REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 35 OF 2017

IN THE MATTER OF THE ESTATE OF CHEGE MUIKARIA (DECEASED)

R U L I N G

1. The deceased in this cause is **Chege Muikaria** who died on 19th March 1989. This cause was filed on 12th July 1999 and a grant issued to **Joyce Wanjiru Chege** and **Grace Nduta Chege** both the deceased's widows who survived him, on 29th October 2004. And following the death of Joyce Wanjiru Chege, she was substituted with her son **Peter Chege Ngata**. The Applicants to the summons filed on 12th October 2018 are **Wanjiru Chege, John Mburu Chege** and several interested parties, including **Charles Kogi**, **John Mwaura Ng'ang'a**, **Minneh Waithira Ndindiri, Mwangi Mugo and Jane Njeri** whose various claims upon the estate of the deceased were dismissed by **Musyoka J** by his ruling delivered on 26th October 2016, following a full hearing.

2. The application filed on 12.10.18 is made by **Charles Kogi** in his own behalf and on behalf of the other claimants who lost before **Musyoka J.** The sole live prayer therein seeks leave to file an appeal out of time against the judgment of Musyoka J delivered on 26th October 2016 (erroneously stated to be the 26th September 2016). The key grounds on the face of the summons is that the Applicants are aggrieved with the said decision and desirous of filing an appeal; that they have an arguable appeal which they were prevented from filing on time by the fact that they were unaware of the delivery of the judgment until 15th June 2017; that they have filed this application without unreasonable delay; and that the Respondents will not be prejudiced if the application is granted. The application is supported by the affidavit of **Charles Kogi** which reiterates the material in the grounds on the face of the application and refers to a draft memorandum of appeal annexure **"CK 3"** which is however not annexed to the said affidavit.

3. The application was opposed. **Grace Nduta Chege**, one of the administrators of the estate through a Replying affidavit filed on 20th November 2019 asserted that the application has been overtaken by events as the distribution of the estate herein and transmission of properties has been completed; that the Applicants are guilty of inordinate delay -- a year since learning of the delivery of the judgment; that they have only sprang into action upon being served with the court process relating to the suit filed in the Environment and Land Court in Thika being **ELC Suit No. 600 of 2017** brought by the administrators to evict the Applicants from estate assets; and finally, that the Applicants have not demonstrated that they have an arguable appeal.

4. The Application was argued on 25th November 2019. Because counsel for **Charles Kogi**, Mr. Kamunya was not in court to move the application at the time scheduled, Mr. Kamau who represents **Wanjiru Chege** who had unsuccessfully asserted before **Musyoka J** to be the adopted daughter of the deceased herein, rose to canvass the summons. After submitting on the spent prayer (2) of the application which for interim stay of execution, counsel turned to the prayer for enlargement of time to appeal. He argued that the Applicants had by their supporting affidavit explained the delay in filing the appeal and this summons and that no prejudice will be suffered by the adverse parties. He was dismissive of the **ELC** suit stating that it had not been demonstrated to exist. Ms Mugo appearing for some of the Interested Parties reiterated Mr. Kamau's last point. She too asserted that the Applicants had by their affidavit explained that they had been unaware of the judgment of **Musyoka J** hence the delay, that the said Applicants have occupied the suit property for 20 years and ought to be allowed a second chance to appeal the decision. Before Ms Mugo could take her seat, Mr. Kamunya for the Applicants Charles Kogi and John Mwaura arrived. In his brief address, he adopted the submissions made by Mr. Kamau and Ms Mugo.

5. In opposition to the application, Mr. Tumu for the administrator/ Respondents emphasized the age of this dispute and asserted that the Applicants were guilty of intermeddling in the estate, their claim thereto having been dismissed by **Musyoka J.** Citing the decision in **Mwangi v Kenya Airways [2003] e KLR** as to the applicable principles, he stated that the period of delay – in this case – 2 years is unexplained and inordinate. Pointing to the depositions of Charles Kogi, he stated that there was no explanation why the Applicants , despite having learned of Musyoka J's decision failed to move the court for a period of about 1½ years. He stated that the administrators stand to suffer prejudice if the application is allowed, as the process of transmission based on the confirmed grant is complete, a fact known to the Applicants. He took the position that the Applicants have not demonstrated an arguable appeal, and in any event, the issues the Applicants now raise belong to the ELC suit whose process was served upon the Applicants in 2018 prompting this application. He views the application as an impediment to the proceedings in the ELC suit and urged the court to dismiss it.

6. The Applicants' counsels in brief rejoinders reiterated earlier submissions. Concerning the ELC suit, Mr. Kamunya asserted that it did not constitute a bar to proceedings in this cause, while Ms Mugo urged the court to disregard the said suit.

7. The court has now considered the matters canvassed in respect of summons. First of all, the Applicants did not deem it necessary to

include a prayer for leave to appeal from the decision of the High Court arising in this succession cause. The Applicants have not bothered to attach a draft memorandum of appeal or attempted to demonstrate in any way that the intended appeal raises serious questions. It is not enough to state from the bar that the Applicants have been in occupation of the estate property for 20 years. They are obligated to demonstrate to this court that *prima facie* they have serious issues to raise by the intended appeal to the Court of Appeal.

8. In **Zeinab Khalifa and 4 Others v Abdulrazak Khalifa and Another [2016] e KLR** the Court of Appeal dealt with the question of appeals to that Court from a decision of the High Court in a Succession Cause. The Court observed that:

> **"[I]t is not disputed that that outside Section 47 of the Law of Succession Act, that Act does not provide for leave to appeal from the High Court to this Court, and therefore leave was required.... (see Makhangu v Kibwana [1995 – 1998] I EA 175). The main consideration in determining whether to grant or refuse an application for leave to appeal is whether the intended appeal raises issues which merit serious consideration. In Sango Bay Estate Ltd and Others v Dredner Bank A.G. [1971] EA 17, Spry v P speaking for the former East Africa Court of Appeal, stated thus:**
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> **"As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration..."**
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> And in **Machira t/a Machira & Co. Advocates v Mwangi & Another [2002] 2 KLR 391, this Court stated that granting or refusing an application for leave to appeal is a matter within the discretion of the court; that the court <u>will only</u> refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal; and that the court can grant leave even where it is not so satisfied where the issue is of public interest or raises a novel point requiring clarification".**

9. All I hear the Applicants herein state repeatedly is that they ought to be given a chance to ventilate their appeal but without making any attempt to show the court that it is one that merits serious judicial consideration. On this account alone, this application ought to fail.

10. Concerning the prayer for leave to appeal out of time, it is not in dispute that the judgment of **Musyoka J** was delivered on 26th October 2016. True, the initial date reserved for judgment was 29th January 2016, but it's an admission of indolence for the Applicants to claim that they only learned of the delivery of the judgement in June 2017, some seven months later. The Applicants do not say that they made any efforts to follow up on the judgment after the initial reserved date passed. Moreover, having learned of the delivery of the judgment in June 2017, and filing a belated Notice of Appeal herein on 6th July, 2017, which notice does not appear to have been filed in the Court of Appeal, it was not until 12th October 2018 that the Applicants filed the instant summons. The summons therefore came two years since the judgment of **Musyoka J** and 1 year and three months since June 2017.

11. Even if this court were inclined to accept the explanation that the delay until June 2017 was due to the fact that the Applicants were unaware of the judgment of **Musyoka J,** it is disingenuous for the Applicants to proffer the same reason in a bid to explain their subsequent 1 year delay in bringing this motion. The total delay of two years is inordinate, and the Applicants needed to give a proper and plausible explanation. So far as an intended appeal to the Court of Appeal is concerned, Section 7 of the Appellate Jurisdiction Act and the procedural law regulating appeals proper, provide guidance as to the principles applicable to a summons of this nature. This is principally out of necessity as the Law of Succession Act and subsidiary legislation made thereunder do not appear to expressly anticipate an appeal in succession causes from the High Court to the Court of Appeal.

12. Order 43 Rule 3 of the Civil Procedure Rules provides that an application for leave to appeal ought to be filed within 14 days of the decision sought to be appealed from. This is the same period provided for under Rule 75(2) of the Court of Appeal Rules for the filing of the notice of appeal. The High court may extend these periods under Section 7 of the Appellate Jurisdiction Act. Rule 77(1) of the Court of Appeal Rules further provides that the ***"intended appellant shall, before or within 7 days after lodging the notice of appeal serve copies thereof on all persons directly affected by the appeal."*** Further, the sum effect of Rules 82(1) and 83 of the Court of Appeal Rules is that an appellant who has served a notice of appeal ought to file his appeal within 60 days of the lodgment of the notice and in default, is deemed to have withdrawn his appeal.

13. The general principle to be drawn from these rules is that time is of the essence. The successful applicant in an application to enlarge time for filing of an appeal 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."**

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

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

15. The Applicants herein have not given a plausible explanation for the lengthy delay in approaching this court or for not filing their appeal on time. The court notes that this cause has been pending in court since 1999. It behoved the parties to move with alacrity to bring the matter to an early conclusion. At a time when courts are deluged by serious case backlogs, parties can no longer be afforded the luxury of litigating at their own leisure. Moreover, the Respondent has already proceeded to effect the transmission of the estate and her plaintive cry that any further delays will prejudice her unduly (indeed the rightful beneficiaries to this estate) is not an exaggeration in the circumstances of this case. Consequently, this court is not persuaded of the merits of the Applicants' summons filed on 12th October 2018 and will dismiss it with costs to the Respondents.

SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND DAY OF JULY, 2020 .

C. MEOLI

JUDGE