

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala; & Lenaola SCJJ)

CIVIL APPLICATION NO. 14 OF 2018

MWIRIGI RINGERA KIBUNJA.....APPLICANT

-VERSUS-

EUNICE KARIMI KIBUNJA.....RESPONDENT

(Being an application to appeal out of time against the judgement and orders of the Court of Appeal (Visram, Koome and Odek, JJA) dated and delivered at Nyeri on the 29th May, 2013 in Civil Appeal No. 89 of 2009).

R U L I N G

[1] Before the Court, is a Notice of Motion dated 12th June 2018 seeking orders for leave to appeal out of time against the judgment of the Court of Appeal delivered on 29th May 2013; stay of execution of the orders of the Court of Appeal; this Court's direction as to the filing of the Notice of Appeal; and costs. The application is supported by the Applicant's affidavit sworn on 12th June 2018.

[2] The background to this matter is that, on the 14th of February, 1992, the respondent filed an Originating Summons at the High Court seeking orders of adverse possession of 5 acres out of 14 acres in parcel No. ***Abothuguchi/Githongo/1825, 1826 and 1827*** (formerly

Abothuguchi/Githongo/494) (the suit property) as against the applicant. The respondent is the daughter of the elder Kibunja who died in or about 1948. The said Kibunja, had two wives one of whom was the respondent's mother who had no male child and the other being the applicant's grandmother who had sons. Apparently, under Meru customary law, a woman, especially a daughter could not get registered as proprietor of clan land. As her mother had no sons, during the land adjudication, the respondent thus opted to register the suit property in the name of the applicant who was by then a minor aged about 5 years old.

[3] The respondent nonetheless continued in occupation and developed a portion of the suit property where she built permanent and semi-permanent structures and planted coffee as well as other food crops. However, desirous of being issued with title to the suit land, sometimes in the 1970's, the respondent sought the help of clan elders who directed that she be issued with title to a 5 acre portion out of 9.5 acres of the suit land. The respondent rejected that decision arguing that the applicant and her mother lived on the suit property as licensees and as such the title could not be split to include them as proprietors of the suit land. She therefore filed the said Originating Summons (OS) before the High Court to exert her right to the suit land.

[4] In a ruling delivered on 4th March, 1993, Kuloba J (as he then was) dismissed the Originating Motion on the ground that it was time barred by virtue of the Limitation of Actions Act. However, on Appeal, the Court of Appeal reinstated the suit for hearing on merit. Emukule J who heard the Motion granted the respondent only a life interest in the suit land.

[5] Aggrieved by that decision, the respondent once again appealed to the Court of Appeal which, by a judgement dated 29th May 2013, allowed her appeal with the result that the respondent is entitled to the entire suit land. The applicant wishes to appeal to this Court against that decision.

[6] It is the applicant's case that the judgement of the Court of Appeal goes against previous decisions by the same Court thereby undermining the rule of law and the principle of legitimate expectation. That the decision also goes against the greater public interest and, if allowed to stand, will occasion substantial injustice to his brother, James Kimathi, who has a school by the name: Marathi Academy—Registration Number 204225—on the said portion of land which is the only private school in the whole of Marathi location, and that the school employees will also lose their employment which shall adversely affect their families and the applicant's brothers who depend on that portion of the land and the school for their sustenance.

[7] It is his further case that after the Court of Appeal judgement, he filed a complaint with the office of the Chief Justice which was dismissed by the Judicial Service Commission vide a letter dated 25th February 2016. He then filed an application for review before the Court of Appeal, which was also dismissed on 6th June 2018 and on 14th of June 2018 he decided to file this application before this Court.

[8] In response, the respondent filed a replying affidavit sworn on the 17th September 2018 and filed in Court on 21st September 2018 opposing the application. She deposed that the application is incompetent and an abuse of the Court process as the applicant ought to have moved the Appellate Court for leave to Appeal to this Court as this appeal is not as of right and this Court lacks jurisdiction to entertain this Application at this point in time.

[9] Having considered the application and response by the parties before the Court, and drawing from this Courts jurisprudence in the case of ***Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others*** [2014] eKLR, we find that the applicant has not given sufficient or any explanation at all for the more than 5 years delay in lodging the appeal, or in the least, lodging a notice of appeal to demonstrate his intention to appeal to this Court. Accordingly, this application fails with costs to the respondent.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April, 2019.

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D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT OF KENYA

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
SUPRME COURT OF KENYA

.....
M. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA