

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: OWUOR, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 151 OF 1999 (NYR.8/99)

WAMBUGU GAKUNGAAPPLICANT
AND
NGUNJU GAKUNGA RESPONDENT

**(Application for extension of time to file Appeal out of
time in an intended appeal at the High Court of Kenya at
Nyeri (Hon. Mr. Justice Tunoi) dated 7th March,
1991
in
H.C.C. NO. 8 OF 1988)**

R U L I N G

In this application, the applicant seeks extension of time within which to file a Notice of Appeal and lodge the appeal itself out of time. The decision intended to be appealed against was given on 7th March, 1991 by Tunoi J, as he then was, almost a decade ago. No steps were taken to institute an appeal to this Court until this application was filed on 19th May, 1999.

In the affidavit sworn in support of the Notice of Motion and the submissions of Counsel, the reason given for the delay in filing the Notice of Appeal and the appeal is that the advocate acting for the applicant at the time, was negligent and failed to file a Notice of Appeal.

The applicant states that the judgment was delivered in his absence. He had prior to the judgment instructed his Counsel M/S Nyawire Gitonga and Company Advocate, to appeal to this Court in the event that judgment in High Court Civil Appeal No.8 of 1988 went against him. He was not informed of the outcome of the appeal. He came to learn that his appeal had been dismissed and execution of the decree had taken place when he was called upon by the Registrar of Lands to surrender the original Title No. Thegenge/Ihethel/16.

In the next paragraph the applicant then states as follows:-

"That after learning of the dismissal of the appeal I requested my Counsel M/S Nyawire Gitonga and Company Advocate to lodge an appeal to the Kenya Court of Appeal, but the informed me that there was no hurry in filing the same."

There is no mention here that he demanded and was given a reason why, if he had already given instructions to the same Counsel to file the appeal the same had not been done for a period of over eight years.

The applicant does not give the date on which he learned of the judgment. If it was upon being called to surrender the Title, looking at the exhibited Green Card, it must be on or about the 26th of June 1998 or a few months after that. He did nothing about his appeal. Instead he filed another suit H.C.C. NO.299 of 1999 on 12th October, 1999, according to Counsel's submission to prevent the respondent (his brother) from burrying his wife on the suit land. That suit was later to be withdrawn by consent on 9th May, 2000.

In the absence of any evidence documentary or otherwise in the form of any letter of instructions, reminder to the alleged negligent advocate for a period of over 8 years, when the applicant alleges that he had not learned of the outcome of the appeal. Then the second period of one year when he alleges that Counsel had admired him that there was no hurry in filing the appeal. I am not satisfied that the applicant

is being candid with the Court in his explanation as to these long delays. In my view and as urged by Counsel for the respondent, the delay of almost ten years is inordinate it militates against my exercising my discretion under rule 4 of the Rules of this Court in favour of the applicant.

In the result I reject the applicants application and accordingly dismiss the same with no orders as to costs.

Dated and delivered at Nyeri this 18th day of May, 2000.

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR