



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 358 OF 2011

IN THE MATTER OF THE ESTATE OF CHARLES NJONJO GITURO alias CHARLES NJONJO GITURO -(DECEASED)

AND

MICHAEL WABUCHI NJONJO

JAMES MWATHI NJONJO.....APPLICANTS

-VERSUS-

PETER WAWERU NJONJO.....RESPONDENT

RULING

The application before me is the Summons General dated 15th February 2018 brought by Michael Wambochi Njonjo. He seeks orders under S.47 of the Laws of Succession Act and rules 67 and 73 of the P&A rules and all other enabling provisions of the law that this Honourable court be pleased to enlarge time within which the applicant “may apply for leave to the Court of Appeal against this Court’s judgment of 17th January 2018 and leave to appeal to the Court of Appeal, and the notice of appeal filed and already served on the respondent to be deemed as property filed.

The application is based on grounds on the face of the application.

-That under Law of Succession Act a right of appeal to Court of Appeal lies with leave of this court.

-That leave was inadvertently not sought at the time the notice of appeal was filed.

-That application has been brought without undue delay and in good faith.

The application is supported by the affidavit of Michael Wambochi Njonjo sworn on 13th February 2018. He depones inter alia that being aggrieved with the Judgment of this court and delivered on 17th January 2018, his counsel inadvertently failed to seek leave to appeal orally hence this application. That he was pursuing the proceedings for purposes of filing the appeal.

Counsel Keli Mwaura for applicant and M. K. Kiminda for respondent agreed to proceed by way of written submissions, which I have considered.

I have perused the record. I did not see a replying affidavit from the respondents. However, there are submissions which I have considered.

The respondent’s position is that judgment was delivered in presence of both counsel and the notice of appeal was lodged within 5 days of the judgment- that leave to appeal and extension of time are both discretionary but will only be given for sufficient reason. That the applicant had not advanced any good reason for failure to seek leave save for mistake on the part of counsel. In any event, counsel for respondent is of the view that no leave is required to appeal. However, he seeks the dismissal of the application with costs.

On the part of the applicant it is conceded that judgment was delivered on 17th January 2018. Relying on **Kiarie vs.Njoroge (1986) KLR 402** cited in **Republic & 3 others Vs.Joseph Mburu Gitau and 635 others (2015)eKLR** the applicant argues that the court has unfettered discretion to grant extension of time where it is satisfied that the cause of the delay did not lie with the applicant but with the advocate (as per Gichuru Ag JA) the words of Madan JA in **Murai Vs.Wainaina (No.4) (1982) KLR;**

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by

senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder of a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of justice”.

Regarding the extension of time, the applicant cited from **ELCA No.8 of 2013 Samuel Mwangi Ng’ang’a Vs.Damaris Wanjiku Kamau & Another (2016)eKLR** where the Judge in determining a similar issue applied the principles set out in the Court of Appeal case of **Stanley Kahoro Mwangi & 2 others vs.Kanyamwi Trading Company Limited (2015) eKLR** thus;

“The principle guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour. The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLICATION NO.NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, (2003) KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO.NAI 332 OF 2004”.

On those authorities the applicant urges this court that he has discharged his burden to enable this court exercise its discretion.

On the issue of leave to appeal.

The right to an appeal may not be fettered but there must be good reason for the requirement for leave in matters Probate and administration –see **Rodah Wairimu Kioi & Another Vs.Mary Wangui Karanja & Another Civil Appeal NRB 69/2004** cited by this court in **The Estate of Samuel Mwangi Muchiri Nyeri HC SUCC Cause No.135 of 2002** “a party dissatisfied with the court’s decision has the liberty to move to the next court on appeal”.

For that reason, the applicant has leave to file an appeal.

The 2nd issue is on extension of time to file the appeal several factors are to be considered: -

- Period of delay.
- Reason for delay.
- Possibly chances of success
- Degree of prejudice of application not granted.
- Effect of delay on public administration.
- Importance of compliance with time limits.
- residence of parties
- whether matter raises issues of public importance.

The list is not exhaustive; however it is upon the applicant to persuade the court on that issue.

Judgment was delivered on 17th January 2018. The application was filed on 15th February 2018. Hence there was no immediate delay in filing the application. Why has the appeal not been filed?

As at the time of filing submissions on 28th November 2018, the applicant was still relying on a letter dated 22nd January 2018 to the Deputy Registrar seeking certified copies of Judgment and typed proceedings.

Where is the seriousness on the part of the applicant to pursue this appeal? A year has passed since the writing of that letter – yet as at the filing of submissions there was no indication that the applicant was serious.

The court’s discretion is to be exercised judiciously but the applicant must also demonstrate that indeed they have an appeal, an arguable one at that and the intention is not just to keep the matter in the court system.

In spite of this court’s observations herein above, it would be absurd to declare that the applicant indeed has a right of appeal and proceed to deny the same. The applicant did demonstrate that he wanted to appeal at the earliest. However, it was his counsel who did not follow the requisite processes at that earliest.

Counsel has taken all the blame for failing his client out of inadvertence. I will take the cue from the Madan JA (as he then was) and accept counsel's admission of mistake in this case, and hold the door to the appellate court wide open for the applicant.

The Summons General dated 13th February 2018 is allowed with costs to the respondent.

Dated, delivered and signed in open court at Nyeri this 18th March 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Ms. Wangari for Mr. Mwaura for applicant

Ms. Mwangi for Kiminda for Respondent.

Mumbua T. Matheka

Judge

18/3/19