.

The discretion of the Court under **rule 4** is perfectly free and in this matter, I am satisfied that Mr. Ongele's understanding of the law respecting the right of appeal was erroneous.

I think that in these circumstances, and though I personally have very little sympathy for the applicant, taking into account the endless nature of this litigation, I should allow his motion for extension of time. I accordingly allow the motion dated **8th June, 2004** and lodged in this Court on **10th June, 2004** and I make the following orders:-

1. The applicant shall lodge and serve his notice of appeal within seven (7) days of the date of this ruling;
2. The record of appeal shall be lodged and served on the respondents within ten (**10**) days from the date the notice of appeal is lodged in court;
3. The applicant shall pay to the respondent, **Sule**, the costs of this motion which I assess at

Shs.10,000/=, such costs to be paid within twenty one **(21)** days of today's date;

4. If the applicant should fail to comply with any or all of the conditions stated in paragraphs **(1)**, **(2)** and **(3)** of this order, then in the event of such failure the notice of motion shall stand dismissed with costs and without any further order of the Court.

Those shall be my orders in the motion.

Dated and delivered at Kisumu this 3rd day of December, 2004.

R.S.C OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR