



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 243 OF 2018

BETWEEN

MOSES KARANJA KAHOCHIO..... 1ST APPLICANT

MUIGAI KAHOCHIO 2ND APPLICANT

AND

JOEL MBURU KANYUKU 1ST RESPONDENT

ISAAC MUIGAI KARANJA 2ND RESPONDENT

(An application seeking the court's leave for extension of time within which to file notice, memorandum of appeal and record of appeal arising from the grant confirmed by the High Court of Kenya at Nairobi (Kimaru, J.) dated 27th June, 2014

in

Succ. Cause No. 1516 of 2008 or Kiambu Succ. Cause No. 76 of 2016)

RULING

The motion dated 15th August, 2018 seeks two substantive prayers namely;

“1. That this honourable court be pleased to extend time within which the applicants may file a notice of appeal challenging the grant confirmed on 27th June 2014 by the honourable Justice Luka Kimaru in the High Court of Kenya at Nairobi.

2. That this honourable court be pleased to extend time within which the applicants may file a memorandum of appeal and record of appeal challenging the grant confirmed on 27th June 2014 by the honourable Justice Luka Kimaru in the High Court of Kenya at Nairobi.”

It is premised on grounds appearing on its face as follows;

“(a) That the grant confirmed on 27th June 2014 disinherited the applicants who were the only beneficiaries of the deceased Karori Kihagi's estate, in terms of the provisions of section 39(c) of the succession act, cap 160.

(b) That should leave not be granted to the applicants, they will forever be dispossessed of all the deceased's parcels of land already apportioned and allocated to the respondents, in full breach and in full contravention of the provisions of section 39(c) of the succession act for which they will forever have no redress and/or remedy.

(c) That the applicants will forever be condemned unheard as they had no opportunity to put their case forth at the time the said grant was being confirmed due to the negligence on the part of their advocate who never filed any replying documents in opposition to the same.

(d) That the delay in instituting the said intended appeal, has been due to the fact that the applicants mistakenly pursued different inappropriate avenues that included seeking to revoke the said grant confirmed on 27th June 2014 and seeking to review and stay the said grant before the honourable court rather than filing an appeal.

(e) That the intended appeal in the circumstances herein has overwhelming chances of success since the honourable court would, once it granted leave, have to consider the following pertinent contested issues:-

(i) Whether or not the applicants should forever be condemned unheard in the circumstances where their advocate was negligent and failed to file replying documents to the respondents' application dated 6th August 2013 for a confirmed grant.

(ii) Whether or not the honourable court misinterpreted the provisions of section 39 of the succession act which clearly places the applicants as the sole beneficiaries to the deceased's estate.

(iii) Whether or not the justice of the matter, in light of the clear omissions and non applicability of section 39 of the succession act should not warrant the setting aside of the grant confirmed on 27th June 2014 as the same amounts to gross injustice as against the applicants who have been unlawfully disinherited yet they are the rightful, sole beneficiaries of the deceased Karori Kihagi's estate."

In support of the motion is an affidavit sworn on 15th August, 2018 by **Moses Karanja Kahochi** the 1st applicant on behalf of himself and his co-applicant **Mungai Kahochio**. The two are brothers and co-administrators of the estate of **Karori Kihagi**, who was their uncle. He swore that the applicants filed a summons for revocation of a grant dated 8th July 2014 as the same had been confirmed adopting a mode of distribution that was contrary to **section 39(c)** of the **Law of Succession Act** and disinherited them.

The said application was dismissed by Musyoka, J. On 26th October, 2016 and they filed an application to review that dismissal but that, too, was dismissed on 8th March 2018. The applicants made yet other applications which suffered the same fate and they finally were advised that they would best be served by pursuing an appeal against the confirmation of grant dated 27th June, 2014. The deponent swears that the same confirmed grant disinherited the applicants as the only beneficiaries of the estate of Karori Kihagi and would remain forever condemned unheard due to the negligence of their advocate who never filed any replying affidavit in opposition to the application for confirmation of grant. By way of explaining the delay sought to be remedied by this motion bought under **Rule 4** of the **Court of Appeal Rules**, the deponent swears at paragraph 17 thus;

"That delay in instituting the said intended appeal, has been due to the application of inappropriate avenues by ourselves and our subsequent advocates, in seeking to revoke the said grant confirmed on 27th June 2014 and subsequently by seeking to review and stay the said grant rather than file an appeal."

He completes his deposition by stating that allowing the motion would not prejudice the respondents and that *"the justice of the matter dictates that the application be granted as the subject matter involves land which is a very emotive, sentimental issue in Kenya."*

The motion was opposed by way of a replying affidavit sworn on 31st August 2018 by **Joel Mburu Kanyuku** the 1st respondent. He recounted the omissions and defaults of the applicants' advocate who failed to file a response to the summons for confirmation of grant which Kimaru, J., after according the applicants opportunity to do so, went ahead and granted. He swore that the delay between 27th June 2014 when the grant was confirmed and 14th August, 2018 when this application was made, was not explained. After the said confirmation the applicants unsuccessfully applied to revoke the grant and participated in other proceedings before the High Court without complaining. Swearing that litigation must come to an end, the deponent contended that there has been inordinate and unexplained delay, so this application ought to be dismissed.

At the hearing of the motion before me, the applicants' learned counsel based his submissions on the grounds on its face and the supporting affidavit as well as the further affidavit of **Moses Karanja Kahochio** sworn on 29th November, 2018 after I granted leave. He admitted that the delay involved herein was over 4 years, but sought to persuade me that although the applicants pursued inappropriate remedies, the matter was active throughout that period and that the failure to take the correct steps was not deliberate. Urging that the applicants would suffer serious prejudice if locked out yet they have an appeal with overwhelming chances of success, in that they were unfairly disinherited without being heard, counsel pleaded with me to allow the application.

Opposing the motion, the respondents' learned counsel **Mr. Kahuthu** maintained that the delay was inordinate, the explanation for it wanting, litigation must come to an end, nobody had been disinherited and the intended appeal has no chances of success. He urged me to dismiss the application with costs.

Mr. Sumba's brief reply readily admitted to the applicants' having taken inappropriate steps in seeking justice, in particular the application for review. However, he pleaded that considering that the grant was confirmed at the behest of people from another house, and the persons entitled did not benefit from what was rightfully theirs, the applicant ought to be granted.

I have given due consideration the application before me together with the rival affidavits and submissions made before me. On application under **Rule 4** is a call to a single Judge of this Court to exercise a discretion in considering whether or not to extend time to a party who has failed to do something or take a step within the time set by our rules. The discretion is free and unfettered to the end that justice shall be done. It remains a judicial discretion however, exercisable not on a whim at the caprice of the judge but rather on sound principle. Over time, a number of considerations have been distilled as guiding exercise of that discretion without fettering it.

Some of the matters I would bear in mind within my perfectly free discretion before extending time for the filing of a notice or record of appeal are;

- (a) The length of the delay
- (b) The reason for the delay
- (c) (Possibly) the likelihood of the intended appeal succeeding
- (d) The prejudice if (any) that the extension of time might occasion to the respondent.

See **LEO SILA MUTISO vs. ROSE HELLEN WANGARI MWANGI** Civil Application Nai 255 of 1997.

As such extension of time is an equitable relief, I would have to consider the general conduct of the applicant as well, while bearing in mind that the discretion exists for purposes of doing justice between parties and of avoiding injustice due to any inadvertent mistake or error. This is informed by the plain fact that courts exist to do justice and not merely to enforce discipline. At any rate, the former must not be sacrificed at the altar of the latter. The discretion would not be exercised in favour of party who has been slothful or unfair or whose conduct as a whole has generally been such as to offend our conception of justice and right to extend to him any or further indulgence.

Having borne all of those matters in mind, it seems to me that even though the length of delay herein is undoubtedly long and inordinate, the applicants have proffered an explanation that appears to me plausible. The picture that emerges is not that of parties who did nothing to try to pursue their rights. They were engaged in trying to seek redress but the procedures they employed and the fora at which they did so, were misguided, by their own admission. They were not indolent, it is just that their industry was misdirected.

Without at all according approval to the mistakes and missteps of the applicants and their legal advisers, I think that the explanation given suffices. I seek this as a case of mistake or a series of mistakes, and mistake are all too human.

I have considered the complaint that the decision sought to be appealed against effectively dispossessed the applicants of property to which they see themselves as the proper beneficiaries under the **Law of Succession Act** thereby disinheriting them. It is not for me to say whether or not they are right but it is enough to observe that the complaint appears, facially at least, to be not an idle one, and is worthy of a hearing.

On those considerations, I find myself satisfied that this application is for granting. I would open the door to allow the applicants to make their case before the Court. It is before the Court that they would know the fate of their complaints. I would think that the prejudice they would suffer were I to lock them out would far outweigh any that the respondents would suffer by having this matter open and bothering them a little longer.

In the result, I order that the applicants do file and serve their notice of appeal (if they have not done so), within **seven (7)** days, and the record of appeal within **Thirty (30)** days, of this date. The costs of this motion shall be in the intended appeal.

Dated and delivered at Nairobi this 21st day of February, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR