



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: SHAH J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI. 215 OF 2002 (NYR. 23/2002)**

1. GERALD MURUNGI
2. M'IKIARA M'MBOROKI
3. SILAS KIMATHI
4. GODFREY GITARI
5. JAPHET KITHINJI
6. JANE NKATHA KITHINJI
7. BARNABA MUKINDIA
8. M'ITUNGA M'ARAYA
9. ANDREW MUNG'ATIA ANJURI
10. JOHN KARUMA M'MUKIRI
11. JOSEPH KAAGI NDIRANGU.....APPLICANTS AND
  1. COMMISSIONER OF LANDS
  2. DIRECTOR OF PHYSICAL PLANNING
  3. DISTRICT COMMISSIONER, MERU
  4. MUNICIPAL COUNCIL, MERU
  5. SALOME GITARI

6. ELIZABETH WANJOHI

7. M'MBOGORI M'MUTWAMWARI

8. GEORGE M. MURITHI

9. KANANU NYAMU

10. HENRY MUGAMBI

11. FRANCIS DAVID ANAMPIU

12. MWENDA ERASTUS

13. ANNE NKAABU

14. CHARLES MURANGIRI.....RESPONDENTS

(An application for extension of time to file notice and record of appeal from the Ruling/Order of the High Court of Kenya at Meru (Kasanga Mulwa, J) dated 16th May,

2002

in

H.C. MISC. APP. NO. 85 OF 1996

### **RULING**

The application before me is stated to be brought under Rules 4 and 74 of the Rules of this Court. The eleven applicants seek orders for extension of time to lodge their notice of appeal and record of appeal out of time. The facts giving rise to the application are that on the 10th day of December, 1996 the superior court at Meru (Etyang, J) granted leave to the applicants to apply for orders of certiorari and prohibition. The applicants had sought such leave to quash the decision reached by the Commissioner of Lands to issue letters of allotment to 11 persons or entities purporting to allot to them eleven parcels of land. Suffice it to say those parcels of land are not all adjoining or adjacent.

Pursuant to the grant of such leave the applicants lodged their Notice of Motion in court on 18th December, 1996 whereby they sought the following orders:

*"1. An order of CERTIORARI do issu e directed to the Commissioner of Lands the first respondent including other Respondents concerned or affected by such order to QUASH and NULLIFY the letters of allotment in respect of plots of Land numbers 544 upto and including 677 Gakoromone Area, Meru Municipality which had been issued on diverse dates in 1995.*

*2. An Order of PROHIBITION do issue prohibiting all the respondents or any of them, their respective servants or agents, from undue, unlawful, arbitrary and antisocial interference with or use of the open spaces and public facilities and utilities at Gakoromone Open Air Market.”*

When eventually the motion came on for hearing before Mulwa, J a preliminary objection was raised on behalf of 7th and 9th respondents to the effect that the leave granted by Etyang, J on 10th December, 1996 was a nullity as it was granted at a time when more than six months had elapsed after the issuance of the letters of allotment by the Commissioner of Lands. The letters of allotment were issued during 1995 and this fact is admitted by the applicants. It is common ground that the statutory period of six months for seeking orders of certiorari had already expired. Upon realizing this Mr. Albert who appeared before me on behalf of the applicants changed his stand to say that this application was for prohibition only. At that stage I called for the file of the superior court and confirmed therefrom that the application was for both certiorari and prohibition. I must point out that copies of the chamber summons application for leave and the following notice of motion are not in the record of the application before me. It is for that reason that I called for the superior court file.

If I were to grant the extension of time to lodge the notice of appeal and the record of appeal out of time, so far as the issue of the certiorari is concerned, the intended appeal would be a non-starter and grant of extension of time would be an exercise in futility. I note that the prohibition is to follow the grant of orders of certiorari. Mulwa, J properly considered the time factor and concluded that the leave granted was a nullity. This Court has said so in a recent decision in Nyeri during this very session.

However, Mr. Albert insisted on going ahead with his application stating that as there is no time limit for orders of prohibition he could still seek extension of time to lodge the notice of appeal and the record of appeal. He says that the notice of appeal was not filed within the prescribed period as his instructing client was not available. His (the instructing client's) sister was in Nyeri in a critical condition and in fact passed away on 20th May, 2002. On 27th May, 2002 his mother was admitted at Isiolo District Hospital as she had "broken her leg". She was not discharged until 6th June, 2002. I accept all that but the absence of a client does not bar an advocate from lodging a notice of appeal which is a simple document.

Upon being questioned, Mr. Albert stated that he had to have fees from his clients before he could lodge a notice of appeal. This obviously is the real reason for non-filing of the notice of appeal. I note that so far no letter bespeaking copies of proceedings and ruling has been filed. Filing of such a letter calls for no instructions or payment of fees.

I am not satisfied that the reason given for non-filing of the notice of appeal is acceptable. An advocate takes no chances especially on a matter of the importance that the nature of the application entailed.

The application itself is riddled with problems. It appears that all parties directly affected by the intended appeal are not before court. The application talks of allocation letters in respect of 133 plots. There are only eleven applicants before me. This issue was not canvassed before me so I leave it at that.

The application does not have the chamber summons and the notice of motion in it. It appears to be not a serious application. The reason given for non-filing, in time, of the notice of appeal is totally unsatisfactory. In the result I dismiss this application with costs.

Dated and delivered at Nyeri this 13 th day of December, 2002.

A.B. SHAH

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JUDGE OF APPEAL

*I certify that this is a*

*true copy of the original.*

DEPUTY REGISTRAR.



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