



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE JA: (IN CHAMBERS)]

CIVIL APPLICATION NO. 289 OF 2019

BETWEEN

TABITHA GATHONI GACHAGWI.....1ST APPLICANT

WILSON GICHUHI GACHAGWI.....2ND APPLICANT

VERSUS

ALICE NJOKI GICHUHI.....RESPONDENT

(Being an Application for Extension of Time to file an application seeking leave to appeal against the Judgment of the High Court of Kenya at Nairobi, (Ougo, J). dated 14th February 2019.)

IN

(Nairobi High Court Succession Cause No. 1257 of 2000)

RULING OF THE COURT

Before me is a motion dated 2nd September 2019, brought pursuant to the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the Law in which **Tabitha Gathoni Gachagwi** and **Wilson Gichuhi Gachagwi** (*the applicants herein*), seek the following orders:

“1. This Honourable Court be pleased to extend time for the Applicants to file an application seeking leave to appeal to this Court the decision of the High Court at Nairobi (Hon R.E Ougo, J.) dated 14th February 2019 in Succession Cause No. 1257 of 2000 upon such terms as may be expedient.

2. The costs of this application be in the cause.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Tabitha Gathoni Gachagwi** (the 1st applicant) who deponed *inter alia* that she was the widow of **Samuel Gachagwi Gichuhi** who was one of the children of **Gichuhi Gathunga** (deceased) and that the said **Samuel Gachagwi Gichuhi** was also deceased and that the 2nd applicant herein was her son and grandson to **Gichuhi Gathunga** (deceased) and that the respondent was a daughter of the deceased.

That, the instant application arose from Nairobi High Court Succession Cause No. 1257 of 2000, relating to the Estate of **Gichuhi Gathunga** (deceased), filed by the respondent who did not involve the applicants and one **Peter Gichuhi Mwaniki** (now deceased) when petitioning for the grant as a result of which they applied for revocation and that on 14th February, 2019, the High Court made a determination *inter alia*

that the respondent had concealed material facts which made the grant liable to revocation.

She further deponed that the applicants were aggrieved by part of the said judgment *inter alia* allowing the respondent to remain as an Administrator of the Estate and granting her the biggest share of land parcel Title No. Lari Bathi/129 yet she had concealed material facts pursuant to which the applicants filed an application seeking leave to appeal from the aforesaid judgment, which application was allowed by the court on **2nd May, 2019**.

That upon perusal of the typed ruling aforesaid, the same was contradictory which led to the respondents' advocates to seek clarification of the same and that on **29th July, 2019**, the High Court clarified the said ruling and in so doing amended its resulting orders declining to grant the leave sought. That, the delay in filing the instant application within the 14 days as required under the Rules of this Court was occasioned by the difference in timelines between the period the judgment and the ruling were delivered and the period it took to have it clarified and amended and that further the applicants intended appeal was not frivolous, was arguable and raised serious questions of law and fact warranting adjudication by the court.

It was submitted for the applicants that in the present case the delay in filing the application was slightly over one month from the date of the amendment of the ruling which was done on **29th July, 2019** and that as such the delay was not unreasonable since failure to file the application within 14 days from **2nd May, 2019** was not due to any fault of the applicants. On the issue of prejudice, it was submitted that the respondent has been all along aware of the applicants' reasons for failing to file the application seeking leave to appeal within the stipulated period and would therefore not be prejudiced and that further she had not opposed the application. Consequently, it was submitted that the applicants had met the conditions for extension of time under Rule 4 of the Court's Rules.

The respondent on the other hand did not file any response to the application.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants' submissions, the cited authorities and the law.

The applicants motion is brought, under **Rule 4** of this Court's Rules.

The said Rule provides:

“4.Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

In the instant case the delay in filing the application is slightly over one month from the date of the amendment of the ruling which was done on **29th July, 2019**. In my considered opinion, the delay is neither inordinate nor unreasonable. In any event, sufficient reasons have been given for the delay to the satisfaction of this court namely; that the same was caused by the fact that the High Court gave a ruling on **2nd May, 2019**, which was contradictory and that after the court amended the ruling and dismissed the

application on **29th July, 2019**, the 14 days provided for under Rule 39 (b) of the Court's Rules had already lapsed and thus the applicants were already out of time due to facts outside their control. As to whether there is a possibility of the appeal succeeding, I have looked at the draft memorandum of appeal and the issues raised therein *inter alia* that that the trial court erred in law and fact in relying on Kikuyu Customary Law to distribute land parcel Title No. Lari/Bathi /129 which led to unequal and unjust distribution of the property among the beneficiaries of the deceased to be weighty and deserving consideration by the court. Of course I am mindful of the fact that I cannot say more regarding this issue as a single Judge lest I embarrass the bench that will be eventually seized of the appeal. As regards prejudice, it has not been demonstrated to this court that the respondent will suffer any prejudice. In any event the respondent has not even opposed the application.

Taking into totality all the circumstances in this case, I find that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case (supra)**, to extend time and therefore allow the application as prayed.

Accordingly, the applicants are hereby granted 60 days to file and serve application seeking leave to appeal to this Court the decision of the High Court at Nairobi, **Ougo, J** dated **14th February 2019**, in Succession Cause No. 1257 of 2000 failure to which this order shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

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

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR