



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: F. SICHALE, J.A IN CHAMBERS]

CIVIL APPEAL (APPLICATION) NO. 18 OF 2020

BETWEEN

CAROLYNE AKINYI WAFULA.....APPLICANT

AND

MARY NANDUTU.....RESPONDENT

(An application for extension of time to file and serve a record of Appeal out of time arising from the Ruling and Orders of the High Court of Kenya at Bungoma (A. Aroni, J) dated 27th March, 2018

in

P & A Cause No. 92 of 2001.)

RULING OF THE COURT

The Applicant's Notice of Motion dated 20th January 2020 brought pursuant to Order 49 Rule 5 and Order 41 Rule 4 of the Civil Procedure Rules and Section 79 G and 3 A of the Civil Procedure Act and all other enabling provisions of the law, seeks the following orders:

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a) Spent

b) THAT this Honourable Court be pleased to enlarge time within which to file the Memorandum of Appeal and upon such enlargement the Memorandum of Appeal filed be deemed as properly filed.

c) THAT this Honourable Court be pleased to grant an order allowing the firm of Messrs Okatch & partners Advocates to come on record for the Applicant/Appellant.

d) THAT the cost of this application abide the results thereof”.

The Notice of Motion is based on the following grounds:

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1. THAT the Applicant is the Petitioner in High Court Succession Cause No. 92 of 2001 currently before the High Court in Bungoma.

2. ***THAT when called upon by the parties and/ or heirs to the estate to make a determination on division of the properties of the estate, the High Court pronounced itself vide the ruling and orders issued by the Honourable Lady Justice Ali Aroni on the 27th day of March 2018.***
3. ***THAT pursuant to the rules governing litigation in succession matters, the Applicant had to seek leave from the High Court before he could appeal the said ruling.***
4. ***THAT on the 19th June, 2019 the High Court did indeed grant the Applicant leave to file the record of Appeal within sixty days of the said ruling.***
5. ***THAT the Applicant was however unable to file the record of appeal within the given timelines as she was yet to be furnished with the typed proceedings to enable her file the record of appeal and thus the delay.***
6. ***THAT the Applicant has an arguable appeal with a very good chance of success and if the Applicant is not granted an extension of time to file the appeal out of time, the Applicant shall be prejudiced as it shall not have a chance to challenge the ruling of the High Court.***
7. ***THAT the Respondents will not be unduly prejudiced if the orders prayed for are granted.***
8. ***THAT it is in the wider interest of justice that the orders sought be granted so as to allow the determination of the intended appeal on its merit.***
9. ***THAT the Respondents will not be unduly prejudiced if the orders prayed for are granted”.***

The Notice of Motion is supported by the affidavit of **Carolyn Akinyi Wafula**. Therein she deposed that; she was the Petitioner in High Court Succession Cause No. 92 of 2001 currently in Bungoma. Together with the Respondent, they are Co-administrators of her late father's estate and during the distribution of the assets; the Court was called upon by the parties and the beneficiaries to make a determination on division of the properties. The High Court pronounced itself vide ruling and orders issued by the Honourable Lady Justice **Ali Aroni** on **27th March, 2018**. Upon the advice of her advocates, she is seeking leave of the Court to file an appeal as succession matters do not arise as of right in the Court. The Applicant's Advocates filed an application for leave before the High Court in Bungoma, which was granted on **19th June, 2019**, a copy of the ruling is hereto annexed and marked CAW-1. The Notice of Appeal was filed on **15th of July, 2019**, a copy of the same is annexed and marked CAW.

The Applicant further swore that they were not furnished with the typed proceedings and copies of the letters requesting for the typed proceedings are marked CAW-3. A certificate of delay hereto annexed and marked CAW 4 showing the delay by 3 months. The Applicant further deposed that firstly, she has an arguable case; secondly, the Applicant will be prejudiced as she will not have a chance to challenge the ruling; thirdly, the delay in bringing the application is inordinate and she humbly requests the Court to extend time to file the Appeal out of time/ or that the Memorandum of Appeal be deemed as having been properly filed out of time; fourthly, the draft Memorandum of Appeal has a high chance of success and finally, the Respondent will not be prejudiced.

The Respondent in their replying affidavit sworn on **18th June 2020**, deposed that the Applicant filed a Chamber Summons dated **5th June, 2018** seeking from the Superior Court orders that; firstly, the application be certified and in view of the urgency, service in the first instance be dispensed with; secondly, the Honourable Court be pleased to grant the Applicant leave to file an appeal of the ruling delivered on **27th March 2018** out of time; thirdly, the Honourable Court be pleased to issue a stay of enforcement of the ruling delivered on **27th March, 2018** pending hearing and determination of this application; fourthly, the Honourable Court be please to issue a stay of enforcement of the ruling delivered on **27th March 2018** pending the filing of the said appeal by the Applicant; fifthly, the Honourable Court do award any other order it may deem just, fit and expedient to award in the interest of

justice and finally, the cost on the Application be provided. Further to that, the Applicant deposed that there were three notable things that emerged from the Applicant's application namely; the Applicant did not seek for leave of the

Superior Court to Appeal against the Ruling of **27th March 2018**; that the Applicant never sought for leave to file a notice of appeal out of time and that the Applicant only sought for leave to file a memorandum of appeal out of time, a prayer that was granted by the Superior Court.

The Applicant further deposed that the orders sought by the Applicant in the premise of the foregoing cannot be granted by the Honourable Court and can only get the appropriate orders in the Superior Court. The Respondent swore that the Applicant has deliberately avoided following the path hereinabove and is only forum shopping. That without prejudice to the foregoing, the Applicant has not found it necessary to explain the delay of the 120 days a period after obtaining the certificate of delay therefore, the Applicant's application is an abuse of Court process.

The Applicant in his submission dated **26th January 2021**, identified one issue for resolution before Court. That is whether the Court should extend time for the Applicant to file her record of Appeal. In response to the issue, the Applicant placed reliance on the case of **Donald O. Rabala v Judicial Service Commission [2020] eKLR** that outlined the principles that guide the Court in exercising its mandate under Rule 4 of the Court of Appeal Rules; Article 159 (2) 9(d) which unfetters the Court from the clutches of technical subservience.

The Applicant further draws Court's attention to the case of **Richard Nchapi Leiyagu v IEBC & 2 others [2013] eKLR** the gist of the case being that *the mandate under rule 4 is discretionary, unfettered and does not require establishment of 'sufficient reasons' neither are they limited.*

The Applicant submits that the power of Court in considering applications is discretionary and ought to be exercised judiciously. She urged that the Court is called upon to address itself as to whether the delay by the Applicant to lodge the Appeal was inordinate. The Applicant stated that the file was handled by **Hon. Lady Justice F. Muchemi, Hon. Justice A. O. Muchelule, Hon. Lady Justice Ali Aron and Hon. Justice S. Riechi**. It is pursuant to this delay that the Deputy Registrar issued the certificate of delay. On whether the application was *res judicata*, the Applicant submitted that the ruling of the Honourable Court of the Superior judge shows that the application was in respect to an application for leave to appeal, the decision of the Court as an appeal in family and succession matters does lie as a matter of right.

The Applicant concludes the submissions by stating that the Court has a duty to promote justice and afford the Applicant a chance to be heard pursuant to the provisions of the Constitution of Kenya, 2010 and drew Court's attention to the case of **Samson Nderitu v Martha Watetu & Joseph Ndumia Kariru CA No. 168 of 2014**, the gist of the case being that it is an established principle that disputes wherever possible, should be finally determined and no party who desire to be heard by the Court should be driven of the seat of Justice.

In **Karny Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018, Koome, JA** stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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 a 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. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal”.

Similarly, in *Abdul Azizi Ngoma vrs. Mungai Mathayo [1976] Kenya LR 61, 62*, the Court of Appeal held:

“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.”

The delays herein were explained by the certificate of delay from the court. It is my opinion that the Application is merited and I hereby allow it. However, this being a Succession matter, I direct that each party shall bear his/her own costs.

It is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR