IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NO. 185 OF 2006

MRS. ROSEMARY MAKENA MWANGI.....1ST APPLICANT

SIMON MURAYA.....2ND APPLICANT

VERSUS

MWANGI HARUN.....1ST RESPONDENT

FLORA KABURA CHEGE THE

ADMINISTRATOR OF THE ESTATE OF JOHN CHEGE.....2ND RESPONDENT

(An application for extension of time to file and serve a Notice and record of Appeal out of time

from the Judgment of the High Court of Kenya at Nairobi (Muli, J) dated 22nd May 1981

in

H.C. MISC. CIVIL SUIT NO. 31 OF 1978

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RULING

Mrs. Rosemary Makena Mwangi and **Simon Muraya** *(applicants*) mother and son respectively, filed a Notice of Motion application dated 17th July 2006, under ***Rule 4 and 42(1) and (2)*** of the Court of Appeal Rules for orders:

1. That this Honourable Court be pleased to grant leave to the applicants to file and serve the Notice of Appeal out of time.

2. That the Honourable Court be pleased to grant leave to the applicant to file and serve the Record of Appeal out of time.

3. Any other relief, direction or order the Honourable Court may deem appropriate and just in the circumstances.

4. That costs incidental to this application abide the intended appeal.

The application was founded on the following grounds:

(a) THAT the applicants are advanced in age and mistakenly thought the appeal was being prosecuted by their counsel on record.

(b) THAT the applicants filed a Notice of Appeal on February but mistakenly failed to file an appeal within the legally stipulated time.

(c) THAT the applicants received certified copies of the proceedings.

(d) THAT the applicants have an arguable appeal with overwhelming chances of success as the as the learned superior court Judge made erroneous conclusion of law.

(e) THAT the applicants will suffer great injustice and irreparable harm if not allowed to appeal.

Rosemary Makena Mwangi's affidavit sworn on 14th July 2006 supported the application. She is said to be aged about 90 years old. The application has not been determined since it was first tabled in Court on 17th July 2006, due to various issues which arose subsequently and have been dealt with by the orders of 20th December, 2006 (Omolo, JA), 24th April 2007, (Githinji, JA) and 11th February, 2008 (Aluoch JA).

The hearing of the said application resumed before me on 11th June 2008, when Mr. Evans Ondieki, counsel for the applicants, Mr. Mwangi Harun, the 1st respondent in person and Mr. Gachoka Mwangi for the second respondent consented to have prayers in the Notice of Motion application dated 28th July 2006, granted to facilitate the hearing and determination of the main Notice of Motion application dated 17th July 2006 aforesaid. I therefore proceeded to record the following order:

"The application dated 28th July 2006, seeking leave to amend the names of the respondents, and a further prayer that the amended version of the pleadings be deemed as filed, be and is hereby granted, as Flora Kabura Chege has since filed a Limited grant ad litem, to the estate of her late husband, to enable her to take over this suit in place of her late husband John Chege".

The parties then proceeded with the hearing of the main application dated 17th July 2006. Mr. E. Ondieki, counsel for the applicants submitted that though the delay in filing the appeal was by more than 20 years (in fact 28 years), the applicant Rosemary Makena took all diligent measures to pursue the appeal, but was let down by her lawyers as she is illiterate.

Mr. Gachoka, learned counsel for the respondent opposed the application for extension of time to file Notice of Appeal and record of Appeal out of time. He submitted that the delay was in ordinate as the judgment intended to be appealed against was deliverer by Muli, J (as he then was), on 22nd May 1981, a period of about 28 years ago. That the applicant blames her former advocates for the delay, however, there is no evidence annexed to the affidavit in support of this application to explain the delay.

Mwangi Harun, the 1st respondent who appeared in person, submitted that he is now aged 83 years old. He submitted further that the suit premises in dispute belonged to his late father. That originally he occupied one room on this plot and leased another room to John Chege, (now deceased). That eventually he sold that room and the land it stands on to the deceased John Chege.

Mr. Ondieki, counsel for the applicant relied on several decisions of this Court in urging his point.

These are: **JEDIDA ALUMASA vs S.S. KOSITANY CIVIL APPLICATION NO. NAI. 337 OF 1996** (*unreported*), **MARGARET APIYO vs JOTHAN THEMWA CIVIL APPLIATION NO. NAI. 257 OF 1996** (*unreported*), and **MURAI vs WAINAINA (NO4)[1982] KLR 39.**

Mr. Gachoka, however, distinguished the position in the first case with this one in that in JEDIDA's case, the Court was dealing with a situation where the appeal had been filed, but the advocate did not annex a certified copy of a decree, and the appeal was struck out, but the court exercised a discretion and granted the extension prayed for. In the second case, Mr. Gachoka submitted that the delay was of 6 months, and again, the learned Judge granted the extension sought, because of the circumstances which were explained and appear in the ruling. In the third authority, this Court held *inter alia*:

"Sufficient reason must be shown before the court can exercise its discretion and grant extension of time.....".

Mr. Gachoka submitted further that the delay herein is of 28 years, and his client has been in possession of the suit premises since the judgment was delivered in 1981.

This being an application under ***Rule 4*** of the Court's Rules, I have unfettered discretion to extend or not to extend time, as requested by the two applicants. As a single Judge, I have to exercise such a discretion on reasons based on based on the principles established by the Court itself. In **MWANGI vs KENYA AIRWAYS LTD, [2003] KLR 48**, the Court having set out matters which a single Judge should take into account when exercising the discretion under ***Rule 4***, went on to hold:

"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered".

As I see it, the important point being made in the above passage is that apart from the length of the delay, the reason for the delay, the possible consideration of the appeal succeeding and the degree of prejudice to the respondent if time is extended, a single Judge would be perfectly entitled to consider any other factor outside these four, as long as that factor is relevant to the matter at hand.

The decision the two applicants intend to appeal against was delivered by Muli, J (as he then was), on 22nd May 1981, in **H.C. MISC. CIVIL CASE NO. 31 OF 1978,** in which the two applicants sued Mwangi Harun who is the 1st applicant's husband and father to the 2nd applicant, and John Chege (now deceased). The applicants sought a declaration that Plot No. 6B, situated at Chuka market, Meru is their property. The suit was heard in full and at the conclusion of it, the learned Judge dismissed the plaintiffs' case with costs and said,

"**For the avoidance of doubt, Plot No. 6B was lawfully and validly sold by Mwangi Harun to John Chege and I declare that Plot No. 6B at Chuka Market is legally vested on John Chege**".

The length of the delay in this case is about 28 years. The reason given for the delay is "**mistakes of lawyers**", though the only correspondence from the applicant's lawyer then, annexed is dated 5th July 1985. The decision made by the learned Judge 28 years ago, was confirmed by the first respondent Mwangi Harun, in his submissions before me, that indeed he sold Plot No.6B Chuka market to John Chege (now deceased). In these circumstances, what possible considerations of the appeal succeeding are there" Over and above the reasons given above, I feel inclined to take into consideration other

relevant facts, such as the ages of the parties to this dispute as they have the evidence of what happened. Further, that some of them namely, John Chege has since died, a fact that might affect the continued litigation in this matter though he has been substituted by his wife. Both the first applicant and the first respondent are well advanced in age, i.e. 90 and 83 years old, respectively. Is it really proper that they should continue with litigation which started on 18th September 1978" I think not. There is also the possibility of prejudice to Flora, the 2nd respondent who has lived on the suit premises since the judgment was granted in favour of her late husband.

I have therefore considered all the circumstances of this case, as disclosed by the pleadings and submissions, and have come to the conclusion that a delay of 28 years is inordinate in these circumstances, and I decline to exercise my discretion in favour of the applicants. This litigation must surely be brought to an end.

The net result of my ruling is that the Notice of Motion application dated 17th July 2006, is hereby dismissed, but I make no order as to costs.

Dated and delivered at Nairobi this 4th day of July, 2008.

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR