IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, J.A - IN CHAMBERS)

CIVIL APPLICATION NO. 75 OF 2020

BETWEEN

WILLIS ONEKO OPIATA.....APPLICANT

AND

FREDRICK OMONDI WERA.....RESPONDENT

(Being an application for extension of time to lodge an appeal against a judgment of the High Court of Kenya (Hon. T. Cherere, J.) dated 29th November 2018

in

Kisumu H.C Succession Cause No. 1021 of 2014)

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RULING OF THE COURT

Before me is a Notice of Motion dated 8th July, 2020 under **Rules 4** and **5(2)(b)** of the **Court of Appeal Rules,** substantively seeking leave of the Court to file an appeal out of time together with an attendant order for provision for costs. It is supported by grounds on its body, a supporting affidavit sworn by **Willis Oneko Opiata**, the applicant, together with annextures thereto. It has been opposed by a replying affidavit sworn by **Fredrick Omondi Wera**, the respondent, on 28th January, 2021 together with annextures thereto.

The application was canvassed through rival pleadings and respondent's written submissions without oral highlighting.

Supporting the application, the applicant avers that he was aggrieved by the trial courts judgment delivered on 28th November, 2018 in favour of the respondent. He applied for and was subsequently supplied with a certified copy of the proceedings for appellate purposes. He blames financial constraints for failure to initiate the intended appellate process timeously. He was also sick for a long time a situation worsened by the onset of corona virus Covid-19 pandemic.

It is, in light of the above assertions, that he contends that unless the relief sought is granted he will be highly prejudiced as the trial court's judgment bestowed a benefit to the respondent who according to him is a fictitious person in so far as succession to land parcel number **Siaya/Mahaya A3358** is concerned. There has been no inordinate delay in seeking the Court's intervention to salvage his intended appellate process. According to him, the reasons advanced above for the delay in seeking the Court's intervention to salvage his appellate process are not only plausible but also excusable.

In rebuttal, the respondent relying on his replying affidavit and submissions contended that judgment was delivered on 28th November, 2018, while certified copies of proceedings were supplied to the applicant on or about 13th December, 2019. Instead of pursuing the intended appellate process before this Court, the applicant unsuccessfully applied twice to the trial court on 24th June, 2019 and 30th June, 2020 respectively for leave to appeal against the said judgment out of time, both of which were dismissed on merit on 24th October, 2019 and 12th August, 2020 respectively, matters not disclosed by the applicant in his supporting documents. The application is, therefore, an abuse of the Court's process and should be declined especially when the Court's intervention is sought twenty (20) months after delivery of judgment have not been explained at all.

My invitation to intervene on behalf of the applicant has been invoked under **Rules** of the Court cited in the heading of the application. **Rule 5(2)(b)** has been cited out of context as it does not fall for consideration in an application of this nature. It is accordingly struck out. What falls for consideration herein is only **Rule 4** of the Courts **Rules**. It provides:

> **"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."**

The principles that guide the court in the exercise of its mandate under the **Rule 4** of the **Court of Appeal Rules** have now been crystallized by case law. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, among numerous others. See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others. The principles distilled from the numerous case law may be enumerated *inter alia* as follows: *The mandate under Rule 4 is discretionary, unfettered, and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the Court's unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance; orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one; the discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered; as the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant; the degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity; whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word **"possibly"**; 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 a delay is the key that unlocks the court's flow of discretionary power. There has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

I have considered the record in light of the above threshold. The factors I am obligated to take into consideration in determining this application as crystallized by the above distilled principles/propositions are but not limited to the period of delay, reasons for delay, arguability of the intended appeal and any prejudice likely to be suffered by the respondent if the Court were to exercise its discretionary mandate in favour of the applicant.

On the period of delay, it is my finding that from 28th November, 2018 when the judgment was rendered to 8th June, 2020 when the application under consideration was filed is a period of one year, six (6) months and ten (10) days. Applicant's explanation for the above delay is as already highlighted above. The first appellate step applicant ought to have taken to express seriousness in his desire to pursue his intended appellate process should have been to timeously file a notice of appeal within fourteen (14) days, pursuant to **Rule 75(1)** and **(2)** of the **Court of Appeal Rules**. These provide:

> **"75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
>
> **2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**
>
> **....."**

Second, to cause the notice of appeal filed to be served on the opposite party within seven (7) days of such lodging as provided for in **Rule 77(1**) of the Court of Appeal Rules. It provides as follows:

> **"77(1) Any An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:**
>
> **....."**

The facts relied upon by the applicant in support of his application are silent as to why no notice of appeal was timeously filed and served as provided for in the above mentioned rules.

The applicant has raised issue of lack of certified copies of proceedings. He has mentioned he applied for a certified copy of proceedings and

that it took long for these to be supplied to him. He has not, however, in his averments disclosed when he applied for those certified copies of proceedings nor when these were supplied to him. It is instead, the respondent who has mentioned in his written submissions that these were supplied to applicant on or about December, 2019. There is no rebuttal to that assertion by applicant. I take it that this is the correct position. It is, therefore, my finding that from the date of capacitation with certified copies of proceedings to the date of presentation of the application under consideration is almost seven (7) months. There is no explanation in the applicant's supporting documents as to why he took no initiative to seek the Court's intervention from the date of capacitation with a certified copy of proceedings.

There was also mention of financial constraints whose details or proof of were not also given. Finances were allegedly intended to hire an advocate to represent him in the intended appellate process. No mention was made as to why no attempts were made by him to initiate the appellate process in person in the manner the application under consideration was initiated. Lastly, there was also mention of sickness whose details were not given. Applicant's supporting facts are also silent with regard to attempts made twice by him to seek similar relief from the trial court.

In **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the thresholds in the above quoted cases, I find that though the period of delay herein is much less than twenty (20) months subject of the Court declining to exercise its discretionary mandate in favour of the applicant in the **George Mwende** case [supra] on the one hand and far much more than the period that led the Court declining to exercise its mandate in favour of the applicant in the **Aviation Cargo** case [supra] on the other hand, explanation given by the applicant herein for delay are not plausible for lack of substantiation as already highlighted above. This prerequisite has therefore not been satisfied.

On arguability of the intended appeal, the applicant relies on a litany of nineteen (19) homegrown proposed grounds of appeal which may be paraphrased albeit in a summary form that the learned Judge erred both in law and fact by: allowing the respondent's claim as a beneficiary to deceased's estate without basis, failing to appreciate contradictions in the respondent's claim, failing to appreciate that the respondent produced no birth certificate to prove both his ancestry and correct names, failing to accord the applicant an opportunity to properly ventilate his case; failing to order for a DNA to prove the respondent's right to claim as a beneficiary of the deceased's estate, failing to give adequate opportunity to his witnesses to testify on his behalf, failing to give adequate weight to the chief's letter which indicated clearly that the respondent was not listed as a beneficiary of the deceased's estate, failing to appreciate that all those who supported the respondent's claim conspired to defeat the cause of justice, including reluctant persons as beneficiaries of the deceased's estate, over stretching the meaning of the word **"interested party"**, and, holding that he obtained the vitiated grant by concealment of material facts without basis.

The position in law as crystallized by principles of case law distilled above is that an arguable appeal need not be one that must succeed, but one that warrants not only invitation to the opposite party to respond thereto, but one that also warrants the Court's interrogation.

Applying the above threshold to the above set out proposed grounds of appeal which the applicant intends to raise on appeal, I have no doubt they would all warrant the respondent's response thereto as well as the Court's interrogation. They are therefore arguable.

The above conclusion on the arguability of the intended grounds of appeal does not perse operate to guarantee the applicant the relief sought, as it cannot be considered in isolation but in conjunction with the rest of the other factors required to be established under **Rule 4** of the **Court of Appeal Rules** before exercise of the Court's discretion in his favour.

On prejudice likely to be suffered by the respondent should the relief sought be granted, his contention is that this is a succession matter; which has been under litigation for a long time, and should be put to rest.

On the basis of the totality of the above assessment and reasoning, it is my view that since the applicant has only succeeded on establishing one factor namely, that the intended appeal is arguable, the application is not sustainable. It is accordingly dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR