



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HCC NO. 113 OF 2017

(FORMERLY NAIROBI CIVIL APPEAL NO. 18 OF 2015)

ALEX WAWERU KIBURA.....1ST APPELLANT/APPLICANT

JOSEPHAT NDICHU KINUTHIA.....2ND APPELLANT/APPLICANT

HANNAH MBITHE WANJIKU.....3RD APPELLANT/APPLICANT

VERSUS

TERESIAH NYOKABI NJUGUNA.....RESPONDENT

RULING

1. The Applicants seek orders that leave be granted to file their Memorandum of Appeal out of time as well as orders restraining the respondents by themselves, their agents and /or persons acting under their instructions from interfering with, selling, disposing off or in any way dealing with property known as NDUMBERI/NDUMBERI 2531 & NDUMBERI 2532(ORIGINALLY NDUMBERI/NDUMBERI 392). The intended appeal is from a judgment delivered in Kiambu Succession Cause No. 114 of 2003 on 29/01/2014. The Application is supported by a Supporting Affidavit by Alex Waweru Kibura the 1st Appellant/Applicant herein with the authority and consent to swear this affidavit on behalf of the 2nd and 3rd appellants/applicants.

2. The Application is opposed. In opposition, the Respondent has sworn a Replying Affidavit.

3. The brief history in regard to this matter is as follows. The Respondent petitioned for Letters of Administration in the Estate of Njuguna Waweru (“Deceased”) in Kiambu Chief Magistrate’s Succession Cause No. 114 of 2003. The Applicants filed a protest. The substratum of the protest was that one of the properties registered in the name of the Deceased was, in fact, only so registered in trust for the Deceased and the Applicants (some through inheritance). As such, the Applicants sought to be included as beneficiaries and to get a share in that parcel to wit LR No. Ndumberi/Ndumberi/392.

4. During the pendency of the Succession Cause, the Applicants had filed a suit at the High Court in Nairobi to wit Civil Case No. 12 of 2010 (OS): Naomi Wanjiku Waweru & Alex Waweru Kibura v Teresia Nyokabi Njuguna for determination of the question of trust. However, in part due to what Musyoka J. found was laches on the part of the Applicants, the OS was never heard before the confirmation hearings in the Succession Cause.

5. Consequently, the Succession Cause proceeded to full hearing and the Applicants urged their case before the Learned S. Oluoch. In a considered judgment, the Learned Trial Magistrate dismissed the

protest and confirmed the grant. In doing so, she did not go into the substantive merits of the protest (on the question of trust). Instead, she made a finding that she had no jurisdiction and urged the protestors (the Applicants herein) to pursue the matter at the High Court. This is what the Learned Trial Magistrate held in pertinent part:

In the light of this decision [In the Matter of Estate of Kimathi Kinuthia P & A No. 109 of 1994] it is clear that this court has no powers whatsoever to entertain the objection. The proper procedure would be to pursue Succession Cause No. 1599 of 2010 pending before the High Court. The objectors should ensure that it proceeds as a normal Originating Summons and not a succession cause following the observations made in the cited case.

6. This judgment was delivered on 29/01/2014. Nudged by this judgment, the Applicants trooped back to the High Court and filed an Application dated 04/02/2014 with the hopes of obtaining injunctive relief so that they could pursue the question of trust. The aim was to preserve the estate pending the hearing of the main suit.

7. The Applicants met a veritable roadblock in their intentions. This was in the form of the ruling by the High Court dated 23/01/2015. Taking a stance diametrically opposed to that taken by the Learned C. Oluoch on the jurisdiction of a probate Court to determine questions of trust, the Learned Judge remarked as follows:

From the record, it is clear to me that the Plaintiffs raised the issue of trust with respect to Ndumberi/Ndumberi/392 long before the confirmation application was filed in Kiambu SPMSCSC No. 114 of 2003. When the confirmation application was eventually filed, they filed a protest affidavit again raising the issue of a trust accruing in the subject property in their favour. The matter was urged in a full hearing, which culminated in a judgment delivered on 20/01/2014. In the judgment, the trial court did not venture into the merits as to whether such a trust existed or not, for it concluded that it had no jurisdiction to deal with the issue.

The matter raised in the instant suit and in the protest to the confirmation application in Kiambu SPMSCSC No. 114 of 2003 in my view fall squarely within the purview of Rule 41(3) of the Probate and Administration Rules. It is a question as to the share of persons claiming to be beneficially interested in, or, put differently, it is a question as to a qualification attaching to a share of a claimant

The matter therefore ought to have been handled in terms of Rule 41(3) of the Probate and Administration Rules by delaying the confirmation of Ndumberi/Ndumberi/392 to await the determination of the instant suit or any other suit brought under Order 37 Rule 1 of the Civil Procedure Rules.

8. With that ruling, delivered on 23/01/2015, the Applicants were left transfixed in the horns of a dilemma on how to proceed. In essence, the Learned Judge had informed them that their grievances were more appropriately raised in the Succession Cause while the Probate Court had told them to ventilate their grievances in the High Court in the Originating Summons.

9. It was against this background that the Applicants filed the present Application.

10. The main issue for determination is whether the Applicants' appeal should be admitted out of time.

11. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

12. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

13. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

14. Consequently, these are the factors upon which I will construct the crucible against which the Applicants’ prayer for extension of time will be measured.

15. The applicants contend that the court is clothed with jurisdiction to allow the applicants’ claim out of time, they rely on the case of *Edward Njane Nganga & Another vs Damaris Wanjiku Kamau (2016) eKLR*.

16. The Applicants argue that the intended appeal concerns ownership of the suit property which they assert to be holding in trust and claim beneficial ownership.

17. They further contend that they have demonstrated that they were prevented by a sufficient cause from filing the appeal on time. Reliance was placed on the case of *Sayers vs Clarke Walker (a firm) (2002) EWCA Civ 645 at paragraph 22 cited in Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others (2014) eKLR*.

18. It was the Applicants submissions that they stand to suffer irreparable loss if the application is dismissed and that the reason adduced is sufficient to demonstrate that the applicants are deserving of the orders sought and the respondent will not be prejudiced at all or suffer any loss.

19. The Respondent argues that the arguments of lack of clarity, legal procedures and/or technicalities by the Applicants are untenable in law as the judgment the applicants seek to appeal is the one delivered on 20th January, 2014 and not the ruling delivered by Justice Musyoka. That the Applicants chose a different route other than the appeal and this application is therefore an afterthought.

20. They further argue that the fact that the Court is clothed with discretion, the delay must not be inordinate and the same must be explained and such is not the case herein. They quoted the case of *Martin Wanjala Wafula vs Margaret Wairimu Mbirua (2017) eKLR and Pondorosa Logistics Limited vs Ayub Wesonga (2017) eKLR*.

21. I would readily agree that the Court always tries to determine disputes on their merits as stated in the Ugandan Supreme Court in *Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22* where it remarked that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.

22. In the circumstances of this case, as outlined in the brief history given above, I am moved to exercise the Court's discretion to allow the Applicants to appeal out of time. This is because the Applicants have demonstrated that the delay in filing the Appeal can be explained and is excusable. The truth of the matter is that the Applicants, perhaps unwisely, took the guidance of the Trial Court as the gospel truth: that the proper forum for their grievance was the High Court in the context of the Originating Summons. The High Court thought otherwise. Consequently, their only option is to appeal against the decision of the Magistrate's Court to refuse to take jurisdiction and, confirming the grant despite the protest and the existing suit in trust which pre-dated the Application of summons for confirmation of the grant.

23. I believe that this is a sufficiently good cause to extend the time for filing the appeal. An extra reason is provided by our general policy in cases of this nature that where possible they should be determined on their merits and not on summary processes.

24. What about the prayer for injunctive relief pending the hearing of the appeal?

25. Our established jurisprudence is to the effect that to be successful in an application for injunctive relief pending an appeal, an Applicant has to satisfy the same four-part test such an applicant must satisfy to get a stay of execution thus:

- a. The Applicant must demonstrate that the appeal it has filed or intends to file is arguable;
- b. The Applicant must demonstrate that he is likely to suffer substantial loss unless the order is made. Differently put, the Applicant must demonstrate that the appeal will be rendered nugatory if injunctive relief is not granted;
- c. The Applicant must demonstrate that the application was made without unreasonable delay; and
- d. The Applicant must demonstrate, where applicable, that he has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

26. Given this test, the Appellant is required, in the first instance, to demonstrate that the appeal is arguable. The test requires the Appellant to show that the appeal is plausible and that the Appellant has conceivable grounds for overturning the lower court decision either on law or merits. The threshold is not to demonstrate that the appeal has overwhelming chances of success. Given my outline of the history of the litigation above, I think it is easy to conclude that the appeal is arguable. The same history explains why the delay in filing the present Application is not inordinate.

27. The subject matter of the dispute is land. If the Respondent proceeds to deal with the land pursuant to the Certificate of Confirmation by transferring or mortgaging it, it follows that she could easily defeat any successful claim by the Applicants. In the specific nature of this case, I think it is best that the subject matter to **wit Ndumberi/Ndumberi/2531 and Ndumberi/Ndumberi/2532** be preserved until the Appeal is heard and determined.

28. Consequently, the orders that recommend themselves are as follows:

a. **The Applicants shall file and serve a Memorandum of Appeal within seven days of the date hereof.**

b. **Status quo shall be maintained respecting parcels numbers wit Ndumberi/Ndumberi/2531 and Ndumberi/Ndumberi/2532 until the Appeal is heard and determined or until the further orders of this Court.**

c. **The Applicants shall file the Record of Appeal within sixty days from the date hereof.**

d. **The Applicants shall write to the Deputy Registrar requesting him to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.**

29. **The costs of this Application will abide by the outcome of the Appeal.**

30. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE