



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE-MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. NYERI 63 OF 2016

BETWEEN

FRANCIS JAMES NDEGWA..... APPLICANT

AND

ELIZABETH NJAI WAHOME..... 1<sup>ST</sup> RESPONDENT

MARY WANJIRU WAHOME..... 2<sup>ND</sup> RESPONDENT

MARGARET WAMBUI MUTURI..... 3<sup>RD</sup> RESPONDENT

ANGERICA WANGUI WAHOME.....4<sup>TH</sup> RESPONDENT

LUCY WANJIKU WAHOME..... 5<sup>TH</sup> RESPONDENT

CATHERINE WANJA WAHOME..... 6<sup>TH</sup> RESPONDENT

*(Being an application for extension of time to file and serve Memorandum of appeal and record of appeal out of time against the judgement of Justice Hon. Ngaah in Nyeri H.C S.C No. 121 of 1993 delivered in court on 18<sup>th</sup> March 2016*

*In*

H.C NYERI SUCC. CAUSE NO. 121 OF 1993)

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RULING OF THE COURT

Before the court is a notice of motion application dated 26<sup>th</sup> September 2016 brought under Rule 4 of the Court of Appeal Rules seeking for extension of time so as to enable the applicant to file and serve the Memorandum of Appeal and Record of Appeal out of time. The same is based on the grounds that the applicant is the first born of the deceased one, **Crispin Wahome Ndegwa** and thus entitled to equal share of the deceased’s estate with the other siblings but the high court in its judgment of 18<sup>th</sup> March 2016 gave the applicant only 0.45 acres whilst the other siblings got 4.45 acres. Of the estate of the deceased which consisted of the following properties **Thegenge/Karia/288, Naromoru Block 2/Mururu/920** and **SWT/41**. According to the applicant, the distribution by court was is unfair and unlawful. The Respondents are striving to quickly enforce the judgment by demarcating the parcels of land in order to defeat the process of appeal.

The application is further supported by the affidavit of the applicant dated 6<sup>th</sup> September, 2016 in which he reiterates and expounds on the above complaints. Suffice to add that aggrieved by the judgment and decree the applicant intends to appeal. Indeed a notice of appeal to that effect has been filed. Subsequently the applicant applied for proceedings and judgment on 21<sup>st</sup> March, 2016 but it was not until 28th July, 2016 that the same were availed to him. Indeed the trial court issued a certificate of delay dated 8<sup>th</sup> August 2016 to that effect. Thus the delay in filing the memorandum and record of appeal was due to delay in getting the proceedings and judgment which was beyond the applicant’s control.

The Motion is opposed by the Respondents vide replying affidavit sworn by **Mary Wanjiru Wahome** dated 31<sup>st</sup> January, 2017 in which she

deposes that; the 3<sup>rd</sup> Respondent is deceased and no substitution has been undertaken, thus the current application cannot proceed before the said substitution, that the applicant has sneaked in the application documents that were not availed in the High court; that after delivery of judgment on 18<sup>th</sup> March, 2016, the applicant did not seek leave of court to appeal to this since the dispute is a succession matter, that the applicant lodged his notice of appeal on 24<sup>th</sup> March, 2016 within time and a certificate of delay was issued on 8<sup>th</sup> August, 2016 while the current application was filed on 29<sup>th</sup> September, 2016 several weeks later and the delay has not been explained why the record of appeal has not been filed and served within 60 days from the date of the certificate of delay. The application is thus a waste of courts time, misplaced, incompetent, misconceived, misguided and preposterous. Further that there is no draft memorandum of appeal that has been annexed to the application which would inform the court whether the intended appeal is arguable.

Parties filed their respective submissions. The applicant in his submissions reiterates the whole averments in his affidavit in support to the application save for additional facts that the documents on distribution of the estate were signed by the court after the death of both **Margaret Wambui Muturi** and one, **Paul Muturi Wanjau** and before any substitution was concluded. The applicant maintains that there was outright discrimination against him in the distribution of the deceased's estate.

The respondents in their submissions equally reiterate the averments in the replying affidavits of the Respondents which I need not to reproduce here.

I have considered the application, the various affidavits in support of and in opposition to the application and the rival submissions. My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules. The Principles that guide the exercise of jurisdiction under Rule 4 of the Court of Appeal are now well settled by numerous pronouncements of this court. For instance in the case of **Richard Nchepe Leiyangu vs. I.E.B.C. & 2 others [2013] eKLR**, the principles were enumerated as follows:-

***“(i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.***

***(ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.***

***(iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.***

***(iv) As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.***

***(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.***

***(vi) 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 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;***

***(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word “possibly”;***

***(viii) 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 power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.***

***(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.***

***(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;***

***(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.”***

The above principles have been reinstated by the Supreme Court in the case of **Nicholas Kiptoo Arap Koriri Salat v Independent Electoral & Boundaries Commission & 7 others**.

I have duly considered the application in light of the rival pleadings, submissions and the above principles. The applicant filed the notice of appeal on 21<sup>st</sup> March 2016 soon after delivery of judgment on 18<sup>th</sup> March 2016 which was well within the prescribed time and equally applied for proceedings on the same day. The proceedings were delayed by 126 days up to 28<sup>th</sup> July 2016. A certificate of delay issued on the 8<sup>th</sup> August 2016 attests to this fact. The applicant however did not file the memorandum and record of appeal thereafter. The current application was filed on 29<sup>th</sup> September/2016, approximately four (4) months and twenty days from when the certificate of delay was issued.

There is no plausible reason advanced by the applicant as to why he did not file the memorandum and record of appeal in time pursuant rule 82 of the court of appeal rules.

However, I need not delve into the merits or demerits of the application as there is there is a jurisdictional issue which I wish to deal with first and whose determination may very well determine the fate of this application. I note that the applicant seeks to appeal from a judgment and decree in a succession cause. Leave of the trial or this court is therefore a prerequisite. In the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR*, this Court pronounced itself as follows:-

***“Under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”***

Under Rule 39 of this Court’s Rules which is the applicable rule here, the applicant ought to have applied for leave to appeal within 14 days from the date of the decision he intended to appeal against. He did not do so.

As a consequence therefore, I do not have a competent application before the court which I can determine on its merits. The entire application is therefore incompetent and I dismiss it with no order as to costs.

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

*Signed*

**DEPUTY REGISTRAR**