



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 137 OF 2020

BETWEEN

FRANCIS WESONGA ODIPO.....1ST APPLICANT

RAMADHAN WANZAFU MUNGAYI2ND APPLICANT

AND

ALI OMONDI MALICHI.....1ST RESPONDENT

MANEYA M. OSAMBAYO.....2ND RESPONDENT

(Being an application for leave to lodge and serve the record of appeal from the Judgment of the High Court of Kenya

at Kakamega (Njagi, J.) dated 17th June, 2020

in

HC. Succession Cause No. 595 of 2009)

RULING

On the 12th February, 2012 the High Court issued a fresh grant of letters of administration to the 1st applicant and the two respondents jointly. They were, however, unable to agree on the mode of distribution of one parcel, **South Wanga/Lureko/181**, registered in the name of the late Odipo Wangoma, the 1st applicant's late father (the deceased). The 1st respondent, for his part, claimed entitlement to a share of that property on the ground that it was registered in the name of the deceased in trust of his (1st respondent's) father, Malichi Wangoma, who was the younger brother of the deceased.

On 17th day of June, 2020, J.N. Njagi, J. agreed that the deceased was registered as proprietor of the land in question in trust for his brother Malichi Wangoma; that the land ought to be shared between the heirs of Odipo Wangoma and the deceased in two equal portions; that since the land measures 33 acres, and because the 1st respondent only desires to be given 12 acres only, that he was entitled to 12 acres of the suit land, **South Wanga/Lureko/181**, and the remaining 21 acres be shared equally between some 6 beneficiaries, with each getting 3.5 acres; and that since John Mungayi Odipo, another beneficiary had died during the pendency of the succession cause, his share would be given to his son, the 2nd applicant.

The applicants were aggrieved but have not filed the appeal arguing that it was not until 3rd November, 2020 when they received the typed proceedings and a copy of the judgment from the trial court; that the delay was squarely attributable to the court, which itself acknowledged this and even issued to them a certificate of delay; and that they have a strong case which ought to be considered and determined by this Court on appeal.

The respondents have raised two issues in opposition to the application; that the 2nd respondent is not properly joined in the proceedings and that the applicants are not deserving of the Court's discretion as the application does not meet the threshold set in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** - Civil Application No. NAI 255 of 1997.

It is here that I must start. This Court in dealing with an application for extension of time exercises discretionary powers. It is also well settled that discretionary powers can only be exercised judiciously and only on sound grounds. Therefore the single Judge will be guided by factors such as, the length of the delay, the reason for the delay, the degree of prejudice to the respondent if the application is granted, and (possibly) the chances of the appeal succeeding if the application is granted.

The applicants have specifically applied that time be extended to them to lodge the record of appeal. That prayer presupposes that the applicants have filed a notice of appeal. From my perusal of the record, this is not apparent. But since the respondents have not complained, I do not wish to get into that question.

Judgment was rendered on 17th June, 2020. The record, in terms of **Rule 82** of the Court of Appeal Rules ought to have been instituted within sixty days of the date when the notice of appeal was lodged. I have not seen the notice of appeal, as indicated earlier.

The Deputy Registrar of the High Court certified that the registry took 120 days to prepare the proceedings and the judgment that were finally presented to the applicants on 2nd November, 2020. This application was taken out on 9th November, 2020.

Taking into consideration all the circumstances enumerated above, the fact that the applicants returned to the High Court to seek orders of stay of execution, whose outcome had not been conveyed by the time they made the instant application, in my estimation, they have made out a case for the exercise of my discretion. The delay is not inordinate and the explanation they have proffered is reasonable and plausible. I cannot discern any prejudice the respondents stand to suffer. Being a family dispute, regarding probate, parties are entitled to a second chance.

For all these reasons, the application succeeds. The applicants have leave to lodge and serve the record of appeal within 30 days of the date of this ruling. Costs will be in the appeal itself.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR