



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: TUNOI, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI 108 OF 2001

BETWEEN

STEPHEN KINORO KAMAU APPLICANT

AND

WANJIKU KINUTHIA

NYAKIEGA KINUTHIA (as administrator of the estate of KINUTHIA
KARIUKI
(DECEASED)).....RESPONDENTS

(An application for extension of time to file and serve
memorandum of appeal out of time in an intended
appeal from a ruling of the High Court of Kenya at
Nairobi (Ang'awa J) dated 19th October, 2000

in
H.C.C.A. NO. 2360 OF 1995 (O.S.))

RULING

This is an application expressed to be brought under **rule 4 of the Rules of this Court** for leave to file an appeal out of time against the judgment of Ang'awa J delivered on 19th October, 2000 in HCCC NO. 2360 OF 1995 (O.S.).

The notice of appeal was filed timeously. There is no dispute about that. As to whether it was served within the prescribed time or not has not been explained either way to my satisfaction and I will exclude the fact of its proper service or otherwise in the decision of the application before me.

The proceedings were collected from the Registry on 5th February, 2001 and this application was filed about 65 days afterwards. The delay in filing the application is said to have been occasioned by the absence in Mombasa by counsel for the applicant. Counsel's omissions should not be visited upon an innocent litigant. Further, technicalities should not be invoked to work injustice.

The dispute, which has been quite acrimonious, involves land from which the applicant has already been evicted and the respondents put in possession. Thus, the respondents will not suffer prejudice if the appeal is allowed to proceed to hearing. Denying the applicant a right of a hearing before the highest court on a technicality, in such a case like this whereof he has constantly desired to have it canvassed, amounts to grave injustice.

The delay involved is not too inordinate in the particular circumstances of this case, especially where land in such a District like Kiambu is the subject of dispute. Moreover, whether the intended appeal is unmeritorious or has no probability of success should not solely at this stage militate against the applicant.

Again, whether the applicant has began on a false start by not including all the relevant prayers in the motion is not material before me.

I exercise my discretion in favour of the applicant and allow the application as prayed. I grant leave to file the Record of Appeal out of time. This shall be done within 21 days hereof. The costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 4th day of October, 2001.

P. K. TUNOI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR