



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 162 OF 2015

BETWEEN

CHARLES ONDIEK AWUOR1ST APPLICANT

SOSPETER ONYANGO AWUOR.....2ND APPLICANT

AND

JACOB ODHIAMBO OTIENO.....RESPONDENT

(Being an application for leave to appeal against the judgement of the High Court of Kenya at Kisumu

(T. W. Cherere, J.) dated 27th June, 2019

in

KSM. Succ. Cause No. 807 of 2004)

RULING

[1] *Charles Ondiek Awuor and Sospeter Onyango Awuor*, 1st and 2nd applicants respectively seem to be seeking leave to file an appeal stating that, they have no automatic right to file an appeal and an enlargement of time within which to file an appeal out of time in respect of the Judgement delivered on 27th June, 2019 in the High Court at **Kisumu Succession cause No. 807 of 2004**. The application is supported by the grounds stated on the body thereto and matters deposed to in the supporting affidavit sworn by the 1st applicant.

[2] According to the applicants, they have an arguable appeal as they fault the trial Judge for ruling that the respondent's father was a biological son of the deceased without cogent proof. They claim that the impugned judgment directed that the registration of three (3) parcels of land do revert to the name of the deceased and therefore they stand to suffer irreparable loss. As regards the explanation for the delay, the applicants state that they filed an application seeking stay of execution before the High court which was dismissed on 21st November, 2019 by which time, the time provided for filing an appeal had already lapsed.

[3] This application was listed for hearing by consideration of the record and submissions without appearance by parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. It was not opposed, although there is evidence on record to show that the respondent was duly notified of the hearing date. Nonetheless, absence of opposition does not lessen the duty placed upon me when exercising judicial discretion which must be exercised based on reason not caprice and by considering each case by its own peculiar circumstances, as always, each case is different from the other.

[4] On the issue of leave to file an appeal on the grounds that the applicants do not have an automatic right of appeal, it is my view that they should have sought that leave to appeal against the impugned judgment from the High Court. If the High Court declined to grant the leave that is when they can apply from this Court. This is because the orders being appealed against were not final. Moreover, the orders related to an objection proceeding where the court revoked the grant of letters of administration issued on 3rd July, 2012 to the applicants. Another grant was issued to the 1st applicant jointly with the respondent and the parties were directed to file an application for confirmation where the decree of confirmation would be issued.

[5] Going by the orders that were issued which the applicants wish to appeal against, it appears the succession matter has not been

completed because this is what the Judge ruled: -

“a) The objection has merit and it is allowed.

b) Letters of administration issued on 3rd July, 2012 in favour of CHARLES ONDIEK OWUOR and SOSPETER ONYANGO OWUOR and the grant confirmed in favour of CHARLES AWUOR, FRED AWUOR, WILLIS AWUOR, PETER OMOLLO and SOSPETER ONYANGO on 14th April, 2015 are hereby revoked.

c) Any sub-division and transfer in respect of Land Parcel Nos. KISUMU/WANGAYA I/1954; KISUMU/WANGAYA I/1957 and KISUMU/WANGAYA I/2555 is hereby cancelled and it is ordered that ownership in respect thereof shall revert to the name of ONGWENY WAYUNGU (DECEASED).

d) CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO are hereby appointed joint administrators of the deceased’s estate.

e) Upon issuance of the Letters of Administration, CHARLES ONDIEK AWUOR and JACOB ODHIAMBO OTIENO shall within 30 days from the date thereof proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all the beneficiaries and their respective beneficial entitlement to the estate.

f) The Petitioners are hereby condemned to pay costs to the Objector”

To me these are not final orders, the trial court is still seized of the matter, therefore if the applicants wish to appeal against the above orders, they should have sought leave before the trial court.

[6] As regards the prayer for enlargement of time, my jurisdiction is circumscribed under **Rule 4 of the Court of Appeal Rules**: -

“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”.

See also **Fakir Mohamed vs. Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR)**, thus: -

“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, (possibly) 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 the 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.”

[7] What the above guidelines portend is that, the applicants to be found deserving the exercise of discretion, they must offer reasonable and cogent explanation for the delay. The ruling was delivered on 27th June, 2019 and the instant application was filed on 17th December, 2019. Every delay even of a few days must be explained by the applicant demonstrating a genuine reason that prevented them from filing the appeal within the time provided in the Rules. Unfortunately, the applicants have not offered any explanation why they did not file the appeal on time. All they have said under paragraph 10 of the supporting affidavit is as follows: -

“That the reason for the delay is that we had filed an application for stay of proceedings pending the hearing of the intended appeal which ruling was only delivered on the 21st November, 2019 dismissing our application”

[8] With respect, I am not persuaded this is a cogent reason for failing to file the appeal because if the applicants were seeking to stay the proceedings to enable them file an appeal, then they ought to have demonstrated they had indeed filed an appeal which they had not. In other words, the applicants misrepresented to the High court where they were seeking stay on the basis that they had filed an appeal which indeed had not been filed.

[9] In conclusion, I think I have said enough to demonstrate that I am unable to exercise judicial discretion in favour of the applicants. That being my view of the matter, the application is dismissed with no order as to costs.

Dated and delivered at Nairobi this 19th day of February, 2021.

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR