



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, JA - IN CHAMBERS)

CIVIL APPLICATION NO. 143 OF 2020

BETWEEN

REBECCA MORAA ONGAKI APPLICANT

AND

JUVINALLIS ONSANDO OGUMBORESPONDENT

(An Application for leave for extension of time to file Notice of Appeal and Record of Appeal out of time against the Judgment of the Environment and Land Court (J. M. Mutungi, J.) dated 26th July, 2019

in

Kisii HCC No. 92 of 2005)

RULING OF THE COURT

Before me, is a Notice of Motion brought under **Court of Appeal Rules** at large and all other enabling provisions of the law seeking leave to file both a notice of Appeal and record of appeal out of time against the decision made in the Environment and Land Court at Kisii, Case No. 92 of 2005 delivered on 26th July, 2019 together with an attendant order that costs incidental to the application to abide the outcome of the appeal.

It is supported by a supporting affidavit sworn by **Rebecca Moraa Ongaki** together with annexure thereto. It is not opposed. At least no replying affidavit has been traced on the record nor written submissions filed by the respondent in response to the hearing notice served electronically by the Deputy Registrar of the Court to Advocates on record for the respective parties on Monday 8th March at 11.00p.m notifying parties of the hearing date of the application which is today 11th March, 2021 and also inviting them to file written submissions according to the specification given therein and time line given. Only applicant complied with that prerequisite by filing written submissions.

The application was therefore canvassed through applicant's sole pleadings and submissions. It is applicant's averments and submissions that she is the administratrix of the estate of the late **Christopher Ongaki Nyangunia** who was the defendant in Kisii HCCC No. 92 of 2005. He was aggrieved by the outcome of the decision in the said matter and expressed his desire to appeal against that decision. He was at the time hospitalized. Acting on the deceased's instructions, Applicant filed a notice of appeal on his behalf. The deceased unfortunately passed on, on 7th August, 2019. His death notwithstanding, the applicant prepared a record of appeal and caused it to be filed. It was only after being advised by her advocate on record for her that the entire process was incompetent in law that she went back to the drawing board to first of all comply with the procedural steps of being vested with authority to champion the appellate rights of the deceased. She withdrew the incompetent processes of court, got herself vested with authority to represent the interests of the deceased through a grant of representation to the estate of the deceased Ad Colligenda bona, and applied before the ELC for substitution.

Upon being capacitated as indicated above is when she filed the application under consideration by which time, time for initiating an appellate process on behalf of the deceased as of right had long lapsed hence the application under consideration seeking prayers indicated above.

It is on the totality of the above uncontested position that the applicant contends that the delay in timeously initiating the appellate process on behalf of the deceased was not deliberate. It was on account of circumstances beyond her control as explained above. It is therefore excusable.

My invitation to intervene on behalf of the applicant has been invoked generally under the Rules of this Court but as subsequently demonstrated by the applicant, the mandate of the Court in an application of this nature is donated by **Rule 4** of the Court's Rules. It provides:

“(4) 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 said Rule is what applicant has highlighted in her submissions without disclosing the source. It is common knowledge that these have been crystalized both by this Court and the Supreme Court of Kenya. Those highlighted by applicant above have been drawn from numerous pronouncements of the Court and restated severally. 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.*

From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

Starting with the delay, it is not in dispute that the intended impugned judgment was delivered on 26th July, 2019, while the application under consideration is dated 28th November, 2020 a period of one year, four (4) months and about five (5) days.

In **George Mwendu 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 above threshold to the uncontroverted position herein, it is my finding that the length of delay under interrogation herein is not so long as that which was the subject in the **Mama Day Nursery School** case [supra] that led to the Court declining relief therein. It is however longer than the length involved in the **Aviation Cargo** case (supra) which also resulted in the Court declining to exercise its discretion in favour of the applicant therein. The above being the position, issue as to whether the applicant's request is sustainable or not will depend on my take on the reasons given for the delay.

As highlighted above, the uncontroverted position is that, the applicant moved timeously to initiate the appellate process but then the deceased passed on a day after initiating the process. Undeterred, the applicant continued to progress the appellate process by filing the record of appeal until advised that all her efforts to pursue appellate rights on behalf of the deceased were all in vain as they were tainted with invalidity and that the process needed regularization. It was only after being capacitated with a grant of representation of the estate of the deceased that she finally gained legal status to resuscitate the process hence this application. Applicant has annexed documentary proof in support thereof. There is no reason for me to doubt them. I am therefore satisfied that they are genuine. The reason for the delay is plausible, and, therefore, excusable.

As for arguability of the intended appeal, there is a draft memorandum of appeal. Applicant intends to fault the trial Judge for not holding that the respondent's right over a portion of land measuring 0.39Hectares out of land parcel No. **West Kitutu/Bogusero/2410** had extinguished; misdirecting himself fundamentally in holding that no evidence had been led to establish a trust; misapprehending the evidence adduced by the parties hence arrived at a wrong decision; misdirecting himself fundamentally in holding that the respondent procedurally acquired his title from land parcel No. **West Kitutu/Bogusero/ 1853**; holding that the respondent had proved his case on a balance of **KSM Civil Application No. 143 of 2020 Ruling of the Court** probability; and lastly, misdirecting himself fundamentally in rejecting the appellant's counterclaim.

In law an arguable ground of appeal is not one that must necessarily succeed but one that is *bona fide* and would not only call for a response from the opposite party but also warrant the court's interrogation. All the above in my view, satisfy the threshold for arguability of the intended appeal.

As for prejudice to be suffered by the opposite party, I find none.

In the result, I find that on the totality of the above assessment and reasoning, the applicant has satisfied the threshold for granting relief under the above rule. The application is allowed and I therefore proceed to make orders thereon as follows:

- (1) The applicant has fourteen days from the date of the delivery of this Ruling to file and serve a notice of appeal.**
- (2) The applicant has sixty (60) days from the date of the lodging of the notice of appeal to file a record of appeal.**
- (3) There will be no order as to costs.**

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 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