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| Case Number: | Civil Application Nai 35 of 1984 |
| Date Delivered: | 20 Nov 1984 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nakuru |
| Case Action: | Ruling |
| Judge: | Alister Arthur Kneller |
| Citation: | Tito Kenyatta v Joseph Gathitu Karenju[1984] eKLR |
| Advocates: | Mr CJO Magina for Applicant |
| Case Summary: | **Tito Kenyatta v Joseph Gathitu Karenju**<br><br>**Court of Appeal, at Nakuru**<br><br>**November 20, 1984**<br><br>**Kneller JA**<br><br>**Civil Application No NAI 35 of 1984**<br><br>***Appeal -*** *extension of time - to file appeal - applicant's intended appeal doomed to fail due to lack of defence - extension of time sought after duration of two years - whether applicant entitled to extension of time - Court of Appeal Rules (cap 9 Sub Leg) rule 4.*<br><br>The respondent filed a suit in a magistrate's court against the applicant in which judgment was entered after the applicant failed to enter an appearance. The applicant made an application to set aside the default judgment which was dismissed, the magistrate noting that the applicant had not indicated what his defence was. On the applicant's appeal against the magistrate's decision, the High Court, in addition, found that the application to set aside had been delayed for six |

months, the decree in the case had been executed and there had been no application to stay execution, and held that the magistrate had properly exercised his discretion in not setting aside the default judgment. About two years after the decision of the High Court, the applicant moved the Court of Appeal for an order that the time for filing an appeal against that decision be extended.

**Held:**

1. The court had a discretion to extend the time for filing the applicant's appeal upon such terms as it deemed just as provided in the amended rule 4 of the Court of Appeal Rules (cap 9 Sub Leg) and that was so even if the events in question occurred before the coming into effect of the amendment.

2. The applicant had no defence to the respondent's claim and his appeal was doomed to fail.

3. There was inordinate delay in bringing the application and if the application was to be allowed, it would cause undue prejudice to other parties.

*Application dismissed.*

**Cases**

1. *Kisee Maweu v Kiu Ranching Farming Cooperative Society Ltd* Civil Appeal 2 of 1983 (unreported)

2. *John Kuria v Kelen Wahito* Nairobi Civil Application 19 of 1983 (unreported)

3. *Murai v Wainaina* (No 4) Civil Application No NAI 9 of 1978; [1982] KLR 38

4. *Wasike v Swala* Civil Application No NAI 50 of 1983; [1984] KLR 591

5. *Ladu Ltd v Siu* The Times November 24, 1983 CA

**Statutes**

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| | 1. Court of Appeal Rules (cap 9 Sub Leg) rules 4, 42, 54(1)(b), 74(2), 76(1), 78, 85(1), 85(2); First Schedule, Form A<br><br>2. Land Control Act (cap 302) section 6<br><br>**Advocates**<br><br>*Mr CJO Magina* for Applicant |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nakuru |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed. |
| History County: | Nakuru |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAKURU**

**(Coram: Kneller JA)**

**CIVIL APPLICATION NO. NAI 35 OF 1984**

**BETWEEN**

**TITO KENYATTA ……..APPLICANT**

**AND**

**JOSEPH GATHITU KARENJU……RESPONDENT**

**RULING**

Tito Kenyatta, the applicant, by a motion on notice filed on June 21, 1984, expressed to be brought under rules 4 and 42 of the Court of Appeal Rules (cap 9), moves for orders that he be allowed to file an appeal out of time from the judgment of Mr Justice Mbaya in the High Court at Eldoret on May 7, 1982, and that if he succeeds the costs of this should abide the result of the appeal. Joseph Gathitu Karenju, the respondent, opposes all this.

The motion is supported by two affidavits of Charles Joseph Oduor Magina, the applicant's present advocate, filed on June 21 and July 12 this year. There is an affidavit in reply from the respondent filed on September 27, 1984.

The respondent filed a plaint in the Resident Magistrate's court Eldoret on December 1980 claiming Kshs 20,000 from the applicant.

He alleged he paid that sum to the applicant in 1969 for the transfer to him by the applicant of plot 71 in the Sango Settlement Scheme which is agricultural land. The local Land Control Board refused its consent to this transaction so it was void: section 6 of the Land Control Act (cap 302). It may have been because the board was apprehensive about the applicant losing this valuable plot and or the only land he owned.

A summons to enter appearance in the suit was served on the applicant on December 3, 1980 but he did not enter appearance or file a written statement of defence. So judgment in default of appearance was entered by the magistrate on January 30, 1981. The applicant's advocate applied on June 26, 1981, for this default judgment to be set aside but it was dismissed on July 11, 1981. The applicant appealed to the judge and on May 7, 1982, his appeal was dismissed with costs. That appeal revolved around whether or not the magistrate had exercised properly his discretion not to set aside a judgment. The learned judge declared he had done so.

The applicant claimed he did not enter appearance because when he received the summons to do so he could not read or understand it because he is illiterate so he trailed around asking others to do so for him. His defence was that the transaction between the parties was not a sale but a lease of this plot. A common assertion these days.

Mr Justice Mbaya noticed, among other matters, that:

i) not a word of this defence was revealed by the applicant in his affidavit in support of his application to the magistrate to set aside the judgment in default;

ii) the application to set aside the judgment was delayed by 6 months;

iii) the decree had been executed; and

iv) there had been no application to stay execution.

The Eldoret magistrate, in his judgment of July 7, 1981, dismissing the application to set aside the judgment in default, noted the applicant had not indicated what his defence was. He took into account a letter on the court file from a Member of Parliament to the District Commissioner, Eldoret, which was copied to him. He wrote about it thus:

“That letter is dated 7th January 1981. It therefore follows that the defendant saw his MP at least on the 6th February 1981” (he means, I think, January 6, 1981) “and showed him the summons and plaint served on him and asked for his help. That means that the defendant is lying when he says that he did not know what to do. His MP obviously told him what to do and in fact in the letter which the MP wrote to the District Commissioner, he had asked the District Commissioner to take action to help him.”

The magistrate had made an order on April 25, 1981, for the sale of the plot subject to a reserve price of Kshs 25,000 and the respondent was allowed to bid for it. The auctioneer sold it on July 4, 1981, to Robert Maina Chege (not the respondent) and the auctioneer deducted his expenses and deposited in court the balance of the purchase price Kshs 66,594 and from that sum, Kshs 25,432.05 has been paid out to the respondent’s former advocate (and presumably he passed on that less his fees and expenses to the respondent) and Kshs 40,161.95 to Magina & Co, the advocates for the respondent. The applicant will not accept any of this from Mr Magina. On October 13, 1982, another Eldoret magistrate ordered the Kakamega District Commissioner to evict the applicant, his family, agents and servants and it is said that this has been done.

Now, about two years after his appeal was dismissed by Mr Justice Mbaya, the applicant asks for more time in which to file an appeal from it.

The applicant claims he told Mr Wambura, an advocate who was with Mr Magina in the firm of Magina & Wambura up to July 1983, that he wished to appeal as early as May 7, 1982. Mr Wambura told him on May 8 what the fee would be and on May 13 the applicant confirmed in writing his instructions to Mr Wambura to conduct his appeal and apply for a stay of further execution. Mr Wambura filed the applicant’s notice of appeal on May 18, 1982, which was in time. Rule 74(2) (*ibid*). It was not served on the respondent and it still has not been served on him.

Mr Wambura wrote to the deputy registrar, Kitale, on May 21, June 30 and July 9, 1982, for copies of the proceedings and the judgment in the appeal but only the last letter was copied to the respondent.

The registry of the High Court at Eldoret supplied the office of Magina & Wambura at Eldoret on July 16, 1982, with the copies of the proceedings and judgment they required and they were passed on to Mr Wambura to draw the notice, grounds of appeal, prepare the record and file it which he did not do, either because the applicant did not pay his fees or he forgot to fulfil the applicant’s instructions.

The applicant approached Mr Magina sometime in August 1983, who applied by a summons in chambers for the applicant, for the time in which to appeal to be extended which was filed in this sub-registry on October 24, 1983, and sent to the registry of this court in Nairobi on October 25, 1983. The deputy registrar of this court in Nairobi sent it back on November 8, 1983, to the deputy registrar of this court in Nakuru who passed it on to Mr Magina because the application should have been by motion on notice.

The applicant's motion on notice was returned about the middle of January 1984 because it was not in accordance with Form A of the First Schedule of the Rules. The amended Rule 4 of the Court of Appeal Rules provides that the court may, on such terms as it thinks just, by order extend the time limited by these Rules for the doing of any act authorized or required by these Rules. This is so even if the events in question occurred before the amendment came into effect, which was on February 6, 1984. See *Kisee Maweu v Kiu Ranching Farming Cooperative Society Ltd* Civil Appeal 2 of 1983.

A recent decision of the full court in a reference from a single judge (Kneller JA), reversed his refusal to extend the time for filing a notice of appeal because it related to land and because the respondent had notice that the applicant intended to appeal, *John Kuria v Kelen Wahito*, Nairobi Civil Application 19 of 1983. (Hancox JA, Nyarangi and Platt Ag JJA) April 10, 1984. Here again, the subject matter is land and the respondent or his advocate knew all along that the applicant was intending to institute his appeal.

The delay here seems to be due to the dilatoriness of his first advocate and the mistake of his second advocate in not complying with the rules of this court which does not necessarily "slam the door of justice" against the applicant. *Belinda Murai v Amos Wainaina* Nairobi Civil Application 9 of 1978.

The applicant submits that the question is whether or not the magistrate and judge exercised their discretion judicially and correctly, and it is meritorious, so extending the time to institute will not cause undue prejudice to the respondent, and the delay is not inordinate. See *Cleophas Wasike and Mucha Swala* Nairobi Civil Application 50 of 1983 (Kneller, Hancox JJA and Nyarangi Ag JA) June 11, 1984 cf *Ladu Ltd v Siu* The Times November 24, 1983 CA.

The fact is, however, that leasing that plot without the consent of the local Land Control Board is also a nullity. Section 6 of the Land Control Act (*ibid*). And so the applicant has no defence to the respondent's claim and, in my view, an appeal to this court, is doomed to fail and it is a service to the applicant to tell him so now. Furthermore, the delay is inordinate and if this application were allowed, it would cause undue prejudice to the respondent and the purchaser.

If that is wrong, and I ought to have granted this application, then I would have ordered that the time in which the applicant may serve copies of the notice of appeal, is extended by 30 days from today. This is much greater than the usual 7 days for doing this but as Mr Robert Maina Chege is a person directly affected by this intended second appeal so he must be served with one. Rule 76(1) (*ibid*). Adequate time for doing so would, I trust, have been made by this longer period.

The record of the appeal would have to be lodged in the appropriate registry within 60 days of the applicant receiving certified copies of all the documents set out in rule 85(1) and (2) Court of Appeal Rules, cap 9, together with certified copies of this motion, affidavits, any notes of the hearing, the judgment and the formal order that arose from it. Certified copies of the application by the parties to the Land Control Board for approval of this transaction and of the letter of the Member of Parliament to the District Commissioner, would have to be included in each record.

Assuming the applicant surmounted successfully all those hurdles, he would be required to serve copies

of the record of appeal on each respondent who complied with the requirements of rule 78.

The applicant, if I had exercised my discretion in his favour would have been granted this considerable indulgence by this court, and although he would have succeeded in what he set out to do it would, in my view, have been right that he should pay the respondent the costs of this application in any event.

As it is, however, in the exercise of my discretion, his application fails and he must pay its costs to the respondent. He would be well advised to collect from Mr Magina the balance of the auction price, less proper legal fees and charges, and use it, if he thinks fit, to buy another plot.

Each party may apply to have these orders varied, discharged or reversed by the full court by applying in writing to the deputy registrar of this court in Nakuru or Nairobi within seven days from today. Rule 54(1)(b)(*ibid*).

Orders accordingly.

**Dated and delivered at Nakuru this 20th day of November , 1984.**

**A.A KNELLER**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR.**