



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU JA (IN CHAMBERS))

CIVIL APPLICATION NO. 48 OF 2020 (UR 40/2020)

BETWEEN

ALI NDERITU NJOROGE.....APPLICANT

VERSUS

SERAH WAMBUI NDERITU.....1ST RESPONDENT

JOHNSON KIRAGU WACHIRA.....2ND RESPONDENT

(Application for extension of time to file and serve the Memorandum and Record of appeal in respect to an intended appeal from the Judgment and decree of the High Court in Nyeri (T. Matheka, J) delivered on 19th April, 2018

in

HC Succession Cause No. 307 of 2003)

RULING

[1] The applicant, **Ali Nderitu Njoroje (Ali)** was the 1st respondent in the application for revocation of grant that was filed before the High Court in Succession Cause No. 307 of 2003 by **Serah Wambui Nderitu (Serah)**. **Johnson Kiragu Wachira (Wachira)**, was also a respondent in the application. In the judgment delivered on 19th April 2018, the learned Judge (**T. Matheka, J**) allowed the application for revocation of grant and redistributed the estate. It is this judgment that Ali intends to appeal against. Ali had lodged a notice of appeal against the judgment on 10th April, 2018, through his former advocate who also applied for certified copies of proceedings and judgment by letter dated 27th April, 2018.

[2] By a notice of motion dated 3rd June, 2020 filed on 8th June 2020, Ali has moved this Court under Rule 4 of the Court of Appeal Rules, for orders for extension of time to enable him file the memorandum of appeal and record of appeal. In an affidavit sworn in support of his application and written submissions, Ali explains that the delay in filing the appeal was due to the mistake of his former advocates who failed to take action or give him any information after he received certified copies of typed proceedings.

[3] Ali deposes that unknown to him, the certified proceedings and judgment were availed to the former advocates on 31st August, 2018 but the advocate failed to file and serve a memorandum of appeal. He further states that he only came to realize this on 22nd May, 2020, when he changed advocates. Ali submits that the mistake of the former counsel should not be visited upon him. He maintains that he has a solid appeal with a high probability of success, and that the respondents will not be prejudiced if the extension of time is granted.

[4] Despite being served with the application and a hearing notice, neither Serah nor Wachira filed any reply to the applicant's motion. Hearing of the motion proceeded by way of written submissions without

the presence of the parties or their advocates. Despite being served with the hearing notice, Serah and Wachira did not file any written submissions.

[5] I have considered the motion and the written submissions of Ali. The issue at hand is whether I should exercise my discretionary powers under Rule 4 of the Court Rules to extend time to enable the applicant file his appeal out of time. The principles which may be taken into account in considering such an application are now well settled. The discretion must be exercised judicially, having regard to the particular circumstances of the case including not only the length of the delay and reasons for the delay, but also the chances of the appeal succeeding and the degree of prejudice that the respondent may suffer if the application is granted. (See Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, (Civil Application No. Nai 254 of 1997), Mwangi vs Kenya Airways Limited [2003] KLR 486).

[6] In Fakir Mohamed vs Joseph Mugambi & 2 others [2005] eKLR, Waki JA addressed the issue of unfettered discretion as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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, (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.”

[7] Further crystalization of the principles was done by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] eKLR, as follows:

“1. 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;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

[8] Using the above principles, it behooves me first, to consider the period of delay and the explanation for the delay. Ali has exhibited a notice of appeal which shows that it was received in the registry on 30th April, 2018. This means that the notice of appeal was filed 11 days after the judgment was delivered, which was within the stipulated timeline provided under Rule 75(2) of the Court Rules that requires a notice of appeal to be lodged within 14 days of the date of the decision against which it is desired to appeal. However, the applicant did not file the record of appeal within 60 days from date of filing his notice of appeal as required under Rule 82(1) of the Court of Appeal Rules. The said 60 days expired on 30th June, 2018. No action was taken until the applicant moved the Court through filing the current notice of motion which was lodged before this Court on 8th June 2020, almost 2 years after the expiry of the statutory period.

[9] In Murai v Wainaina (No. 4) [1982] KLR 38, this Court held that mistake of an advocate or legal advisor may amount to sufficient reason to meet the requirements of Rule 4 of the Court of Appeal Rules that at that time required sufficient reasons to be established for the delay before extension of time could be given. The position has now changed to the extent that Rule 4 has been amended to give the single Judge unfettered discretion in determining an application for extension of time. That is not to say that no reason is required for the delay, as an explanation must still be given.

[10] The applicant acted with due speed and diligence in filing the notice of appeal and sending the letter bespeaking the proceedings to the Registrar of the High Court. Thereafter the steam appears to have ebbed out, as no record of appeal was filed. The application for extension of time was made slightly less than two years after the decision, subject of the intended appeal. The applicant blames his counsel for the delay and maintains that he only realized the mistake made by his former advocate in failing to take

action to file the record of appeal on 22nd May, 2020 when he changed advocates. The question is, what action did the applicant take in pursuing his appeal between 10th April, 2018 when the notice of appeal was filed and 22nd May, 2020 in ensuring that the proceedings were obtained and record of appeal filed? He has not demonstrated that he took any action in pursuing the matter either in court or with his previous counsel.

[11] As **Odek JA** stated in ***Charles Maina Muriuki vs Jamleck Muchira Wanjau, [2014] eKLR***, whereas it is a general principle that mistake by counsel should not always be visited upon a client, the client must demonstrate that he has on his part exercised diligence as indolence on his part is inexcusable. Both the applicant and his advocate had a duty in ensuring that appropriate action is taken to have the record of appeal filed in time. The attempt by the applicant to completely shift the blame to his advocate cannot therefore hold. I find that the explanation for the delay is not satisfactory.

[12] In the judgment subject of the intended appeal the learned judge found that there was concealment of material fact and consequently, revoked the grant of representation that had previously been issued. Ali's draft memorandum of appeal challenges the said decision on a number of grounds. I find that the delay in filing the appeal is likely to cause prejudice to the respondents who may be delayed in realizing the judgment and the distribution of the estate. In addition, the applicant has not demonstrated that he had applied for, or obtained leave of the Court to appeal against the judgment of the High Court in a succession matter, and it is arguable as to whether his appeal can be sustained without such leave.

[13] The upshot the above is that I find that the applicant is not deserving of the exercise of this Court's discretion. The application is accordingly dismissed. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR