



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: HANCOX, JA (IN CHAMBERS))

CIVIL APPLICATION NO NAI 92 OF 1985 (NYR 7/85)

(In the matter of an intended appeal)

BETWEEN

SAMUEL MATHENGE MUGENYU APPLICANTS

AND

WANJIRU MUGENYU

NYOKABI MUGENYU RESPONDENT

(Application for extension of time to file an intended appeal from a decree order of the High Court of Kenya at Nyeri (J S Patel, J) dated March 13, 1985)

in

High Court Civil Appeal No 13 of 1983)

RULING

The intended appeal in which the present application is made was listed for hearing before the full court on May 21, 1986, but could not be heard because leave had not been granted to file the record of appeal out of time, as is now sought.

The case originally came before second class district magistrate at Nyeri on a reference to that court under section 120(2) of the Registered Land Act, (cap 300), to determine who were the heirs to the deceased Richard Mugenyu and entitled to succeed to the land of Tetu/Unjiru/623. The magistrate decided, on April 23, 1983, that the land should go to the two wives Wanjiru w/o Mugenyu and Margaret Nyokabi w/o Mugenu who survived him. He did not award a share in the land to his other wife Thogori Mugenyu, the mother of the present applicant, who predeceased her husband, who was apparently given the deceased's other piece of land at Tetu/Karaihu/56, on which she was buried.

The applicant appealed to the High Court but the judge agreed with the magistrate's finding and dismissed the first appeal on March 15, 1985. From that decision the applicant has now preferred a second appeal to the court, having filed his Notice of appeal on March 29, 1985. Accordingly, in the absence of a certificate of delay under the proviso to rule 81(1) of the Court Rules, (for which the applicant was given instituted by filing the records and memorandum by May 28, 1985. Instead it was lodged at the court's registry on June 11, 1985, fourteen days out of time.

Mr Kaburu, on behalf of the respondent, has objected to the extension of time being mainly because, though given every opportunity to do so, the applicant never obtained his certificate of delay, so as to cover and therefore exclude from the sixty day time limit, the period stated in paragraph 4 and 5 of his supporting affidavit of September 27, 1985. Moreover, Mr Kaburu says, there was no explanation either of the applicant's delay between lodging the record of appeal and making the present application one and a half months later on October 1, 1985. Finally, Mr Kaburu submitted, there was no indication of any important legal point arising which would make it desirable that the second appeal should be heard in any event.

The discretion to enlarge time is now unfettered since the amendment to the rules introduced by Legal Notice NO 14 of 1984, and the indications from the recent decisions of single judges and the full bench of the court are that a more liberal approach is now being adopted than formerly to these applications.

In the instant case, notwithstanding that there is no certificate of delay the extra time sought is comparatively small. Having considered Mr Kaburu's submission, I nevertheless propose to grant the application, and extend the time for instituting the appeal to June 11, 1986, so as to validate that which has been done. However, I award the costs of this application to go to the respondent in any event.

Dated at Nyeri this 25th day of November, 1986.

ARW Hancox

Judge of Appeal

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

DEPUTY REGISTRAR

