



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J MOHAMMED, JA (IN CHAMBERS))

CIVIL APPLICATION NAL. NO. 257 OF 2019

(IN THE MATTER OF THE ESTATE OF JOSEPH MUOKI NDIVO

(DECEASED)

BETWEEN

TERESIA KALEE NDIVO.....1ST APPLICANT

TERESIA KANINI NDIVO.....2ND APPLICANT

AND

IRENE NTHENYA MUTUNE.....RESPONDENT

(An application for extension of time to file notice of appeal out of time in

an intended appeal from the judgment of the High Court of Kenya at

Nairobi (Musyoka, J) dated 10th May, 2019 in H.C. Succession Cause No 436 of 2008

RULING

BACKGROUND

1. This is an application by way of Notice of Motion dated 31st July, 2019 brought under Rule 4 of the Court of Appeal Rules (the Court Rules) in which the **Teresia Kalee Ndivo** (the 1st applicant) and **Teresia Kanini Ndivo** (the 2nd applicant) seek orders *inter alia*: for an extension of time within which to file and serve the notice of appeal against the decision of the High Court (Musyoka J.) dated 10th May 2019.
2. The application is based on the grounds in the body of the application, the supporting affidavit sworn by the 1st applicant. **Irene Nthenya Mutune** (the respondent), is the widow of **Joseph Muoki Ndivo** (deceased) who was the son and brother of the 1st and 2nd applicants respectively.
3. The application is anchored on grounds that the applicants intend to file an appeal against the judgment of the High Court and that the delay in filing the appeal was wholly attributable to the applicants' previous advocates; that the mistakes of counsel should not be visited on their clients; that the instant application has been filed without inordinate delay and that the respondent will not suffer great prejudice if the orders sought are granted.
4. The application was opposed by the respondent who filed a replying affidavit on 16th September 2019 on the grounds that the orders sought in the notice of motion are not capable of being granted as they have been overtaken by events; that the applicants secretly petitioned for grant of letters of administration intestate in respect of the estate of the deceased; that the applicants concealed the fact that the deceased was survived by a widow (the respondent herein) and three (3) children; that the applicants obtained letters of administration of the estate of the deceased; that the letters of administration were confirmed and the applicants proceeded to transmit/transfer to themselves some properties of the estate of the deceased and to collect monies payable to the estate of the deceased; that the respondent filed summons for revocation of the confirmed grant and reversion to the deceased's estate land parcel No. **Laikipia/Olarabel/232** which the applicants had

already transmitted/transferred to themselves; that the respondent was issued with a grant of letters of administration intestate of the deceased's estate; and that the application is misconceived and unmerited and should be dismissed with costs.

Submissions by counsel

5. At the hearing of the application, learned counsel, **Mr. Onyancha B'womote** represented the applicants while learned counsel, **Ms. Agnes Nzei** represented the respondent. Mr. B'womote relied on the supporting affidavit sworn by the 1st applicant. Counsel submitted that the applicants instructed their previous advocates to file a notice of appeal; that the previous counsel filed a letter dated 23rd May, 2019 bespeaking proceedings; that the applicants' previous counsel failed to file a notice of appeal in spite of the applicants' instructions to do so; that the mistakes of counsel should not be visited on the applicants; and that the applicants have an arguable appeal with high chances of success.

6. **Mrs. Nzei** opposed the application and relied on the respondent's replying affidavit. Counsel submitted that the learned Judge properly interpreted the Law of Succession Act to the effect that the respondent as the widow of the deceased ranked 1st in priority in respect of the estate of the deceased; that the respondent has already been issued with letters of administration in respect of the estate of the deceased; that the applicants have not given a plausible explanation for the delay in filing and serving the notice of appeal; that the applicants have not adduced evidence to prove that the applicants' previous advocates were instructed to file a notice of appeal and failed to do so; that the instant application is an afterthought; and that the applicants have not demonstrated that they stand to suffer any prejudice if the application is not granted. Counsel urged the Court to dismiss the application.

Determination

7. I have carefully considered the application, the submissions by counsel, the authorities cited and the law. The discretion that I am called upon to exercise in this application is provided under **Rule 4 of the Court Rules** as follows:

“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.”

8. The impugned judgment was delivered on 10th May 2019. Rule 75 of the Court Rules provides that a notice of appeal should be filed within 14 days from the date of the impugned decision. The notice of appeal should have been filed on or before 24th May, 2019.

9. The parameters for the exercise of such discretion are clear. In **Njuguna v Magichu & 73 others [2003] KLR, 507**, this Court stated as follows:

“The discretion exercisable under Rule 4 of the Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual legal basis.”

10. The factors to be considered were stated in **Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No Nai. 332 of 2004)**, where it was held that:

“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, (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 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.” [Emphasis supplied].

The principles set out by this Court upon which the judicial discretion under **Rule 4 of the Court Rules** may be exercised are as stated in **Mwangi v Kenya Airways Ltd (2003) KLR 486**:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the

Rules. For instance, in Leo Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend 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.”

11. On whether there is merit in the appeal, the applicants contend that they have an arguable appeal. In dealing with an application for extension of time, a single Judge should not make definitive pronouncements on the success of the intended appeal as the same may embarrass the Court that will deal with the main appeal. I have perused the Draft Memorandum of Appeal and find that the appeal is arguable as it raises issues for determination, *inter alia*, the interpretation of **Section 66 of the Law of Succession Act** as regards the order of preference in the grant of letters of administration intestate. As this Court stated in **Wasike V. Swala [1984] KLR 591**, an arguable appeal need not be one with an overwhelming probability of success.

12. On the issue of whether the respondent will be prejudiced if the application is granted, it is the respondent's claim that she will suffer prejudice if the application is allowed as she will be deprived of the fruits of her judgment. The respondent contended that she has already obtained letters of administration in respect of the estate of her deceased husband and will be greatly prejudiced if the orders sought are granted as she and the children of the deceased are likely to be dispossessed of properties forming part of the estate of her deceased husband.

13. The applicants seek this Court's discretion to allow them to file his notice of appeal and record of appeal out of time. The issue that falls for my consideration is whether the explanation given by the applicants for the delay in lodging his appeal is reasonable and excusable. It is upon the applicants to place sufficient material before the Court which would explain the delay in filing the Notice and Record of Appeal. The Court has to balance the competing interests of the applicants with those of the respondent. This was well stated in the case M/S Portreitz Maternity V. James Karanga Kabia, Civil Appeal No. 63 of 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

14. 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 favour. There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in Monica Malel & Another V. R. Eldoret Civil Application No. Nai 246 of 2008 stated:-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the applicants are

not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

15. As this Court stated in Donald O. Raballa vs. Judicial Service Commission & Another 2018 Eklr:

“the circumstances disclosed in this case do not amount to a mistake of counsel but inaction after receiving instructions to act in the matter. In the case of Rajesh Rughani vs Fifty Investment Ltd. & Another (2005) eKLR this Court held:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

16. In Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR, this Court stated that:-

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

It would not matter whether the party was schooled in legal procedures or was a functional illiterate.”

It follows that the applicants herein have not placed any material before me to evidence that they followed upon the filing of the Notice of Appeal with their previous advocates.

17. Further, this Court in Waweru & Another V Karoni [2003] KLR 448 stated that:

“The rules of the Court must prima facie be obeyed and in order to justify a Court in extending the

time during which some step in the procedure requires to be taken there must be material on which the Court can exercise its discretion.”

17. In the circumstances of this case, there is no material placed before me to warrant the exercise of my discretion in favour of the applicants. Accordingly, I find that this application has no merit. In the result, I dismiss the Notice of Motion dated 31st July 2019. The order that commends itself to me is that each party will bear their own costs.

Dated and delivered at Nairobi this 24th day of January, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR