



REPUBLIC OF KENYA



KENYA LAW
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**Marete v Marete & another (Civil Application E025 of 2021)
[2022] KECA 971 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 971 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E025 OF 2021
KI LAIBUTA, JA
AUGUST 26, 2022**

BETWEEN

JULIUS MUTHURI MARETE APPLICANT

AND

JUDITH KAROKI MARETE 1ST RESPONDENT

GLADYS NCECE KATHURIMA 2ND RESPONDENT

(Being an application for extension of time to file and serve the record of appeal out of time from the Judgment of the High Court of Kenya at Meru (F. Gikonyo, J.) delivered on 12th February 2019 in Succession Cause No. 3 of 1978)

RULING

1. By a Notice of Motion dated March 4, 2021 and made under Rule 4 of the [Court of Appeal Rules](#), the Applicant (Julius Muthuri Marete) seeks, inter alia, extension of time to file and serve the appeal and record of appeal out of time against the judgment delivered on February 12, 2019 by Hon. F. Gikonyo, J. in the High Court of Kenya at Meru Succession Cause No. 3 of 1978; and that the costs for and incidental to this application be provided for.
2. The Motion is supported by the applicant's affidavit sworn on March 4, 2021 and is made on 16 grounds set out on the face of the Motion, but which I need not replicate here. Accordingly, I take the liberty to summarise and rephrase them as follows: that the applicant is infirmed and advanced in age, which impaired his speech and movement since the year 2018; that his counsel lodged a notice of appeal against the impugned judgment in time; due to his infirmity, he was unable to pursue the intended appeal with his advocates despite having applied for and obtained certified copies of the proceedings in the High Court; that the certified copy of the judgment was supplied to him on February 19, 2021, outside the 60 days prescribed for the lodging of the record of appeal; that the applicant is yet to obtain the requisite certificate of delay; that the respondents proceeded to apply for execution of the judgment



delivered on February 12, 2019, which was allowed vide a ruling delivered on February 15, 2021; that, if execution takes place, the intended appeal would be rendered nugatory; that there is danger of the applicant being deprived of his land if the impugned judgment is not stayed; that it is in the interest of justice that the judgment and the subsequent orders be stayed pending the hearing and determination of the intended appeal; that the applicant has an arguable appeal with a very high chance of success; that it is in the interest of justice that his application be allowed; and that his memorandum of appeal and record of appeal are ready for filing within such reasonable time as may be directed by this Court.

3. The applicant's supporting affidavit merely restates the grounds aforesaid. In response, the 1st and 2nd respondents filed replying affidavits both sworn on July 5, 2022, and which contain common averments to the effect that the applicant's Motion was filed after inordinate delay, the same having been filed on March 29, 2021 while judgment was delivered on February 12, 2019, more than 2 years and 1 month later; that the applicant has not explained this unreasonable delay; that the application is filed in bad faith; that the High Court distributed the estate comprised of the suit property equally among all the children of M'Marete Kiunga, the father of the parties to this application; that the intended appeal does not have any probability of success since the estate has already been shared equally among the children of their deceased father; that the impugned judgment has already been executed in the absence of orders staying execution; and that the intended appeal has been overtaken by events.
4. Learned counsel for the respondents (Ms. Kaimenyi Kithinji & Co) filed written submissions dated 20th July 2022, while Learned counsel for the applicant (M/s. Gichunge Muthuri & Co) filed theirs dated July 25, 2022.
5. Rule 4 of the [Court of Appeal Rules](#) gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
6. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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."
7. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR also lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

"The exercise of this Court's discretion under Rule 4 has followed a well- beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors."

8. The Applicant's prayer for extension of time to file the record of appeal is dependent on my findings on the following issues: whether the intended appeal is arguable with a possibility of success; the length of



the delay, and whether such delay is inordinate; the reasons for the delay in filing the record of appeal; and whether the Respondent would be unduly prejudiced by the extension of time as sought.

9. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In his undated draft Memorandum of Appeal, the applicant advances 9 grounds on which his intended appeal is anchored. According to him, the learned Judge erred in law and in fact: in entertaining an application made under the Civil Procedure Rules, 2010 and the Land Registration Act, 2012 in a succession cause; in applying the Law of Succession Act and the Constitution of Kenya, 2010 in retrospect over the estate of the deceased, who died in 1971, and whose estate was devolved under the then applicable law in 1978; by disregarding the clear provisions of section 2 of the Law of Succession Act and Article 267 of the Constitution; by failing to appreciate that the grant issued by the District Magistrate on January 24, 1978 was not sought to be revoked, but proceeded to revoke the same and issued a fresh Grant to the applicant and the 1st respondent when no application was made in that regard; in failing to appreciate the applicable law relevant to the deceased's estate; by entertaining an application to review the orders of January 24, 1978 by an application made on September 16, 2015 over 37 years later; by distributing the estate of the deceased when the same had already been distributed on January 24, 1978 in the absence of an application for revocation of Grant and fresh distribution; by ordering equal sharing of the estate while no application therefor had been made, which was against the applicable law and principles; and in making findings against the law, facts and weight of evidence.
10. Even though this is not the only basis for consideration, the grounds set out in the Applicant's draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. The use of the word "possibility" also points to the probability that the intended appeal might not succeed, a matter to which I have no jurisdiction to determine.
11. In Joseph Wanjohi Njau v Benson Maina Kabau, Civil Application No. 97 of 2012 (Unreported), Hon. Mr. Justice Kathurima M'Inoti held that "the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court."
12. In Muchungi Kiragu v James Muchungi Kiragu and another [1998] eKLR, the Court held that:

"This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it."
13. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under Rule 4 to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the Court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in filing the intended appeal?
14. I also take note of the fact that the impugned judgment was delivered on February 12, 2019. The applicant filed his application for extension of time to file his record of appeal on March 29, 2021. The application came two years and 1 month later. He purports to blame the delay on his ill health and infirmity. Yet, nowhere in his supporting affidavit or other material before me does the applicant attempt to explain his advocate's failure to lodge the intended appeal even after obtaining certified



copies of the proceedings despite prior instructions to lodge an appeal. Neither has the advocate filed an affidavit to explain his own inaction.

15. It is over 2 years since his counsel lodged the notice of appeal and, yet, the applicant has taken no steps to institute the appeal in compliance with the requirements of Rule 84(1) of this Court's Rules, a delay which, unless excusable for good reason, is inordinate. Accordingly, his conduct or inaction for that long a period is inexcusable. In the circumstances, this Court cannot come to his aid. To hold otherwise would be to reward an indolent litigant who sat on his rights and, as an afterthought, now seeks to resurrect a dispute long dead and buried to the prejudice of those who peaceably embraced the judgment of the learned judge and moved on. Moreover, the impugned judgment has already been executed and the estate distributed accordingly. Consequently, his application has been overtaken by events, and must fail.
16. On the authority of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR, I find that the applicant's indolence counts and, in the absence of any reasonable excuse, works to the respondents' prejudice to the undesirable effect of unfairly delaying or denying them the fruits of the impugned judgment, which has already been executed.
17. With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that "... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable." It is only then would consideration as to whether the intended appeal is arguable would be worthy of the Court's attention in exercise of its discretion under Rule 4. It is noteworthy, though, that the applicant's Motion comes too late in the day, and any attempt to turn the tide would be to the respondent's prejudice.
18. In *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR p.61-2, this Court had this to say on the matter:

"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."
19. The applicant has not given any plausible and satisfactory explanation for the delay in filing his appeal. To my mind, his application comes as an afterthought, and there is no doubt in my mind that the Respondents and other beneficiaries of the already-distributed estate would invariably suffer undue prejudice by extension of time to lodge the intended appeal so long a time after delivery of the impugned judgment.
20. This Court has on numerous occasions pronounced itself on the principle that litigation must come to an end. In view of the foregoing, I find that the Applicant's Notice of Motion dated September 3, 2021 lacks merit. It fails and is hereby dismissed with costs to the respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

