

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: BOSIRE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI.42 OF 2000 (UR. 1/2000 KSM)

BETWEEN

JAMES ASHIONO BUKHALAAPPLICANT

AND

THE MINISTER FOR LANDS AND SETTLEMENTRESPONDENT

**(An application for extension of time to file and serve
Notice of appeal and record of Appeal out of time in
an appeal from a ruling of the High Court of Kenya
at Kakamega, (Justice B.K. Tanui) dated 19th day of
May, 1998 in
H.C.MISC.A. No.7 of 1998)**

RULING

The applicant's deceased brother Peter Ligami Ashiono, was the unsuccessful party in a final appeal under the Land Adjudication Act, Cap 284 of the Laws of Kenya. The decision in that appeal was given on or about 28th November, 1985 by Anthony Waituika, a Special District Commissioner, in exercise of powers delegated to him by the Minister for Lands and Settlement. Subsequently on 19th January 1998, the applicant, James Ashiono Bukhala, as the administrator of his deceased brother's estate moved the superior court at Kakamega (Tanui J) by a motion on notice for an order enlarging the time within which to commence judicial review proceedings by way of an application for certiorari, to bring the Special District Commissioner's decision aforementioned to be quashed, on the ground that it was not based on reasonable grounds. The application was expressed to be brought under O.XLIX rule 5 of the Civil Procedure Rules. There was a delay of over 13 years in bringing that application.

Tanui, J ruled on the application on 19th May, 1998 and in that ruling declined to extend the time within which to apply for judicial review on two main grounds, firstly, that there was no material upon which the extension could be granted, and secondly, that even if such material existed, O.XLIX, rule 5, above, under which the application was brought did not apply. Neither the applicant nor his counsel was present on the date of the ruling, and the applicant has not explained the reason or reasons for his counsel's nonattendance. But his explanation for his own absence is that he was then out of the country on a special assignment and did not return until sometime in September, 1998; and soon thereafter his counsel advised him about the ruling. Even then he did not try to take the essential step until 16th October, 1998, when a draft Notice of Appeal was drawn. The interTvheinsi nga pdpelliacya tihoans, adlastoe dn ot1 8tbhe enJ aenxupalrayi,n e2d0.00, for extension of the time within which to file and serve a notice of appeal was not lodged in court until 24th January, 2000, over three months after the applicant returned into the country, but the applicant has not explained in his affidavit in support of the application, as he was obliged to, the reason for the delay.

The jurisdiction of the court under rule 4 of the Court of Appeal Rules, is discretionary and being judicial the discretion is exercisable on the basis of evidence and legal principles. The onus was on the applicant,

which in my view he has failed to discharge, of explaining reasonably why he did not take the essential step within the prescribed time. The applicant has all along since the delivery of the ruling against which an appeal is intended, been represented by counsel. There is no averment that the advocate was not duly instructed to represent the applicant or to take the essential steps in the intended appeal. In view of that the absence of the applicant personally from within the jurisdiction of the superior court does not explain the delay. Besides at different stages of the proceedings between the parties starting from the decision of the Special District Commissioner to date, the applicant has consistently been late in taking the essential steps in the relevant proceedings.

In the result and for the foregoing reasons, I am not satisfied that the applicant is deserving of exercise of my judicial discretion under rule 4 of the Court of Appeal Rules, in favour of extending the time within which to file and serve a notice of appeal. I dismiss his application dated 18th January, 2000, with costs.

Dated and delivered at Kisumu this 23rd day of March, 2000.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR