



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: O'KUBASU, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 331 OF 2000**

BETWEEN

1. GEORGE ROINE TITUS

2. DANIEL NDICHU APPLICANTS

AND

JOHN P. NANGURAI (as personal representative of

HARRY LEWIS NANGURAI, now deceased)RESPONDENT

**(Application for extension of time to file grounds of
affirming the decision in an intended appeal from a
decree of the High Court of Kenya at Nairobi
(Bosire, J.) dated 30th October, 1996**

in

H.C.C.C. NO. 1038 OF 1974)

R U L I N G

This is an application for extension of time in which to file a notice of cross-appeal.

Facts leading to this application are fairly simple and straight-forward. On 3rd July, 2000 the applicants herein were given leave to file the notice within five days. The notice was however not filed as per the court order due to the fact that a clerk in the office of applicants' counsel did not take appropriate steps. Mr. Wandabwa conceded that the delay was his own responsibility. It was also submitted that the dispute herein relates to ancestral land and that the appeal raises matters of public interest.

Mr. Wachira in opposing this application pointed out that a similar application for extension of time had been made and granted by Owuor J.A. on 3rd July, 2000. The applicants were granted an extension of five days but the applicants failed to comply with that order of Owuor J.A. It was after four months that this application was filed. In Mr. Wachira's view the application is res judicata.

Perhaps we should start from this issue of res judicata. The position here is that the applicants are seeking an extension of time in which to file a notice for cross-appeal. It is true that a similar application was made and granted. They did not file the same in time. They are now coming up once again seeking an extension. I do not think the issue of res judicata applies to the facts of this case. This court has wide

discretion under rule 4 of this Court's Rules in dealing with the issue of extension of time. In an application of this nature the court is being asked to exercise its discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in its favour. Although this is unfettered discretion but like all judicial discretion it must be exercised on reason not caprice; and the exercise must not be arbitrary or oppressive - see Samken Ltd, Abercrombie of Kenya Ltd v. Mercedes Sanchez, Rau Tussel, Mohamed Osman Maalim- CivilI nA ppetahle No.p reNsaie.n t 21 aopfp l1i9c9a9t i-o n (unMrre.p ortWeadn)d.abwa for the applicants has explained the circumstances that led to this delay. A clerk in their office failed to file the notice within time. Mr. Wandabwa took full responsibility for the mistake. The issue here now is whether this explanation is acceptable. If the explanation is acceptable then this Court would exercise its discretion in favour of the applicants. As Lakha JA said in Peter Maina Munyua v. Damaris Njoroge - Civil Application No. Nai 210 of 1999 (unreported)

"When there is no explanation there can be no indulgence."

And in Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted."

In the present application I find that bearing in mind what this Court has stated to be guiding principles in an application of this nature, although the delay might appear inordinate yet the explanation given is satisfactory. Again, it has been pointed out that the dispute herein relates to ancestral land and as matters relating to land tend to be rather emotional to which parties always attach great interest I am of the view that the applicants ought not be shut out from what the statute allows them to do. Accordingly, I allow the application and the applicants are now granted leave to file their notice of cross-appeal within 14 days from the date of this ruling. Costs of this motion shall be in the appeal.

These shall be my orders.

Dated and delivered at Nairobi this 30th day of March, 2001.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR