



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 94 OF 2018

BETWEEN

DANIEL K. MWALIMU.....1ST APPLICANT

ZAKAYO MWALIMU.....2ND APPLICANT

VERSUS

JOSEPHINE BEN MALOMBE.....1ST RESPONDENT

JANE MARY WILLY MUNYOKI.....2ND RESPONDENT

ROSSY NDUMI MWALIMU.....3RD RESPONDENT

WINNIE KATANU MWALIMU.....4TH RESPONDENT

MARTHA CANDY MWALIMU.....5TH RESPONDENT

EVELYN MUTHEU MWALIMU.....6TH RESPONDENT

KYLE MUENI MWALIMU.....7TH RESPONDENT

R U L I N G

1. By way of Notice of Motion, the Applicants, **Daniel K. Mwalimu** and **Zakayo Mwalimu**, seek leave to appeal out of time against the order issued by **Hon. R. Ombata, RM** dated **31st January, 2017**.

2. The Application is premised on grounds that; the Applicants are and have always been dissatisfied with the impugned Ruling and desire to challenge the same on Appeal; the proposed Appeal raises very serious issues of law and fact that are arguable and deserve to be heard and determined; that the Applicants were caught up with time as their erstwhile Counsel who acted for them at the time had been suspended from practice and had been barred from appearing in Court by Judicial Officers in Kitui Law Courts and as such he kept dodging the Applicants hence failing to advise them on the Ruling and its implications.

3. That as a result the Applicants instructed a new Counsel to appeal but the Lower Court declined to enlarge time within which the Appeal should be lodged.

4. The 1st Respondent, **Josephine Ben Malombe** having been authorized by the other Respondents deposed an affidavit in reply where she deposed that the Applicants their brothers are not yet administrators of the Estate of their late father, **Mwalimu Maingi** but mere Petitioners thereto; having failed to comply with orders of the Lower Court issued on **31st January, 2017** requiring them to deposit all rents arising from the Deceased's two (2) properties in Kitui Township known as Plot Numbers **4096/97** and **4096/254** respectively, properties which were previously owned by their uncle **Mwanzia Maingi** and brothers (their late father and his other siblings).

5. That in **2008**, sharing of the properties previously registered in the name of **Mwanzia Maingi** amongst brothers was finalized and their father was allocated the two (2) properties and he continued collecting rent for the two (2) properties until his demise; rent that is now being collected by the Applicants who have failed to account for it; and that **Mwanzia Maingi's** name is being dragged into the proceedings to distort facts.

6. Further, it was averred that the Applicants deliberately excluded the two (2) properties from the schedule of the Deceased's properties which they were offering for sale to third parties having colluded with some officials of Kitui County Government after the death of their father to have these properties registered in the name of **Mwalimu Maingi and Sons** to the exclusion of the Respondents and that when orders were issued the Applicants' lawyer had not been suspended from practice.

7. The Application was canvassed by way of oral submissions. It was urged by the Applicants' Counsel, **Mr. Kilonzi**, that the reasons for the delay are adequately explained as the main issue was the erstwhile Advocate who refused to appear was suspended a few days before the Ruling of the Court and the contention in the Ruling is a question of two (2) plots alleged by the Respondents to be part of the Estate of which the Applicant argue that they are not. That the Court correctly found that the question of ownership was serious to be tried but proceeded to order that all rent collected had to be accounted for; an issue that the Applicant seek to raise on Appeal.

8. In response **Mr. Mwalimu**, Counsel for the Respondents urged that the Respondents had demonstrated that the properties in issue belonged to their late father. That the Applicants had not disputed the fact that rent from the two (2) properties was being collected by themselves. That their uncle **Mwanzia Maingi** who held leases in trust for his brothers one of them being Deceased had not come out to claim rights to the properties herefore his name was being dragged into the instant matter. That the Application before the Lower Court was for preservation of properties that is why the Court stated that the rent collected be accounted for. That their Advocate was suspended in **February, 2019** after the Ruling was delivered in **January, 2018**. It has therefore not been explained why it took them one (1) year to file the Application. That instead of coming to this Court **Mr. Kilonzi** went to the Lower Court to make an Application therefore the Appeal should have been against refusal to grant leave to appeal out of time.

9. In the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997)** (unreported) the Court of Appeal stated that:

“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

10. This is a matter where there has been a delay of approximately 342 days.

11. The Applicants fault their former Advocate for not giving them requisite advice to appeal soon after the Ruling was delivered. He was in attendance when the Ruling was delivered which is clearly confirmed by the record.

12. It is alleged but not demonstrated that the Applicants were dealing with the clerk to the Advocate as

he was away most of the time.

13. The Applicants have petitioned for Letters of Administration of the Estate of their father. After they were accused of having failed to disclose existence of some assets that allegedly formed part of the Estate and a Ruling was delivered in that regard they failed to pursue the matter until nine (9) months later when they were served with a mention notice to appear in Court. They however failed to appear in Court as required. Subsequently after they instructed another Advocate, the current one, they promised to comply with the Court order but failed to do so. Two (2) months later they filed the instant Application. The reason given for the delay is not plausible.

14. This is a Succession matter where issues raised will be addressed by the Court when it comes to distribution of the Estate of the Deceased, therefore failure to canvass issues raised on Appeal will not be prejudicial to the Applicants who are to blame for not moving with speed to comply with the law.

15. In the premises, I find the Application lacking merit. It stands dismissed with costs to the Respondents.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of June, 2019.

L. N. MUTENDE

JUDGE