



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 109 OF 2020

BETWEEN

DAVID MUGO MUTHIORA.....APPLICANT

AND

JOSEPH KAMAU NJOROGE..... RESPONDENT

*(An application for extension of time for filing a record of appeal out of time from the ruling of the High Court of Kenya at Nairobi (R.E.Ougo, J.) dated 30th June 2017)*

in

SUCCESSION CAUSE NO. 1669 OF 2011)

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RULING

This is an application dated 4th April 2019 by **David Mugo Muthiora** (the applicant) seeking extension of time within which to file and serve the record of Appeal against the ruling of the High Court, (**Ougo, J.**) delivered on 30th June 2017, having filed a notice of appeal on 27th July, 2017. The application is expressed to be brought under **Rule 4 of the Court of Appeal Rules, Section 1A, 3 and 3A of the Appellate Jurisdiction Act.**

The brief facts leading to the ruling sought to be impugned on appeal are that the respondent had sued the administrator of the estate of **Susan Waithera Muthiora** (the applicant) after grant of letters of administration had been confirmed alleging to have bought an acre from the deceased in respect of the parcel known as **Karai/Gikambura/1434** and which information was not brought to the attention of court at the time the grant was confirmed. He further pleaded that the confirmation was done without the applicants' share being indicated in the grant. As expected the application was opposed, however in a ruling delivered by the trial court on 30th June 2017 it found in favour of the respondent, that's he was entitled to an acre from the deceased estate and in particular from the suit property. It directed that the administrators do discuss and give an acre to the respondent and the matter be mentioned in 60 days to confirm compliance with the orders of the court and get further directions. Dissatisfied with the said ruling, the applicant lodged an appeal against the said decision and equally brought up the current application.

The applicant contends that: the delay in lodging the record of appeal was due to the delay in receiving typed proceedings; that the applicant, after the ruling was delivered filed a notice of appeal and requested for typed proceedings which was assessed and paid for the same but after some time, he was informed that the file was missing in the registry. Several follow-ups were made to no avail including writing to the deputy registrar, the registrar of the high court of Kenya, the high court ombudsman and the presiding judge of the high court division but even to date the file has not yet been traced.

The applicant avers that his intended appeal raises triable issues which are weighty including handling a matter that dealt with land ownership and transfer which was to be tried by a different court; finding that there exists a land sale transaction when ideally there was not among other grounds.

The respondent did not file any response or submissions to the application.

I have considered the application, grounds in support thereof, the respondent's replying affidavit, submissions by counsel and the law. **Rule 4 of the Court of Appeal Rules** does not provide the factors that the court ought to consider in an application of this nature but courts have over the years devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. In this regard case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters as follows:

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”*

Further in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** dealing with the same issue, this Court rendered itself thus:

*“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path..... 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, (possible) 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 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 factor.**”*

There is no maximum or minimum period of delay set out under the law. Further, the reason or reasons for the delay must be reasonable and plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court stated:

*“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 delay is the key that unlocks the court's flow of discretionary favor. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”*

The delay in filing the record of appeal is approximately three years eight months. The applicant cited the delay to being occasioned by the loss of the file and despite several efforts that have been made including writing letters he has to concerned authorities but have not yielded any fruit whatsoever. There are letters dated 17<sup>th</sup> December 2018, 28<sup>th</sup> January 2019 and 13<sup>th</sup> March, 2019 all from the applicants advocate requesting for the file or assistance to have the same traced which letters bear the rubberstamp of the superior court but the rubberstamp does not indicate or show receipt of the same. Some of the letters for instance has a date of 14<sup>th</sup> August 2017 but the high court family division stamp is of 11<sup>th</sup> October 2017. The applicant has not attached any letter from the court showing that indeed they received his letters and they have tried to look for the file in vain.

I am also meant to understand that the file has not been traced to date as stated by the applicant in his motion at paragraph “m” and in the submissions that are recently filed. What then would be filed when this court extends the time to filing of the record of appeal? **What prevented the applicant from preparing and filing the record of appeal without the proceedings as he wants to do now without those proceedings?** Will the order therefore avail the file? As if the applicant if time is granted and the file has not been traced, what will be the essence of the said order? The delay from 2017 to date has not been explained to my satisfaction.

In **Hamendra Mansukhalal Shah v Alnoor Kara & Another [2000] eKLR** the Court stated as follows:

*“I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged.”*

From the foregoing, the applicant had a duty to obtain evidence from the court registry to show that there was a delay in typing and supply of proceedings. The applicant also had the responsibility to follow up on their case after writing the letters and get response to the same. The blame has been put to court but the deputy registrar ought to have given the applicant some evidence to show that indeed there was problem from their side and that the file had gone missing. The applicant had also an option to apply for the reconstruction of the court file on the basis of the documents in it's which option he did not exercise.

On the chances of success of the intended appeal succeeding and, without going into the merits of the intended appeal as this will be determined by the full bench which will be seized of the appeal, I have looked at the annexed intended memorandum of appeal and the ruling and would say possibly the same maybe arguable I am guided by the sentiments of this Court in **Athuman Nusura Juma v Afwa Mohamed Ramadhan**, CA No. 227 of 2015 where this Court stated as follows:

***“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”***

On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying them an extension, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the ruling of the trial court and is desirous of appealing against the said judgment albeit out of time hence the instant application.

Bearing in mind the aforementioned parameters, from the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in **Leo Sila Mutiso** (supra). In the circumstances of this application, I find that the delay was inordinate and insufficiently explained. Without expressing definitive conclusions, the applicant has also failed to demonstrate the likelihood of the intended appeal succeeding. In the result I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application dated 4<sup>th</sup> April, 2019 with costs to the respondent.

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

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**