



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, J.J.A.)

CIVIL APPLICATION NO. NAL 115 OF 2015

BETWEEN

RHODA NDULULU SENGETE.....1ST APPLICANT

DANIEL KASIMU GIBSON.....2ND APPLICANT

AND

TABITHA KAVENGE MATOLO.....RESPONDENT

(Being an Application for extension of time to file and serve Notice and Record of Appeal arising from the Judgment and Order of the High Court of Kenya at Nairobi (C. Kariuki, J.) dated and delivered on 19th December, 2014 *in HC E.L.C. Cause No. 309 of 2005*)

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RULING OF THE COURT

1. The applicants herein were aggrieved by the dismissal of their application for extension of time to file and serve a notice of appeal and record of appeal out of time by a single Judge of this Court (Koome, JA) made on 5th April, 2019. They now come before this Court on a reference under **Rule 55(1)(b)** of this Court's Rules imploring this Court to vary, discharge or reverse the impugned decision.
2. A reference is not an appeal rather an invitation to this Court to interfere with the exercise of the discretion bestowed on a single Judge under **Rule 4** of this Court's rules. This Court will only interfere with such discretion where it is apparent that: the single Judge took into account an irrelevant factor which he/she ought not to have taken into account or that he/she failed to take into account a relevant factor which he/she ought to have taken into account; that he/she misapprehended or did not properly appreciate some point of law or fact applicable to the issues at hand or; that the decision on the available evidence and law is plainly wrong. The onus of proving the infringement of any or all such principles is on the applicant. See **George Itotia Ng'an'ga v. Mary Wanjiku Kimaru, Civil Application No. Nai. 38 of 2006 & Ramesh Shah v. Kenbox Industries Limited, Civil Application No. Nai. 232 of 2007 (UR.143/07).**
3. A brief background is that on 19th December, 2014 the High Court (Kariuki, J.), vide E.L.C. No. 309 of 2005, entered judgment to the effect that the parcel of land known as Makueni/Konza South Block 1 (Marwa) 46 be shared between the applicants' family and the respondent's family in the manner prescribed in the said decision. The decision did not settle well with the applicants and they decided to challenge it on appeal. They did not however file the Notice of appeal on time, hence the application for extension of time.
4. The application was premised on among other grounds that the mistake of counsel ought not to have been visited on an innocent client. It was supported by an affidavit of even date sworn by the 2nd applicant where the explanation given for the delay is that the firm of M/s Wanyoike & Macharia Advocates then on record for the applicants, failed to file the notice and record of appeal, and that such omission was only discovered when the applicants gave instructions to M/s E.M Obonyo & Co. Advocates to follow up on the intended appeal.
5. Having considered the application, affidavits on record and submissions by counsel, the single Judge found that: the applicants' delay as attributed to the applicant's former advocates was not excusable as there was no evidence on record showing that the applicants had instructed the said advocates hence a lack of demonstration of due diligence on the part of the applicants and; the applicants had failed to

demonstrate prejudice as, despite there being evidence on record that the respondent had already obtained a grant of letters of administration, there was lethargy on their part to pursue an appeal to challenge the grants.

6. It is based on these findings that the single Judge dismissed the application with costs in favour of the respondent.

7. The applicants are now before this Court on allegations that the learned single Judge in dismissing the application did not consider relevant factors and considered irrelevant ones. Mr. Omondi, counsel for the applicants submitted that the learned Judge failed to consider the chances of success of the intended appeal. He urged that the application be allowed.

8. In opposition, Mr. Mbindyo counsel for the respondent, citing among other cases, **James Mwangi Mathenge & Another v. Charles Mwai & Another**, Civil Application No. 265 of 2005 and **John Koyi Waluke v. Moses Masika Wetangula & 2 Others**, Civil Appeal (Application) No. 307 of 2009, submitted that the single Judge duly considered what she ought to have considered. He maintained that the learned Judge considered the issue of delay and all other relevant issues.

9. Counsel submitted that upon receiving instructions, counsel on record for the applicants filed the application for extension of time after a period of 74 days had lapsed. He maintained that the learned Judge considered the issue of prejudice and properly found that the applicants had failed to challenge the grant of letters of administration granted to the respondent. Further, that despite the fact that the learned Judge considered the issue of the chances of success of the intended appeal, it was not a mandatory issue for determination.

10. He urged the Court to dismiss the application for not warranting any interference by this Court.

11. In consideration of this reference and with the aforementioned principles in mind, it is pertinent to decipher whether the learned single Judge erred so as to determine whether this Court ought to interfere with her exercise of discretion.

12. In an application under Rule 4 of this Court's Rules, as was the one before the single Judge, before exercising the unfettered discretion to grant an extension of time, a single Judge must take into account such relevant factors as, the length of delay, the reasons for the delay, possibly the chances of success of the appeal, and any prejudice that the respondent may suffer in the event the application is granted. (See: **Leo Sila Mutiso v. Rose Hellen Mwangi** Civil Application No. Nai. 255 of 1997 and **Mwangi v. Kenya Airways Ltd** (2003) KLR 486.) However, such unfettered discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. (See: **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others**, CA. No. 14 of 2013).

13. The applicants herein fault the single Judge on the argument that she failed to consider relevant factors and considered irrelevant factors. They further argue that she failed to consider the chances of success of the intended appeal.

14. In her decision the learned Judge's decision made the following findings:-

**“[7] Under Rule 75 of the Court Rules, the applicant was required to lodge the Notice of Appeal within fourteen days of the date of the judgment delivered on 19th December, 2015. Therefore, the applicant herein was required to file the Notice of Appeal on or about the 26th January, 2015. The application for extension of time to file the Notice of Appeal was filed on 5th May, 2015 almost four (4) months after lapse of the requisite time frame. Any delay is a delay and in my view is unreasonable should be explained, when the delay is of several months it is what is termed inordinate and the burden of offering cogent explanation is higher.**

**[8] I now proceed to consider whether the explanation advanced by the applicant for the delay in lodging the Notice of Appeal was reasonable and excusable. It was the applicants' contention that the delay in filing the Notice of Appeal was occasioned to his counsel who did not follow their instructions. On the other hand, the respondent contended that the applicant did not attach any evidence to show counsel failed to take instructions therefore no mistake can be attributed to counsel. On prejudice, counsel argued that his client is advanced in age; she would wish to see the end of this protracted litigation during her life time; she is the mother and grandmother respectively of the applicants, she has been granted a confirmed grant of letters of administration over the subject suit property and she would wish to distribute it to her heirs...**

**[9] Is the delay attributed to the applicants' advocates excusable; the applicants did not attach any evidence on their part to show that they had instructed the said firm of advocates; better still, there was not even a letter following up on the said instructions. I think it is time litigants started to bear the mistakes made by lawyers whom they have chosen. I say so because sometimes it has become almost obvious for every delay an advocate is blamed and yet no action is demonstrated to show there was due diligence on the part of the litigant.**

**[10] On the issue of prejudice, counsel for the respondent argued very strongly that his client octogenarian would be prejudiced. Counsel presented a Ruling in Succession Cause No. 823 of 2009 in which the respondent was granted a confirmed grant of letters of administration vesting the suit property as per the judgment intended to be appealed against. This contention is not farfetched and for the very reason that this appeal involves a delicate relationship of members of the same family. The applicants have taken all this into consideration and thus should have been diligent to ensure the appeal was filed on time.”** (Emphasis supplied)

15. It is evident from the above excerpt that as set out in **Leo Sila Mutiso v. Rose Hellen Mwangi** (supra) the learned judge considered the factors she ought to have considered in determining the application before her.

16. On the issue that the learned Judge failed to consider the issue of chances of success of the appeal, it is apt to note that that comes as a last, possible, consideration after a party has satisfied the other requirements. The possibility of the appeal succeeding does not *ipso facto* entitle a party to extension of time.

17. In view of the above, the applicants have failed to demonstrate to the satisfaction of the Court that the learned Judge failed to exercise her discretion properly; that the Judge considered some extraneous matters or failed to consider relevant matters and as a result arrived at the wrong decision. On the issue of prejudice, we were informed that the respondent is in her sunset years and it is her wish to see this estate distributed before she takes her last breath. Any further delay would in our view be very prejudicial to her.

18. We find no reason to interfere with the learned Judge’s decision.

Accordingly, we dismiss this reference with costs to the respondent.

**Dated and delivered at Nairobi this 10th day of July, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**