



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, JA (IN CHAMBERS))**

**NAIROBI CIVIL APPLICATION NO. 6 OF 2020**

**BETWEEN**

**URBANUS MUINDE MUTUKU.....APPLICANT**

**AND**

**DANIEL MBITHUKA MBINDA.....RESPONDENT**

*(Being an application for extension of time to file notice of appeal from the*

*Judgment and Order of the High Court of Kenya at Machakos (G.V. Odunga, J.)*

*made on 6<sup>th</sup> November, 2019 in Succession Cause No. 1035 of 2012)*

**RULING**

1. By his application dated 7<sup>th</sup> January 2020, the applicant, Urbanus Muinde Mutuku, seeks an order for extension of time for filing of notice of appeal. He intends to appeal against a ruling by the High Court at Machakos (*G.V. Odunga, J.*) delivered on 6<sup>th</sup> November 2019 dismissing his protest against the appointment of the respondent as administrator of the estate of Dominic Mutuku Mwole, deceased. In the same ruling, the court ordered rectification of the confirmed Grant to reflect the correct acreage of the property known as Machakos/Mua Hills/650 to be administered by the respondent as 15 acres instead of the entire parcel which measures 39.22 acres.

2. In his affidavit in support of the application, the applicant explains that two days after delivery of the ruling, that is on 8<sup>th</sup> November 2019, his advocates wrote a letter to the Deputy Registrar of the court seeking assistance in tracing the court file; that the delay in filing the notice of appeal was not deliberate; that at the time the ruling was delivered he did not have money to pay legal fees or court fees and had to seek out other beneficiaries to chip in.

3. The respondent has opposed the application. He depones, in his replying affidavit that the ruling was delivered in the presence of counsel for both parties and a certified copy of the same was available 7 days later; that it is not clear why the applicant's advocate who had instructions to appeal the ruling by the time he wrote to the Deputy Registrar on 8<sup>th</sup> November 2019 did not do so and it is therefore confounding why a notice of appeal was not filed in a timely fashion; that litigation in respect of this matter has been going on for the last 16 years and he has suffered emotional and financial distress and it should come to an end.

4. I have considered the application and the submissions presented. The court has unfettered discretion under Rule 4 of the Court of Appeal Rules, to extend time where circumstances warrant. That discretion must, however, be exercised judicially and each case must be considered on its own facts. As *Waki, JA* stated in *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*:

***“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 public 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: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Iqweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”***

5. Applying those principles to the matter at hand, it is clear that when the ruling in question was delivered by the High Court on 6<sup>th</sup> November 2019, counsel for both parties were present. There is no plausible explanation given why a notice of appeal was not filed

promptly in accordance with Rule 75(2) of the Court of Appeal Rules. There is no suggestion that the applicant or his advocates attempted to file a notice of appeal and that the same was declined by the lower court on the basis that the court file court not be located. The reasons advanced by the applicant that he was prevented from filing the notice of appeal because he did not have money to do so and that the file was not available appear inconsistent and are not persuasive.

6. The respondent says that he has been under emotional and financial distress for the last 16 years litigating over the matter and stands to suffer prejudice, if the application is allowed, as he helplessly watches his investment in land that he purchased from the deceased waste away.

7. I am not, in the foregoing circumstances persuaded by the applicant that I should exercise the court's discretion in his favour. He had until 20<sup>th</sup> November 2019 to file the notice of appeal. There is really no good reason given why he did not do so. Furthermore, the present application was not filed until 14<sup>th</sup> January 2020, that is about one and half months after the time for filing the notice of appeal had lapsed. No plausible explanation has been offered for that delay either.

8. I accordingly dismiss the applicant's notice of motion dated 7<sup>th</sup> January 2020. I make no orders as to costs.

Orders accordingly.

***Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2020.***

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**