



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISC. C.C. NO. 60 OF 2020**

**JOSEPH MWANIKI NDUNG’U.....APPLICANT**

**VERSUS**

**FRANCIS MUNGAI NDUNG’U.....1<sup>ST</sup> RESPONDENT**

**PETER MURIU NDUNG’U.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant in the motion filed on 5<sup>th</sup> March, 2020 is **Joseph Mwaniki Ndungu**. He was the administrator appointed in **Thika Succession Cause No. 222 of 1986 In the Matter of the Estate of Ndung’u Mwaniki (deceased)**. The grant issued and confirmed to the Applicant was subsequently revoked *vide* the judgment of **Musyoka J** delivered on 26<sup>th</sup> October, 2016 in **Nairobi Succession Cause No. 2351 of 2011**.

2. The court also rejected the Applicant’s claims to exclusive ownership of the sole asset of the estate of the deceased namely land parcel **LR No. Ndarugu/Karatu/435** and directed that the lower court file be returned to **Thika CM’s Court** for purposes of the issuance of a grant to the successful applicants before **Musyoka J**, namely, **Joseph Kamau Ndung’u**, **Jackson Mwaniki** and **Miriam Wanjiru**. The Court further directed that the new administrators to move with speed to have the grant issued to them confirmed in the said court. Indeed, in compliance with these orders, the new administrators namely **Francis Mungai Ndung’u** and **Peter Muriu Ndung’u** moved the lower court seeking the distribution of the estate asset equally among ten beneficiaries of **Ndung’u Mwaniki (deceased)**.

3. The Applicant herein protested, claiming that the asset was his property absolutely having repaid the full purchase price to redeem it from a third party who had previously purchased it from the deceased. By her ruling delivered on 31<sup>st</sup> July, 2019, the trial magistrate referring to the judgment of **Musyoka J**, dismissed the Applicant’s claims and directed that the grant be confirmed as proposed by the administrators. Under the certificate of confirmation of grant dated 31<sup>st</sup> July, 2019, the suit property was distributed equally between ten beneficiaries of the deceased including **Francis Mungai Ndungu** and **Peter Muriu Ndung’u** (Respondents herein) and the Applicant.

4. The said certificate does not include the successful applicants before **Musyoka J**, and it may well be that they had already passed on and were replaced by their children surviving them, as often happens in these matters. Be that as it may, some ten months after the ruling of the lower court of 31<sup>st</sup> July, 2019, the Applicant herein filed the instant application expressed to be brought under sections 79G and 95 of the Civil Procedure Act seeking leave to file an appeal out of time from the said ruling. On grounds that due to failing health and financial constraints, he had been unable to file the appeal on time though aggrieved by the ruling. The application is supported by the Applicant’s affidavit amplifying the grounds on the face of the motion.

5. Through the affidavit sworn by **Peter Muriu Ndungu**, the Respondents opposed the application. Restating the 34-year history of the dispute, the deponent asserts that the suit property has now been subdivided in accordance with the confirmed grant, that the applicant has not given plausible reasons for the delay in bringing his application and that the same is an afterthought. He further deposes that several beneficiaries have died during the pendency of the dispute. He views the intended appeal as an attempt to challenge the judgment of **Musyoka J** before a court of concurrent jurisdiction and urged the court to dismiss the application to allow the beneficiaries take hold of their shares to the estate of the deceased.

6. By the court’s directions the application was canvassed by way of written submissions. As to the applicable principles, Applicant relied on the decision of the Court of Appeal in **Thuita Mwangi v Kenya Airways Ltd (2003) eKLR** wherein the court cited the case of **Leo Sila Mutisa V Rose Hellen Wangari Mwangi Civil Application No. Nai 255 OF 1997**. Reiterating the depositions in the supporting affidavit, the Applicant states that he should be allowed to appeal out of time as he has an arguable appeal.

7. For their part, the Respondents assert that the Applicant has not demonstrated good and sufficient cause for not filing the appeal on time and emphasizing the age of the dispute, and the fact that the Applicant was awarded a share in the estate, assert that the Respondents and other beneficiaries stand to be prejudiced if the litigation is further extended. On the appeal itself the Respondents point out that the decision of the lower court was based on the determination contained in the judgement of **Musyoka J**, against which no appeal was preferred and

that that this court cannot adjudicate over issues already determined in the said judgement. Citing the delay in this case and relying on the decision of the Court of Appeal **Karny Zahrya v Shalom Levi [2018] eKLR** the Respondents stated that the unfettered discretion of the court in a matter of this nature must be exercised judiciously. The Respondent's point out that no evidence of alleged illness or incapacity on the Applicant's part has been tendered and that given the age of the dispute the other nine beneficiaries of the estate will be prejudiced if the application is allowed.

8. The court has considered the material canvassed in respect of the motion. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

9. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited V. John Ochanda and 996 Others [2015] eKLR** that:

**"In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. ... This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place...."**

**It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution...."**

See also **Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others [2019] eKLR**.

10. Section 79G of the Civil Procedure Act provides that:

**"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

11. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

**"(T)he underlying principles a court should consider in exercise of such discretion include;**

**1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**

**2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**

**3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**

**4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

**5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**

**6. Whether the application has been brought without undue delay.**

**7. ...."**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

12. The ruling of the lower court was delivered on 31<sup>st</sup> July, 2019 but it was not until 5<sup>th</sup> March, 2020 that the instant motion was filed – a delay of about 8 months. The copy of ruling attached to the Respondent's affidavit indicates that both parties were represented at the ruling.

The Applicant claims that he was prevented from filing the appeal by poor health and lack of funds. No medical report has been exhibited to prove illness or hospitalization of the Applicant in the material period.

13. The incomplete piece of alleged Kenyatta National Hospital appointment card (annexure marked **JMN2** to the Applicant's affidavit) does not indicate much, beyond his name and the inscrutable scribble reading "**8 a.m. FRID 12/6/15 Eye.**" If the latter is a reference to a doctor's appointment, the same was way back in 2015 and therefore irrelevant to the period material for the purposes of the present application. As pointed out by the Respondents, the Applicant did not have to be available and in perfect health to file his appeal when he had an Advocate on record. Indeed, his children who allegedly funded the present application could as well have conveyed his instructions to is Advocate. Moreover, there is no proof furnished of any monies sent to the Applicant by his children to enable the filing of this case. The reasons advanced by the applicant do not stand up to scrutiny and appear contrived.

14. In an application seeking the exercise of the court's discretion, it behooves the applicant to demonstrate candour and such applicant should not place apparently contrived material before the court. Although the delay in making the application is 8 months, the same must be taken in context. This dispute is 34 years old and looking at the draft memorandum of appeal, it appears that the Applicant is seeking to revisit the issues surrounding his alleged purchase of the sole asset of the estate. Having read both the judgment of Musyoka J, and the ruling of the lower court the latter, which is the alleged subject of the intended appeal, it is patently clear what that the Applicant is seeking by the present application is a chance to bring a camouflaged appeal against the judgment of Musyoka J. The questions relating to the Applicant's claim as a purchaser to the suit property were determined on evidence, in the said judgment in October, 2016. All that the lower court did was to give effect to the judgment. The Applicant not having appealed from the findings of Musyoka J cannot be allowed to reopen the determined questions in the guise of an appeal from the ruling of the lower court. Evidently therefore, the chances of his appeal seeing the light of day appear slim.

15. But more concerning is the fact that after a long delay since 1989, the estate of the deceased herein has finally been distributed between ten beneficiaries including the Applicant. Some beneficiaries did not live to see this outcome and they died before receiving their share. Litigation must come to an end. It will be prejudicial for all the surviving beneficiaries who have finally received their share of the estate to be embroiled in yet another extended period of litigation and attendant anxiety. Reviewing all relevant matters, this court is not persuaded that the application filed on 5<sup>th</sup> March, 2020 has any merit. The same is dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29<sup>TH</sup> DAY OF JULY 2021.**

.....

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Mr Kanyi for the Applicant**

**Mrs Ngala for the Respondents**

**Court Assistant : Kevin**