IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE J.A IN CHAMBERS)

CIVIL APPLICATION NO. 319 OF 2019

BETWEEN

NAOMI WANJIRU MBUTHU.....APPLICANT

AND

BERNADETTE MURUGI GITAU.....1ST RESPONDENT

ROSE MURUGI MACHARIA.....2ND RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal and Record of Appeal in an intended appeal against the judgment of the High Court at Nairobi (Musyoka J.) dated 29th September,2017 **IN Succession Cause No. 2070 of 2011)**

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RULING

In a judgment delivered on **29th September, 2017**, **Musyoka, J**. confirmed the joint grant of letters of administration intestate issued to **Naomi Wanjiru Mbuthu** (the applicant herein and the widow of **Eliud Ndirangu Macharia**), **Rose Murugi Macharia** (the 1st respondent) and **Bernadette Murugi Gitau** (the 2nd respondent). In dismissing the affidavit of protest consequently filed by the applicant on the grounds that: the respondents had sufficiently been provided for through gifts *inter-vivos;* that some of the property did not belong to the estate and that the deceased had directed that the respondents inherit what he had invested in jointly with their mothers with the residue going to her late husband; the court found as follows

> **"17. The protestor has not proved that there were any inter vivos gifts to either of the parties. She has also not pointed me to any statutory provisions or case law that would justify departure from the application of section 38 of the Law of Succession Act to the distribution before me. The estate ought to be divided equally. The administrators propose a distribution that is equitable, while the protestor proposes one that is skewed to her favour and against the administrators.**
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> **18. The protestor raises an issue that the administrators did not do any valuations before coming to court. I note that she has not presented any herself, nor has she moved the court for valuation of the assets. I note that the administrators propose subdivision of most of the assets, and therefore I am persuaded that the distribution they propose would be fair. There is also the question as to whether some of the assets did not belong to the estate. The protestor alleged that they did not, but again she presented no evidence. She says one property fell on a road reserve; a document from the relevant government office would have sufficed as proof thereof. She also alleges that other two assets were held as a joint tenancy, a copy of the title would have sufficed as proof of that allegation.**
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> **19. In view of everything that I have said, I shall resolve the application dated 13th October 2015 in the terms proposed. A certificate of confirmation of grant shall issue accordingly. As the bulk of the estate is situate within Kiambu County, the matter herein shall be transferred to the High Court at Kiambu for final disposal".**

Dissatisfied with this ruling, the applicant filed an application before the High Court on **18th April 2018**, seeking inter alia '**that the certificate of confirmation of grant confirmed on 29th September 2017 be revoke/or annuled**'.

In dismissing the application, Onyiego.J who was seized of the matter, upheld the preliminary objection raised by the respondents that the application was *resjudicata,* and in a ruling delivered on **5th July 2019** stated as follows:

"23. It is common ground that the judgment delivered on 29th September 2017 was a culmination of a protest filed by the applicant herein opposing the mode of distribution of the estate as proposed in the application for confirmation filed by the 1st and 2nd administrators. Parties called their respective witnesses and had their day in court. A plain reading of the application dated 18th December 2018 reveals that the issues raised in the aforesaid protest are similar

…

26. In a nutshell, the issues now being raised by the applicant are geared towards reopening the entire suit which is already determined. The applicant is actually raising an appeal indirectly in the same court. She should have challenged the decision before the court of appeal instead of filing one through the backdoor. The allegations that some properties listed in the schedule of assets had been distributed in the estates of Wangari Macharia the widow to the deceased and Eliud Ndirangu Macharia is not correct as the assets in each cause are distinct.

27. In the circumstances of this case, this court has become functus officio. Section 76 regarding annulment or revocation cannot apply as parties were given an opportunity to be heard and presented their respective cases when the protest was canvassed. To hear and determine the application in question will be akin to sitting on an appeal in respect of my colleague's judgment. The suit has been fully heard and determined by a competent court with jurisdiction."

Aggrieved by this decision, the applicant now intends to appeal against the earlier decision delivered by **Musyoka J**. on **29th September, 2017**. She has filed a Notice of Motion application dated **30th September, 2019** now before me, craving for extension of time within which to lodge a notice of appeal and record of appeal.

In the Supporting affidavit sworn by the applicant, dated **30th September, 2019**, (which mostly contains averments on her objection against the confirmed grant) she depones that the reason for delay was that she filed the revocation application in the High Court when she realized that most of the properties belonging to her late husband had been divided to the respondents; that some of the evidence she submitted to her previous advocates to be submitted to the court had been omitted; that the respondents had started to execute the certificate of Confirmation of grant. It is further deposed that the delay is not inordinate and that the intended appeal is not frivolous and has high chances of success.

The 1st respondent, **Bernaette Murugi Gitau** opposed the application in a replying affidavit dated **12th February 2020,** where she deponed inter alia that; no sufficient explanation has been given for the inordinate delay of two years; that the delay of two years is a clear indication that the applicant did not intend to file the application before this court; that the applicant does not have an arguable appeal; that both respondents will suffer great prejudice as they have been denied the benefit of their inheritance for almost 20 years and that the appeal has very low chances of success.

At the hearing of the application, learned counsel **Mr. Ondieki** appeared for the applicant and learned counsel **Ms. Kiagayu** appeared for the respondents.

Counsel for the applicant conceded that the previous counsel on record made a mistake by filing an application for revocation in the High Court which resulted in the delay in lodging the appeal. He submitted that he took over the conduct of the matter after the trial, and that he heeded the sentiments of the High Court that the judgment of **Musyoka, J** ought to have been challenged in the Court of appeal. It was counsel's position that mistakes of counsel should not be visited on litigants and that it was in the interest of justice that the application be allowed given that the properties in contention were in the process of being transferred.

In opposing the application, **Ms. Kiagayu** contended that the delay was inordinate and unexplained. In her opinion, the applicant's flagrant disregard of the rules and regulations of the Court was obvious as it took almost 7 months after the impugned ruling of **29th September 2019** for the applicant to file the application for revocation of grant before the High Court. She pointed out that the said application was dismissed **on 5th July, 2019** thus applicant should have filed a notice of appeal immediately thereafter. Instead, the applicant filed the instant motion on **1st October, 2019**.

Lastly counsel took issue with the introduction of new evidence in the affidavit in support of the motion dated **30th September, 2019**. She argued that this Court was being invited to listen to evidence which was not produced before the High Court.

I have had the benefit of perusing the record in its entirety, the application, the supporting affidavit thereto, the replying affidavit filed by the respondents and the authorities thereto. I have also taken into account submissions by both counsel. An application under **Rule 4** of the Rules of this Court invites this Court's to exercise its unfettered discretion in extending the time for filing an appeal. However, this discretion cannot be exercised capriciously but must be firmly grounded on reason. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, Sup. Ct Application No. 16 of 2014,** gave guidelines for exercise of discretion to extend time and stated as follows:

"…we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;

2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents, if extension is granted;

6. whether the application has been brought without undue delay; and

7. whether in certain cases, like election petitions, public interest should be a consideration for extending time"

In view of the guidelines enunciated by the Supreme Court above, the question before me is whether the applicant has satisfied the court that time should be extended for them to give notice of their intention to appeal.

The applicant seeks to challenge the judgment of **Musyoka, J** delivered on **29th September, 2017**. The present application was filed on **1st October 2019,** a delay of about 2 years. The explanation for the delay is that the applicant acted on advice of her previous counsel who directed her to pursue orders for revocation of grant of letters of administration intestate in the High Court. The applicant submitted that mistake of counsel should not be visited upon an innocent litigant.

Having elected to pursue a certain course of action to the end and forfeiting all other avenues and their timelines with the intent of succeeding, can the advocate be said to have made a mistake? I think not. Rather, it was a deliberate choice that was taken by the applicant on the advice of her counsel.

In **Somportex Ltd v Philadelphia Chewing Gum Corporation [1968] 3 All ER 26, Lord Salmon** stated:

> "***that if a party, who has had the best professional advice, elects to*** **take a course of this kind, acts on it and that action has the effect of postponing the proceedings for three months, he should not subsequently be able to say that he resiles from what he has done and would now rather elect one of the other courses**"

In **Mary Waruga Wokabi & 3 others v Jacob Mwanto Wangora[2019] eKLR**, **Civil Application No. Nai 352 of 2018, Makhandia J**., faced with a similar application where the main reason for the delay given was that the advocates inadvertently believed that in challenging the ELC judgment on the basis of a review, as opposed to an appeal would have been more apt, expressed himself as follows:

> "***The question that arises is whether having chosen the avenue of*** **review and lost, the applicants can now turn around and pursue an appeal. Though it might be argued that in this case the applicants are seeking to appeal after their review application was heard and disposed, and that the applicants are not pursuing both avenues simultaneously, the intended appeal is still untenable in my view. It becomes a situation where the applicants want to have it both ways by filing an application for review and an appeal of the same decree or order which is tantamount to abuse of the court process. Having pursued the remedy of review and lost, the applicants have compromised their right to appeal against the said judgment and decree.**

Even if it were to be argued that a litigant who sought the counsel of two different advocates on the best course of action and trustingly followed their professional advice however mistaken, should not be punished for their misdeeds; the mistake alleged by the applicant only accounts for the period up to the delivery of the ruling by **Onyiengo J.** on **5th July 2019**. The remaining 88 days from **5th July 2019** when the applicant's application for revocation was dismissed to **1st October 2019**, when the instant application for extension was filed have not been explained. In **Motorways Kenya Limited v Kenya Engineering Workers Union [2018] eKLR; Civil Appeal Application No. 111 of 2018 Waki, JA** stated**:**

> ***"Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate."***

As for the prejudice likely to be suffered by the respondent if the extension sought is granted, the respondents submitted that they stand to b prejudiced as they have been waiting for almost 20 years to enjoy the fruits of distribution of the estate of their deceased father. Indeed, it is undisputed that the applicant filed an affidavit of protest before the High Court and was unsuccessful. In a bid to take a second bite of the cherry, she challenged the confirmed grant of letters of administration intestate by filing an application for annulment where she raised the same grounds of objection. Having failed in her pursuit yet again after the High Court dismissed her application, she is now attempting a third bite of the cherry by pursing an appeal. In the circumstance the applicant wants to have her cake and eat it at the expense of the respondents. As stated by **Makhadia, J** in **Mary Waruga Wokabi** case above**, *"It becomes a situation where the applicants want to have it both ways by filing an application for review and an appeal of the same decree or order which is tantamount to abuse of the court process."***

In view of the circumstances stated above, I decline to exercise my discretion. There is no merit in the motion before me and I order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of May, 2020.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR