



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: O'KUBASU, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 299 OF 1999

BETWEEN

1. RICHARD MUCHAI NJOROGI

2. MUCHUI WAINAINA

APPLICANTS

AND

1. SUSAN MUTHONI GACIRI

2. HARRY MUCHUI MWANGI

RESPONDENTS

**An application for extension of time to file notice of
appeal from a conviction, judgment of the High Court
of Kenya at Nairobi (Mr. Justice Etyang) dated 14th
July, 1999**

in

H.C.C.C NO. 2707 OF 1995)

RULING

This is an application for leave to file Notice of Appeal and record of appeal out of time. The application is supported by the affidavit of Richard Njoroge Muchui who is the attorney-in-fact of the superior court was delivered on 14th July, 1999. The applicant instructed his advocates to lodge a Notice and record of appeal. The advocate on record wrote a letter requesting for proceedings. The applicant left everything to his advocate. When the applicant went to the advocate's office to check on progress of appeal he was surprised to find that notice of appeal had not been lodged. That is why there was this delay.

Mr. Gatheru for the respondent opposed this application arguing that litigation must come to an end.

The dispute herein relates to family land which came to court by way of a succession case. 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 his favour. The applicant must give a satisfactory explanation for the delay. If the explanation is acceptable, the Court will then exercise its discretion in favour of the applicant. As Lakha J.A. said in Peter Maina Munyua v. Damaris Njoroge - Civil Application No. NAI 210 of 1" W9h9e9r e(unrtehpeorret edi)s no explanation there can be no indulgence".

]And 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:-

"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, the applicant has explained why there was a delay in filing Notice of Appeal. He said that he had instructed his lawyer immediately after the ruling of the superior court was delivered. He relied on his lawyer's ability to proceed professionally. Unfortunately, the applicant's advocate abandoned him and never filed the Notice of Appeal. So, the applicant was surprised when he discovered that his advocate had not filed a Notice and Record of Appeal. The delay was therefore caused by the advocate and not the applicant. It would be unfair to punish the applicant for errors committed by his advocate.

Having considered the history of this matter and the explanation given by the applicant and in view of the fact that no prejudice would be caused to the respondent if the application is granted I find that this is a proper case in which I should exercise my discretion in favour of the applicant. As this is a family dispute I think the applicant ought not be shut from exercising his statutory right to be heard on appeal. Accordingly, I allow the application and extend the time for filing a Notice of Appeal by 15 days from the date of this ruling and then the Record of Appeal is to be filed 15 days from the date of filing the Notice of Appeal. The costs of this application shall abide the intended appeal.

Dated and delivered at Nairobi this 21st day of July, 2000.

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR