



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Waki JA)

CIVIL APPLICATION NO NAI 178 OF 2003

PAULA WAHETI MUCHINAAPPLICANT

VERSUS

HENRY WANJOHI MUCHINA.....RESPONDENT

(An application for extension of time to file and serve Notice of Appeal

and Record of Appeal from the Judgment of the High Court at

Nakuru (Tanui, J) dated 18th June, 1992 in HCCC No 499 of 1990)

RULING

About 13 years ago, Paula Waheti Muchina (Paula) sued her step brother Henry Wanjohi Muchina (Henry) before the High Court in Nakuru claiming that Henry held some family land in trust for her and seeking a declaration to that effect and subdivision of the land. It is common ground that the land which was in a settlement scheme in Nyandarua was originally allocated to their father in 1964 on terms that he paid some loan on it to the Settlement Fund Trustees. It is also common ground that their father left his ancestral land in Kangema, Muranga and settled on that land with his family. None of the parties know of any other land of their father. Paula never married but ended up with 6 children. Henry was the only son but had 6 sisters, most of whom were married. In 1975 however their father transferred the land to Henry and he became the registered owner.

He did nothing however to disturb the occupation and use of the land by Paula and her children. Indeed he has done nothing since he became the registered owner to disturb that occupation and use upto date.

It is Paula who sued him in 1990 as stated earlier but Henry did not file a counterclaim. His defence was that he bought the land from his father on a willing seller/willing buyer basis and there was no "Trust" that could be inferred in his Title. The learned judge of the Superior Court agreed with him and dismissed Paula's case on 18th June, 1992.

Paula was not satisfied with that judgment and therefore sought an order for stay of execution pending appeal which order was granted. At the time she was represented by counsel and she instructed him to prefer an appeal. But no Notice of Appeal or any appeal has ever been filed for the last 10 years or so. She only made an attempt in February 2000 to have the case transferred to the Land Disputes Tribunal for adjudication but her prayers were dismissed. Nothing happened thereafter until Henry sought to recover

his costs of the suit and obtained orders for Paula's committal to civil jail in default of payment. That is when she came before this court and filed the Notice of Motion dated 24th June, 2003 seeking extension of time to file Notice of Appeal and a Record of Appeal out of time. That was the matter argued before me and the subject matter of this ruling.

The principles upon which this Court should exercise its discretion under rule 4 of this Court's Rules are not in dispute. The discretion is in terms unfettered but it still has to be exercised Judicially, not whimsically. Each case stands on its own facts but they all have to be considered on the underlying principle of justice. As Lakha JA stated in Civil App 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 JA 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 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 advocates' 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 Mbaria Mbogo & Another v Mbutu Ngugi*. (UR).

Learned counsel for Henry, Mr Gethi submitted that the explanation given for the delay was not convincing. In his view Paula was well informed and knew all along that she ought to have filed an appeal within a limited period. She simply went to sleep and if her advocate also went to sleep, her remedy is against him.

I think on the whole the explanation given does not wholly exonerate Paula from blame as she ought to have realized earlier than later that her advocates were not executing her instructions. It is not lost to me however that the respondent did nothing over the period to have the order for stay of execution set aside or to pursue the costs of litigation before the Superior Court. Paula may well have been lulled into a false sense of security. That she was intent on challenging her step-brother's title is however clear. I refer to the pronouncements of Shah JA in the case above which I think largely apply to Paula's case.

As I said earlier the respondent has done nothing to disturb the status quo and I am told from the bar that he had no intention of evicting Paula and her children from the land. He will be prejudiced however, I am

told, if the matter is now reopened after a lull of 10 years enjoyment of his rights under the judgment. He will incur costs which may not be recoverable since Paula says she is poor.

There is no doubt that Henry has vested rights in the judgment which was favourable to him. It is as weighty as the right of appeal which Paula was also entitled to. In the circumstances of this case however I think an order for costs would adequately compensate any prejudice suffered. I see no express plea made that the applicant is poor and there is no order of the Court to that effect.

As for the likelihood of the appeal succeeding, I say little about it. Suffice it to say that justice will be enhanced when both parties know with finality from the highest Court in the land whether or not a trust exists in the disputed parcel of land. I agree with learned counsel for Paula, Mr Odhiambo, that it is a weighty issue of law. Being of that frame of mind I make the following strict orders:-

- a) That the application dated 24th June, 2002 be and is hereby allowed.
- b) That the Notice of Appeal be filed and served within seven days of this ruling.
- c) That the Record of Appeal be filed and served within 14 (fourteen) days of service of the Notice of Appeal.
- d) That the applicant pays the costs of this application in any event, such costs to be taxed if not agreed.
- e) In default of compliance with any of the above orders (a) to (d), this application shall stand dismissed without any further order of the Court.

Dated and delivered at Nakuru this 1st day of October, 2003

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR