



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 133 OF 2006

IN THE MATTER OF THE ESTATE OF CHARLES MUMBUCHE GICHONGE (DECEASED)

SUSAN NGIMA MUMBUKI.....APPLICANT

-VERSUS-

JOSEPH MAINA MUMBUKI.....RESPONDENT

RULING

On 21 May 2015 this court confirmed the grant of letters of administration for the administration of the estate of one Charles Mumbuche Gichonge who died intestate on 16 October 1995. The confirmation was against the backdrop of the dismissal of the applicant's protest on 17 December 2015 for want of prosecution.

By a summons general dated 29 May 2015 the applicant sought to have the orders dismissing the protest and confirming the grant varied or set aside; for reasons I gave in my ruling delivered on the 4th day of November, 2016 I dismissed the application. A little over a year later, to be specific, on 27 November, 2017, the applicant filed a motion seeking stay of execution, apparently of the order confirming the grant, initially pending the hearing and determination of the motion but ultimately, pending the hearing and determination of her intended appeal against that order of 21 May 2015. She also sought for leave for extension of time to file and serve the notice of appeal and in that regard that the draft notice be deemed as duly filed and served upon payment of the requisite fees. This is the application that is the subject of the present ruling.

The application is instituted under section 3A, 3B and 7 of the Appellate Jurisdiction Act; the applicant has also invoked the inherent powers of this honourable Court.

In the affidavit sworn in support of the summons, the applicant's learned counsel has deposed that she has opted to appeal rather seek for review of the orders of the court because there is no error apparent on the face of the record. Counsel has also sworn that she is aware that the requisite notice of appeal was filed by the applicant's previous advocates to challenge the ruling delivered by this court on 4 November 2016 (though she has mistakenly stated that it was delivered on 29 November 2016) but in her opinion, the appropriate course would have been to challenge, by way of an appeal, the order of 21 May, 2015 confirming the grant. But then the period within which the notice of appeal ought to have been lodged has since lapsed and it is for this reason that the applicant is seeking extension of time to file and serve this notice.

The explanation for the delay in filing and serving the notice is fairly simple and straight forward: that failure to file and serve this document was a mistake on the part of the applicant's previous counsel and shouldn't be visited on the applicant.

The respondent opposed the motion and swore a replying affidavit to this end stating that indeed the applicant filed a notice of appeal with the intention of appealing against the ruling of 4 November 2016 but never took any further step towards the lodgment of the substantive appeal or its prosecution.

Nevertheless, so the respondent has sworn, the delay in filing the application is inordinate and there is no reason why he should be delayed any further from getting his share of the deceased's estate.

The power of this court to extend time for issuance of a notice of intention to appeal is found in section 7 of the Appellate Jurisdiction Act which reads as follows:

7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

Although this provision speaks of only an appeal from a judgment of the High Court, it should apply to an appeal from a ruling or an order by the same court as well; at least it does not expressly exclude a ruling or order from its application. It is worth noting, however, that the power is discretionary.

Speaking of when such power may be exercised the Court of Appeal in **Annah Mwihaki Wairuru v Hannah Wanja Wairuru [2017] eKLR** cited its own decision of the court in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** where it had said:

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.

Apart from these factors outlined by the Court of Appeal I would suppose that if there is any other reason which the court considers sufficient in the circumstances of the case, it may as well grant the application; after all, the exercise of this power is, as noted discretionary and thus unfettered, and this aspect of that power would be lost if the court was restricted to considering specific factors only to the exclusion of any other reason or reasons that would, in all fairness, be found to be tenable in explaining the delay and are, at any rate, helpful in arriving at a just decision.

Turning back to the application at hand, the order sought to be appealed against was made on 21 May, 2015 yet the present application was not made until two and a half years later, more particularly on 27 November 2017. In the intervening period the applicant filed an application for review of the order which she now intends to appeal against; that application was filed on 28 May 2015, relatively timeously, one would say, after the delivery of the ruling. It was, however, dismissed on 4 November 2016. Since that time, the applicant did not take any action until more than a year later when she filed the present application.

Meanwhile, by a summons dated 30 June 2017 and filed in court on the even date, the respondent sought the intervention of this court for the transmission of the estate to the respective beneficiaries; in particular, he sought the deputy registrar's hand in execution of the transmission documents now that the respondent had declined to co-operate and either surrender the crucial documents or execute others that are necessary for completion of the administration of the estate. The present application was filed four months after the respondent's application was filed.

What emerges from these events is, one, that the applicant has at least exercised either of the two options open to her in the wake of the impugned order; she sought for its review rather than appeal against it. For reasons which are apparent in my ruling, that application was dismissed. Secondly, there are obvious instances of unexplained and inordinate delay by the applicant in taking whatever steps that, in her view, were the appropriate steps to remedy her situation.

The applicant's present counsel has urged that the delay was caused by the applicant's previous advocate when he took the wrong course and applied for review rather than appeal against the impugned order. As will soon become evident, there was nothing wrong in seeking review rather appealing, but even if the learned counsel is right, no explanation has been given why it had to take the applicant more than a year to file her present application after the delivery of the ruling dismissing the application for review.

It is also obvious from these ensuing events that the applicant was only jolted into action after the respondent filed the application for the intervention of the deputy registrar to transmit the estate. As noted, her application was filed four months after the respondent's application had been filed and most likely, she was hitherto under the mistaken belief that without her co-operation nothing much would happen towards completion of administration of the deceased's estate.

That there was what, at any rate, is inordinate delay in filing the present application, is not only beyond dispute but it is also a fact that has even been acknowledged by the learned counsel for the applicant herself; what, in my view, is lacking, is a satisfactory explanation for this delay. In my humble view, it is not enough to fault the previous learned counsel for the applicant for having opted to file an application for review, when in the opinion of her present counsel he ought to have filed an appeal against the impugned order. Under order 45 of the Civil Procedure Rules, the application for review was an option that was very much open for the learned counsel to take and I, for my part, was prepared to allow his application if only he could demonstrate to my satisfaction any of the conditions for grant of relief under that particular rule.

It is also worth noting that the applicant is not precluded from appealing merely because she applied for a review of the order in issue; I suppose it is upon this understanding that the applicant is now intent on appealing against the order that was previously the subject of a review application.

This issue was addressed by the Court of Appeal in **African Airlines International Ltd versus Eastern and South African Trade and Development Bank (2003) 1EA 1(CAK)** where it had been argued that since an applicant for extension of time to file an appeal had preferred a review he could not file an appeal against the same order that was a subject of its review application. The Court did not hesitate in dismissing this argument and in doing so, it held as follows:

The legal position is, we think, well settled. It was succinctly stated in Sarkar's Law of Civil Procedure (8th Edition) Volume 2 at 1592 as follows (omitting the citation of the case law):

Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it though the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with.

It follows that both options of review and appeal were always open to the applicant and as much as she is entitled to appeal against the order in issue there was nothing wrong in seeking for a review of the order in the first instance.

I am tempted to digress a little if not for anything else, to attempt to put into their proper perspective the twin processes of appeal and review particularly on the question of the appropriate time of when they may be activated and, whether the activation of one course has any impact on the other.

According to **Sir Dinshah Fardunji Mulla in his book, Code of Civil Procedure, 18th Edition page 3676**, the expression 'from which an appeal is allowed' which expression is adopted in order 45 should be construed liberally and thus an application for review is competent in cases where an appeal is provided for and the fact that an appeal lies is usually no ground for rejecting an application for review.

It would appear from the available law that what matters is the timing of preferring either of the two processes; where the application for review is first made and thereafter an appeal is preferred, the review application can be disposed of provided the appellate court has not disposed of the appeal. The reason is obvious to see; once the appeal is disposed of, the appellate decision prevails and binds the court before which the application for review is preferred. For the same reason, after an appeal has been preferred from a decree, no application can be made for a review of that decree. A party against whom a decree has been passed is precluded, after dismissal of his appeal, from applying for a review.

But if, after an appeal is filed, fresh evidence is discovered, the appellant may withdraw the appeal and apply for a review; however, he cannot file an application for review unless he has first withdrawn the appeal. This is because where the appeal is filed first, the court has no jurisdiction to entertain the review application on a judgment or order which is the subject of appeal pending for determination in the higher court.

Where an application for review has been presented before a party to the suit, and an appeal is afterwards preferred from the same decree, whether by the same party or by the other party to the suit, the court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application. But that power exists so long as the appeal is not heard and because once the appeal is heard the decree on appeal is the final decree in the case and the application for review of judgment of the court of first instance cannot longer be proceeded with. (see **Mulla (supra) at Pages 3677-3678**). This partly reflects the position in **Order 45 rule 1(2) of the Civil Procedure Rules** which reads as follows:

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

I understand this to mean that where there are several parties eligible for an application for review or an appeal any of them may apply for review of an order or decree despite the fact some other party has already appealed against the same order or decree; this, however, is subject to two conditions; first, the ground of appeal should not be the same ground upon which the application for review is based and, second, the applicant for review is not a respondent in the appeal because if he is, he should be able to bring out his case in the appeal rather than an application for review. The presupposition is the basis of what would have been his application for review can properly be determined in the appeal filed by the different party.

When the law is considered from the foregoing perspective, it is reasonable to conclude that the pendency of the application for review between the time it was filed and time it was determined cannot be used against the applicant or her previous counsel; if to say it again, the only deficiency I find in her application is the inexplicable delay in filing it. Really, in the absence of any reason or explanation for the delay, the applicant is not only deemed to have deliberately breached the rules pertaining to the filing the sort of application she filed but also there is no material upon which this court can exercise its discretion in her favour. Concerning compliance with the rules of court on taking certain actions, the Privy Council in **Ratnam –vs- Cumarasamy Another [1964] 3 All ER 933**, stated at page 935 that:

The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

It couldn't have been put any clearer.

There is one more thing about the ruling of 4 November, 2016 which the applicant's counsel has brought to my attention and which I think has some implications on the applicant's bid to appeal against it. Counsel has deposed that after the delivery of the ruling, the applicant's previous advocate filed and served a notice of appeal with the intention of appealing against it. To date that notice has not been withdrawn; in these circumstances, it is difficult to see how, on the one hand, the applicant can be appealing against the order rejecting his application for review and on the other hand, appeal against the order which was the very subject of review.

When one remembers that a notice of appeal is as good as an appeal and the court of appeal is seized of jurisdiction the moment the notice of appeal is filed (see **Patrick Gathenya versus Esther Njoki Rurigi & Another (2008)eKLR; Equity Bank Limited versus West Link MBO Limited (2013)eKLR and Safaricom Limited versus Ocean View Beach Hotel Limited & 20Others Civil Application No. 327 of 2009(UR)**) there is no doubt that the question whether the order confirming the grant should have been reviewed and probably set aside or vacated is pending for determination before the Court of Appeal. It would, in my humble view, be an abuse of the court process, at the very least, if the same court would be asked in a separate appeal by the same appellant to consider overturning the same order.

Finally, would the grant of the application prejudice the respondent? I suppose it will. The grant, as noted was confirmed four years ago and the cause itself has lagged in this court for the last twelve or so years. The applicant could not co-operate and help in completion of the

administration of the estate. Prior to and even after the confirmation of grant she had been lethargic in taking whatever step that was, in her view, necessary to prosecute her grievances. History shows that after she filed her protest, she never took any action on it and it was out of the respondent's initiative that it was fixed for hearing on several occasions none of which she attended court. Again, while she is entitled to file the present application, the fact that she filed it only after the respondent had resorted to court for assistance in transmission of the deceased's estate is, in my assessment, a testament of the various delaying tactics she has employed to frustrate the conclusion of the administration of the estate.

It is true, and I agree, that without any order staying the execution of the confirmation order, the grant of the application, ipso facto, is not enough to cause any prejudice to the respondent but allowing the application would not be all that inconsequential either; the net effect of extending time to file and serve the notice of appeal and in the same breath staying the confirmation order would undoubtedly be that there is still be a case, with no end in sight, hanging around the respondent's and the rest of beneficiaries' heads. In short, any further delay in conclusion of this matter after it has been in court for close to thirteen solid years is prejudicial to the respondent, and of course, the would-be beneficiaries of the deceased's estate.

For all I have said, the inevitable conclusion that I have to come to is that the applicant's application has no merits and it is hereby dismissed. Parties will cater for their own respective costs.

Signed, dated and delivered in open court this 12th day of July, 2019

Ngaah Jairus

JUDGE