



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 95 OF 2020

BETWEEN

ZACHARIA NYAKUNDI.....APPLICANT

AND

HAGGAI OGOTI.....1ST RESPONDENT

KENNEDY OSORO.....2ND RESPONDENT

(Being an application for leave to appeal against the ruling of the High Court of Kenya at Kisii (Ougo, J.) dated 2nd July 2019 in Succession Cause No. 537 of 2015)

RULING

1. In his application dated 17th August 2020, the applicant Zacharia Nyakundi the applicant seeks an order for enlargement of time within which to lodge an appeal and also leave to appeal against a ruling of the High Court at Kisii (*Ougo, J.*) delivered over one year earlier, on 2nd July 2019. In that ruling, the High Court allowed the respondents application for revocation of a grant of letters of administration that had been issued to the applicant as the sole administrator of the estate of Samuel Obite Getabu alias Obite Getabu and ordered a fresh grant to issue in the names of Haggai Ogoti and the applicant. In the same ruling the court directed the applicant and the said Haggai Ogoti, the 1st respondent, to apply for confirmation of the grant within 45 days.

2. The respondents' application for revocation of grant on the basis of which the ruling of 2nd July 2019 was given was based on grounds that the applicant had failed to disclose the respondents as beneficiaries of the deceased contending that a parcel of land known as Nyaribari Masaba Bonyamasicho/299, though registered in the name of the deceased, was held in trust for the respondents' father, who was mentally handicapped.

3. The applicant explains, in his undated supporting affidavit, that the reason for the delay in making the present application was because he had filed an application of stay of proceedings "*pending the hearing of the intended appeal*" before the High Court and a ruling in respect thereof was only delivered on 5th August 2020.

4. In opposition to the application, the respondents have submitted through Ms. Momanyi Aunga & Co advocates that the reason given for the delay in presenting this application is "*lame*"; that the application for stay of proceedings in the High Court referred to by the applicant was only filed on 20th January 2020 after the respondent had applied for confirmation of the grant; that there is no explanation why a notice of appeal was not filed within 14 days of the ruling given on 2nd July 2019.

The case of *Leo Sila Mutiso vs. Rose Wanjari Mwangi, Civil Application No. NAI 255 of 1997* was cited for the proposition that the discretion conferred on the Court must be exercised judiciously and there has to be explanation for delay.

5. Furthermore, it was submitted for the respondent, the intended appeal is frivolous as there is no dispute that the applicant's father and the respondent's father were "blood brothers" who had lived harmoniously with no dispute over the property.

6. I have considered the application. It is correct, as submitted by counsel for the respondents that the decision whether or not to grant leave to appeal is discretionary and the matters for consideration in that regard include length of delay involved, reasons for the delay, chances of appeal succeeding and the prejudice that might result. *Waki, J.A* captured the principle in the context of an application for extension of time to appeal in **Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR** as follows:

“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

7. In relation to the present case, the ruling the applicant intends to challenge on appeal was delivered on 2nd July 2019. The present application is dated 17th August 2020. The length of delay involved in presenting the application is over one year. What is the explanation for that delay? The applicant says that he was waiting for delivery of a ruling in respect of his application for stay of proceedings before the High Court, which was delivered on 5th August 2020. What the applicant does not say, which is evident from the ruling of 5th August 2020, is that he filed his application leading to that ruling on 20th January 2020. That was over six months after the delivery of the ruling of 2nd July 2019. Moreover, I am not persuaded that applicant would have been prevented from seeking leave to appeal in a timely fashion by reason that he was also applying for stay of proceedings in the High Court.

8. I am unable, in the absence of a plausible explanation for the inordinate delay involved, to exercise the Court's discretion in favour of the applicant. It is also noteworthy that the applicant is a joint administrator of the estate of the deceased and is not excluded in the administration of the estate.

9. I therefore decline to extend time as prayed. Having declined the request for extension of time, the question of leave to appeal against the ruling given by the High Court on 2nd July 2019, assuming the same is required, also fails. (see **Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & another [2016] eKLR**)

10. In the result, the application dated 17th August 2020 is hereby dismissed. Having regard to the relationship between the parties, I make no orders as to costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR