



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 424 OF 2001

BETWEEN

RUTH WANJIRU METAAPPLICANT

AND

PENINA NYAMBURA KIMANIRESPONDENT

(An application for extension of time to file serve

Notice and Record of Appeal from a Ruling of the

High Court of Kenya at Nairobi (Aluoch, J) dated

13/10/94

in

H.C.SUCC. C. NO. 1127 OF 1989)

RULING

I have before me an application for extension of time to lodge a notice of appeal and record of appeal out of time. The application comes as a result of Civil Appeal No. 2 of 2001 having been struck out. That appeal was lodged by the present applicant. It was struck out on 4th December, 2001 on the ground that the exhibits produced during the hearing of the suit in the superior court were not included in the record of apTphea la.pPLICANT had the misfortune of not only Civil Appeal No. 2 of 2001 having been struck out but also that of her earlier appeal, Civil Appeal No. 128 of 1998 having been struck out. As far as Civil Appeal No. 128 of 1998 is concerned the applicant's advocates had not only not included in the record of appeal exhibits produced in the court but also not obtained leave to appeal. She obtained leave to appeal from the superior court on 1st day of March, 2000 and lodged Civil Appeal No. 2 of 2001 having obtained extension of time to lodge the same.

This application was lodged in this Court on 6th December, 2001. There is therefore no delay whatsoever in the lodgment of this application.

The issue, that therefore, falls for determination is: do I allow the applicant a further bite at the cherry? The dispute between the parties revolves around a parcel of land (now sub-divided) which once belonged to **Edwin Kimani Meta**. The respondent is the widow of Edwin. Letters of Administration were granted to her in her capacity as widow. The applicant challenged grant of such letters of Administration on the ground that the respondent had failed to disclose that the deceased Edwin was an elder brother of the applicant and he held the land in question **KABETE/KARURA/39** in trust for himself, the applicant and an elder brother **Nicholas Makorla Mhetaav**.e gathered these facts from the record of Civil **Appeal No. 2 of 2001** after both counsel agreed that I could have a look at that record for reference purposes.

The respondent laments that she has been dragged into courts since 1989 through no fault of her. That may be so but when the dispute is between members of a family concerning inherited or inheritable land the court ought to bring the litigation to an end after full ventilation of grievances. I am minded to give one last chance to the applicant so that her intended appeal could properly be heard by this Court.

I am told, however, that the land in question has already been sub-divided and that therefore the intended appeal would be futile. That is not quite the case. The sub-divisions are amongst family members and not outsiders. The applicant's counsel stated that he will serve notice of appeal on all affected parties. He knows what would happen if he does not so serve the notice of appeal.

The counsel for the respondent stated that the applicant's counsel had deliberately left out a vital document in the record of appeal which was struck out. This is an affidavit which was filed in response to the application for leave to appeal lodged by the applicant in the superior court. I do not think that affidavit is a primary document. It came after the cause was determined. It was overtaken by events when the superior court granted leave to appeal which ruling (granting of leave to appeal) has not been appealed against. I am unable to say that the omission was deliberate.

In the exercise of my discretion, under **rule 4** of the Rules of this Court I grant the application and order that the applicant do file a fresh notice of appeal within the next seven days, serve a copy thereof on all affected parties within the prescribed period of seven days after filing of the notice of appeal; that the respondent do file her record of appeal within 30 days of the filing of the notice of appeal and serve copies on all affected parties within seven days of filing thereof. The applicant will pay costs of this application to the respondent which I assess at Shs.10,000/= within the next 30 days failing which execution may issue.

I apologize to counsel for not referring to the various authorities they have quoted but I see no need to refer to them. The principles for grant of extension of time are well settled and there is no need of a rehash of them here.

Dated and delivered at Nairobi this 3rd day of May, 2002.

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.