



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 83 OF 2017 (UR NO. 54/2017)**

**BETWEEN**

**PHILEMON CHERUIYOT KENDUIYWA.....APPLICANT**

**AND**

**HELLEN CHEMELI KENDUIYWA.....FIRST RESPONDENT**

**JULIAN CHEPTOO KEDUIYWA.....SECOND RESPONDENT**

**RUTH JEBET KIPTOO.....THIRD RESPONDENT**

**LILIAN CHEPKOECH KENDUIYWA....FOURTH RESPONDENT**

*(Application for extension of time to file a notice of appeal and  
record of appeal against the ruling of the High Court of Kenya*

*at Kitale (J. R. Karanja, J.) dated 12<sup>th</sup> July, 2012*

**in**

**KITALE SUCCESSION CAUSE NO. 85 OF 2004)**

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**RULING**

[1] By a notice of motion dated 26<sup>th</sup> July, 2017, **Philemon Cheruiyot Kenduiywa**, (hereinafter referred to as the applicant), has moved this Court seeking to have the notice of appeal filed by him deemed as properly filed and served, or in the alternative to have time extended to enable him file the notice of appeal and for the Court to grant him leave to lodge an appeal out of time against the ruling and order of the High Court (Karanja J) made on 12<sup>th</sup> July, 2012 in Kitale Succession Cause No. 85 of 2004.

[2] The applicant is aggrieved by the confirmation of the grant issued to the first respondent and the mode of distribution approved by the High Court. He contends that his views were not taken on board; that the distribution adopted is causing undue hardship and injustice; that it has resulted in relocation of the applicant and some of his brothers from land where they have been in occupation; and that the land, which they have developed has been taken away and given to their sisters. The applicant therefore seeks an opportunity to appeal the ruling of 12<sup>th</sup> July, 2012. The applicant explains that the failure to file and serve the notice of appeal within time was not intentional but was due to the mistake of his former advocate.

[3] In his supplementary affidavit sworn on 15<sup>th</sup> November, 2017, the applicant explains that his application was filed five (5) days after the sixty (60) days that he was given by the High Court had expired; that the delay in service of the motion was caused by a clerk who was instructed to effect service but who failed to do so; and that he was not given a hearing before the confirmation of the grant.

[4] The applicant reiterates that he was let down by his former advocate who failed to file the applicant's proposed mode of distribution; that

the applicant only came to learn of this failure after the confirmation of the grant, and that the issuance of the title deeds following the distribution was unprocedural and should be cancelled by the Court.

[5] The application is opposed by the respondents. Hellen Chemeli Kenduiywa (1<sup>st</sup> respondent), has filed a replying affidavit and written submissions. The 2<sup>nd</sup> respondent Julian Cheptoo Kenduiywa has also filed a replying affidavit. In her affidavit the 1<sup>st</sup> respondent who is mother to the applicant opposes the motion. She maintains that the applicant has not given any good reason for the inordinate delay; that the applicant had the court stamp irregularly backdated; that the applicant was aware of the confirmation of the grant and had in fact filed applications for setting aside the confirmation; and that during the hearing of the Succession Cause the applicant was given time but failed to reply to the 1<sup>st</sup> respondent's application for confirmation of the grant and approval of distribution.

[6] The 2<sup>nd</sup> respondent maintains that the applicant has slept over his rights as he has only come to court four (4) years after the confirmation; and that the applicant is abusing the process of the court as he has filed several applications including the application for extension of time which applications have been dismissed by the court. The 1<sup>st</sup> respondent pleads that she is aged over eighty five (85) years old and would wish to have the matter of the estate resolved.

[7] In her affidavit, Julian Cheptoo Kenduiywa (2<sup>nd</sup> respondent), who is a daughter to the 1<sup>st</sup> respondent and sister to the 3<sup>rd</sup> respondent, 4<sup>th</sup> respondent, and the applicant, urged the court to dismiss the applicant's motion. She stated, *inter alia*, that the application is an afterthought; that leave of court to appeal has never been obtained more than five years after the order sought to be appealed was made; that the application is an abuse of the court process as there are other applications pending; and that the intended appeal would prejudice many other persons who are not party to the appeal.

[8] During the hearing of the motion, the applicant was represented by Mr. Kiboyi, the 1<sup>st</sup> respondent by Mrs Beatrice Munialo and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents by Mr. Ndarua Kiarie. Mr. Kiboyi submitted that the applicant was formerly represented by the firm of Chebii Cherop & Company Advocate; that the advocate was given time by the High Court to file relevant documentation but that due to miscommunication, the input of the applicant and other beneficiaries were not presented to the Court. Counsel therefore urged the Court that the delay in filing the appeal was caused by a breakdown in communication between the applicant and his counsel; that the applicant has a good appeal and should not be locked out of the seat of justice; that unlike the respondents who are not likely to suffer any prejudice the applicant will suffer if he is not allowed to appeal as he will have to move from his home.

[9] Mrs. Munialo opposed the application contending that the applicant has not given any reason as to why the appeal was not filed in time and why his application is being made five (5) years down the road. Relying on **Kerescent Masinde vs Concepta Namaemba Masinde & Another**, Civil Application No. Nai 75 of 2006, counsel submitted that the applicant has not explained the delay of five (5) years, nor has he explained why the application was filed out of time.

[10] Mrs Munialo submitted that contrary to the applicant's averments his homestead was not being moved as it was only a portion of the land that he cultivates that has been affected. Further, that the application has already been overtaken by events as the order of the court has been executed, land subdivided and titles issued. Relying on **Mary Rono vs Jane Rono & Another [2005]** eKLR, counsel urged the Court to find the mode of distribution proposed by the applicant unsuitable as it would exclude most beneficiaries.

[11] Learned counsel, Mr. Ndarua, submitting on behalf of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, argued that the applicant was given ample time for the hearing of the succession matter before the mode of distribution was approved; that although the applicant was laying the blame on his counsel, it was his responsibility to follow up the matter with the counsel; that the delay of five (5) years was inordinate and unexplained. Further, that the applicant was not coming to court with clean hands as he had backdated his application which was filed out of the time given by the Court.

[12] I have carefully considered the application and the submissions made before me. I take note that what is before me is an application for extension of time; that the power to extend time, is a discretionary power given to the Court under Rule 4 of the Court of Appeal Rules; and that the matter is before me as a single judge under Rule 53 of the Court Rules.

[13] In **Mwangi vs Kenya Airways Limited [2003]** KLR 487, this Court having referred to the parameters governing applications for extension of time set in **Leo Sila Mutiso vs Hellen Wagare Mwangi**, Civil Application No. Nai 255 of 1997, stated as follows:

**“In general Rule 4 gives a single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of a single judge and as we have pointed out the Rule gives a discretion which is not fettered in any way”.**

In this case, it is clear that there has been an inordinate delay of more than four years in bringing the application. The applicant has not given a reasonable explanation for the delay but has simply sought to shift the blame to his former counsel. But much as it is stated, that he had instructed his former counsel, and that there was some miscommunication, the applicant has nothing other than his word to confirm this. On the other hand, The respondents have demonstrated that the succession matter has been pending for a long time, and that should the court extend time to enable the applicant file his intended appeal, it would further delay finalization of the succession dispute and this would be prejudicial to the respondents', more so the first respondent who is 86 years old.

[15] The applicant has partly relied on Article 159(2)(d) of the Constitution that requires this Court to administer justice without undue regard to procedural legalities, but the applicant has conveniently ignore Article 159(2)(b) that requires the Court to be guided by the principle that justice shall not be delayed. I find that in the circumstances of this case, it would neither be fair nor just to allow the application for extension of time as it would only cause undue delay.

[16] Accordingly, I find no merit in the notice of motion dated 26<sup>th</sup> July, 2017 and dismiss it. As the matter involves a family dispute I make no orders as to costs.

**Dated and delivered at Eldoret this 31<sup>st</sup> day of May, 2018.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**