



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 359 OF 2019

BETWEEN

GATHUKU KAMAU MWANGI.....1<sup>ST</sup> APPLICANT

AND

HARRISON GATHUKU MUHIA.....1<sup>ST</sup> RESPONDENT

JOSEPH PETER KAMONDE.....2<sup>ND</sup> RESPONDENT

(Being an application for leave to file and serve an Appeal from the judgment of the High Court, Family Division (Musyoka, J) delivered on 20<sup>th</sup> September 2018 in SUCC No. 2775 of 2004)

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RULING

The background in brief to this motion is that by an application in the High Court, *the applicant, Gathuku Kamau Mwangi*, sought to revoke the grant of letters of administration issued to *the respondents, Harrison Gathuku Muhia and Joseph Peter Kamonde* in respect of the estate of their late grandfather *Gathuku Mwangi Muchai (the deceased)*, who was the registered proprietor of land known as *Land Reference No. Lari/Magina/194 (the suit premises)*. His case was that their grandfather, the deceased had three wives, and that his mother was the daughter of the deceased's second wife. He claimed that the respondents as administrators of the Estate had shared out the suit premises amongst themselves, and had omitted to include his grandmother's family.

The learned judge of the Environment and Land Court (*Musyoka, J*) concluded that because the Law of Succession was enacted in 1981 which was after the deceased died, its substantive provisions were inapplicable to the case, and in reliance on *section 2 (1)* of the Act, the judge concluded that the deceased's estate would be distributed according to Kikuyu customary law. In so doing, the court determined that the applicant, being the son of the deceased's daughter, was not entitled to inherit the deceased's estate.

It is this decision that prompted the applicant to seek an appeal before this Court. By way of a Notice of Motion dated 15<sup>th</sup> November 2019 premised on *rule 4* of the *Court of Appeal Rules*, he sought for time to be extended to file an appeal and also sought orders to restrain the respondents from entering upon the suit premises registered in the deceased's name.

The application was brought on grounds that the period for filing the appeal had already lapsed, because the applicant's counsel had refused to proceed with the appeal; that the respondents had entered onto the deceased's land and chased away his tenants and were threatening to evict him, and that his intended appeal had a high chance of success.

The application was supported by the applicant's affidavit, sworn on 12<sup>th</sup> November 2019 wherein it was deponed that after the judgment was delivered on 21<sup>st</sup> September 2018, he sought to obtain copies of the judgment and the proceedings; that typing of the proceedings took too long, by which time the period for filing the appeal had already lapsed. The applicant further deponed that he obtained a Certificate of delay on 22<sup>nd</sup> July 2019 which he took to Messrs. Otieno Okiambera Advocates who told him to return in a month's time, so as to enable them prepare the necessary documents for filing of the appeal; that after several visits, the advocates had not filed the appeal, and instead advised him to take away his documents and to conduct his own appeal, as it was claimed that he had refused to pay their legal fees.

The applicant averred that while he awaited the filing of the appeal, the respondents had filed a *Miscellaneous application No. 20 of 2019* to obtain *ex parte* orders to have a caution he had placed on the title of the suit premises removed, and had since entered upon the suit premises and were subdividing it between themselves; that they had also informed him that they would demolish the home that he had constructed

thereon.

In response to the application, the 1<sup>st</sup> respondent filed an affidavit in reply on behalf of the 2<sup>nd</sup> respondent and on his own behalf where it was deponed that the applicant had to date, not filed a Notice of appeal, and neither had he lodged a letter requesting copies of the typed proceedings, or supplied such copy to the respondents. The deponent averred that he is the son and administrator of the deceased who died intestate on 24<sup>th</sup> July 1964; that there are no rented houses were constructed or rented by the applicant on the suit premises; that the applicant is the great grandson of the deceased, and is not a beneficiary of the deceased's estate, nor the owner of the deceased's house constructed on the suit premises; that the deceased had two wives, Waithera and Gatego; and that the applicant is the son of Nguga Mwangi, the daughter of Gatego who is married and living in Njoro.

As concerns the alleged instructions to Messrs. Otieno Okiabera Advocates, it was deponed that the applicant was wrong to blame the firm of advocates for his failure to file to appeal within time. It was averred that he was merely forum shopping in search of a favourable decision.

Prior to hearing the application for extension of time, the applicant abandoned prayers 3 and 4 of the motion with respect to the orders sought for stay of execution of the lower court's orders, as they were not a matters within the remit of this Court to determine.

Submitting in person before me, the applicant outlined the contents of his affidavit through Kikuyu/English translation, and urged that time be extended so as to enable him file an appeal.

**Mr. Jaoko**, learned counsel for the respondents opposed the application and also reiterated to a large extent the contents of the respondents' affidavit, save to add that with respect to the allegation that the firm of Otieno Okiabera were the cause of the delay in the filing of the appeal that, the applicant had not provided any affidavit or correspondence from the firm showing that they were instructed to file the appeal; that the applicant is a vexatious litigant; that this Court should not grant the orders sought, as the respondents stood to suffer immense prejudice.

An application for extension of time is governed by **rule 4 of** this Court's Rules. Under **rule 4**, it is settled that, the Court has unfettered discretion on whether or not to extend time for filing of an appeal. In so doing, the discretion should be exercise judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where this 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.”**

Beginning with the length of delay, the judgment of the Succession Court was issued on 20<sup>th</sup> September 2018, and this application was filed on 15<sup>th</sup> November 2019, which was a period of 14 months delay. It is also observed that, though the applicant has filed a Notice of appeal, a record of appeal has not been filed to date. As to whether the delay was explained, the applicant contends that after the judgment was delivered, he requested for copies of the certified proceeding which took a long time to prepare. He thereafter obtained a Certificate of delay on 22<sup>nd</sup> July 2019, and proceeded to instruct the firm of Otieno Okiabera; that the firm informed him to return after one month, but, on his return, he found that they had not filed the appeal. Despite several months of pursuing them, the appeal was not filed; that eventually they informed him that they would not represent him, and advised him to file his own appeal.

So, was the Certificate of delay of 22<sup>nd</sup> July 2019 sufficient to explain the delay of the period between the date of the judgment and the 22<sup>nd</sup> July 2019? The applicant explained that the preparation of the certified proceedings took a long time.

But the proviso to **rule 82 (1)** of this Court's rules states in relevant part that;

**“....Provided that an application for a copy of the proceedings in the superior court has been made in accordance with sub rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”** **Rule 82 (2)** then stipulates that an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his or her request to be supplied with copies of the proceedings was in writing and a copy of it was served on the respondents.

In other words, to invoke the proviso to **rule 82 (1)**, the applicant must produce a request to be supplied with the proceedings, and demonstrate that a copy was served on the respondents. The record does not show that a request for proceedings was made, and the respondents contend that they were not served with one. Without a letter evincing the request for proceedings addressed to the Registrar and copied to the respondents as required by the rules, the applicant cannot benefit from the period of delay specified in the Certificate. This means that from the date the judgment was delivered until the Certificate was issued in 22<sup>nd</sup> July 2019, no explanation for the delay has been provided.

What about the period from 22<sup>nd</sup> July 2019, that is when the firm of Otieno Okiabera were alleged to have been instructed until the date of this application, which is a further 4 months delay? The explanation advanced was that Otieno Okiabera delayed the filing of the appeal. But, the applicant has not produced a letter of instruction to the advocate, and neither is there a letter from the firm showing that they had taken up the brief, or acknowledging that the delay was of their making. Without any support for this assertion, I find the explanation to be implausible, and unsatisfactory.

As no sufficient explanation why the appeal was not filed within the required time has been proffered, I find that the delay in filing the appeal to be unexplained.

The next consideration is whether the intended appeal has any chance of success. The applicant has attached a draft memorandum of appeal to the application. The gist of his complaint is that in determining the suit, the learned judge relied on Agikuyu customary law to find that since he was a maternal descendant of the deceased he had no right to inherit a part of the deceased's estate.

In reaching a determination, it is clear that the learned judge relied on Agikuyu customary law for the reason that the dispute predated the Law of Succession, Cap 160, which was enacted in 1981 and therefore its provisions could not be relied upon. So that, if the Law of Succession expressly ousts application of its substantive provisions in cases such as this where the deceased's demise predated the law, and it was further specified that, in their place, customary law ought to be applied, can the learned judge be faulted for having applied Agikuyu customary law?

Finally, the deceased died in 1964 and the suit was filed in 2004. The succession cause will have been in the judicial system for in excess of 15 years, without it having reached finalization. More fundamentally however is the unexplained delay of over one year in seeking to file the appeal, which seems to me to have been an afterthought.

In sum, the conclusion I have reached is that the application is not merited. The Notice of Motion dated 15<sup>th</sup> November 2019 is hereby dismissed. Since this is a dispute among family members, I order each party to bear their own costs.

**It is so ordered**

**Dated And Delivered At Nairobi this 8<sup>th</sup> day of May, 2020.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**Signed**

**DEPUTY REGISTRAR**