Indakwa v Omumasaba (Civil Application E129 of 2023)
[2024] KECA 701 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 701 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E129 OF 2023

JM NGUGI, JA

JUNE 21, 2024

BETWEEN

SILAS ODERA INDAKWA ..... APPLICANT

AND

EMMANUEL ODERA OMUMASABA ..... RESPONDENT

(Being an Application for Extension of time within which to lodge an appeal against the Ruling and Orders of the High Court of Kenya at Kakamega, (Musyoka, J.) dated 22nd July, 2022 in Succession Cause No. 539 of 2006)

RULING

1. The late Yohana Indakwa Alias Indakwa Odera ("Deceased") died on 1st January, 1981. He was buried shortly thereafter but his soul is yet to rest easy – more than fourty years later. The only asset he left behind, a parcel of land known as E/Wanga/Isongo/668 measuring 10.5 acres ("Suit Property") has become a source of enduring conflict and controversy since then. The application under consideration, dated 18th October, 2023, is the latest iteration of that controversy.

2. The Deceased's son, Silas Odera Indakwa, the applicant herein, petitioned for letters of administration intestate to the estate of the Deceased in 2007. Later that year, the respondent, who is the applicant's cousin, filed an objection to the mode of distribution of the Deceased's estate. His claim was that the Suit Property was family land which the Deceased held in trust for himself and the respondent's father.

3. In a ruling dated 12th May, 2015 by Chitembwe J. but delivered by Sitati J. on 23rd June, 2015, the respondent succeeded in his claim. The High Court ruled that the Suit Property would be transmitted to both the respondent and the applicant with the former getting 5.0 acres and the latter getting 5.5 acres.

4. The applicant says that he was dissatisfied with that ruling of Chitembwe J. It would seem that a Notice of Appeal dated 30th June, 2015 was lodged at the High Court registry on 14th July, 2015. However, the applicant did not seek leave to file the appeal. Neither did he pursue the appeal. The matter went cold.

5. The next action from the applicant was an application dated 8th October, 2021 filed at the High Court. The application itself is not attached to the application before this Court. However, the learned Judge (Musyoka, J.), in his ruling dated 22nd July, 2022 described the application as one praying for "a reopening of the file herein and for extension of leave to appeal out of time, and leave to file a Notice of Appeal with respect to the ruling of 12th May, 2015 of Chitembwe, J. ...."

6. The learned Judge dismissed the application as one wholly without merit making the consequential finding that the delay in making the application was inexcusable. The learned Judge held that:

> "It is seven years now since the order was made. A delay of seven years is neither reasonable nor excusable. If it was a matter of months or even a year, then the court could consider exercising discretion to expand time to file an appeal. Seven years is unreasonable and inordinate. The applicant may have a good case, but that alone, is inadequate."

7. The applicant was, again, dissatisfied with that ruling. Through his advocates, he lodged a Notice of Appeal at the High Court registry. It is dated 14th August, 2022. The date of lodgment is not clear but it appears to be 5th September, 2022 which would place it outside the statutory timeline.

8. In any event, again, no action whatsoever followed that lodgment of the Notice of Appeal. The matter went cold. The next action that followed is the present application which was filed on 18th October, 2023 – about a year and two months later. The present application seeks two prayers as follows:

    1. That time within which to file appeal be enlarged and or extended and leave be granted to file the memorandum of appeal out of time.

    2. That costs incidental to this application to abide in the outcome of the intended Appeal.

9. The application is opposed. The respondent has filed a lengthy replying affidavit which rehashes the history of the litigation between the parties. It seeks to paint the applicant as a vexatious litigant who is hell-bent on keeping the dispute aflame despite the courts having pronounced themselves authoritatively on the rights of the parties. He asks the Court to dismiss the application and allow the matter to rest.

10. I have considered the application, the affidavit in support thereto and its annextures – including the judgment of the Environment and Law Court, the replying affidavit and the written submissions by both parties. The only question for determination is whether the applicants have met the threshold for the exercise of the Court's discretion to grant leave for them to file an appeal out of time.

11. This Court is empowered to grant extension of time under Rule 4 of the *Court of Appeal Rules* which provides that:

> " The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

12. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

> "It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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."

13. In the present case, the applicant puts the entire blame for the delay at the doorstep of his former lawyer. His narrative, which is the same narrative he presented at the High Court to explain the seven-year delay in bringing the application that gave rise to the impugned ruling, is that he expected his lawyer to file the necessary appeal; and that he paid for the services; but that the lawyer failed him. He argues that he has a good appeal with overwhelming chances of success that should be allowed to proceed to full ventilation. However, to substantiate the chances of success, he attacks, not the impugned ruling of Musyoka J. dated 22nd July, 2022 but the ruling of Chitembwe J. On that score, the applicant complains that the learned Judge made a finding of a trust while he did not have jurisdiction to do so.

14. On his part, the respondent opposes the application on three grounds:

    a. That the application is unclear whether it seeks extension of time to appeal against the ruling of Chitembwe J. dated 12th May, 2015 or that of Musyoka J. dated 22nd July, 2022;

    b. That the jurisdiction of the Court is not properly invoked; and,

    c. That there has been an inordinate and inexcusable delay in bringing the application.

15. The respondent is correct that the application has been framed in a confounding way. While it is intituled as seeking an extension of time to bring an appeal against the ruling of Musyoka J. dated 22nd July, 2022, the material deployed as ammunition for it is against the ruling of Chitembwe J. dated 12th May, 2015. However, in context, one can, acting with much charity, discern that it is the ruling of Musyoka J. dated 22nd July, 2022 that the applicant seeks to appeal against.

16. However, there are three difficulties with the application even assuming that what the applicant seeks to appeal against is the ruling of Musyoka J. dated 22nd July, 2022.

17. First, as the respondent correctly points out, the ruling delivered by Musyoka J. was with respect to a succession matter. As this Court has severally pointed out, there is no automatic right to appeal to this Court in a succession matter. See, for example, *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another*[2014] and *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another* [2019] eKLR. In the present case, the applicant neither sought nor obtained leave to appeal against the impugned ruling. The leave must be sought, in the first instance, at the High Court; and only a refusal to grant it would be appealable to this Court.

18. Second, the history of this case makes the delay inexcusable and makes it an inappropriate one to grant discretion to keep the fires of the conflict ablaze. As rehashed earlier in this ruling, the original ruling which the applicant is dissatisfied with was delivered on 23rd June, 2015. That is eight (8) years, 11 months and 24 days ago or 3,241 days ago. It also took the applicant more than one year and two months to present this application to Court.

19. In both spurts of delay, the applicant blames his lawyer. It is true that it is not in every instance that the errors of an advocate would be visited on his client. However, the litigation belongs to the client and it is incumbent upon him to keep abreast of the litigation. One cannot delay a matter for eight years; in two different contexts and then seek the equitable embrace of the Court to keep the litigation alive. Such a litigant's adversary, too, must be accorded justice; and justice, in this case, extols the need to bring the litigation to an end. The respondent was justified to think that this matter ended in 2015 only for him to be vexed by an application to revive it in 2021. He was equally justified to think that the matter had ended after the period for filing an appeal expired. He has now been dragged back to the litigation in this Court.

20. Third, the applicant has not demonstrated a seriousness in pursuing the appeal anyway. If he had, he would have demonstrated that he applied for certified copies of the proceedings and ruling, and would have copied of the letter so requesting to the respondent. This has not happened.

21. In short, I have come to the conclusion that the discretionary factors in this case are not in the applicant's favour. The delay is too long; and the reasons given for the delay not acceptable. Besides, a condition precedent for the present application – namely leave to bring the appeal – has not been met. Finally, in part due to the confusion alluded to above, the applicant has not been successful in demonstrating that he has a good case on appeal against the exercise of discretion by Musyoka J. and why the learned Judge's conclusion that a delay of seven years is inordinate and inexcusable is too perverse to amount to an abuse of discretion.

22. The upshot is that the application dated 18th October, 2023 is for dismissing. I hereby do so and award the costs to the respondent.

23. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2024.

JOEL NGUGI

.....

. JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR