



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MURGOR, J.A.)**

**MISCELLANEOUS APPLICATION NO. 106 OF 2019**

**BETWEEN**

**ALI OMAR ALI ABDULRAHMAN.....APPLICANT**

**AND**

**MOHAMED ALI ABDULRAHMAN.....RESPONDENT**

*(Being an application for leave to file and serve a Memorandum and record of*

*Appeal out of time from the ruling and order of the High Court at Mombasa*

*(Thande, J.) delivered on 6<sup>th</sup> October 2017 in Succession Cause No. 206 of 1989)*

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**RULING**

By a Notice of Motion dated 20<sup>th</sup> May 2019 premised on **Article 159 (2)** of the **Constitution, sections 3A and 3B** of the **Appellate Jurisdiction Act** and **rule 4** of the **Court of Appeal Rules**, the applicant, **Ali Omar Ali Abdulrahman** has sought orders for extension of time within which to lodge a memorandum and record of appeal against the ruling and orders of the High Court (**Thande, J.**) dated 6<sup>th</sup> October 2017. The application was brought on the grounds that after delivery of the ruling, the applicant instructed his advocate Kenga & Company Advocates to lodge an appeal on his behalf; that the advocate proceeded to lodge a notice of appeal and embarked on preparing a memorandum and record of appeal. It was stated that prior to the appeal being lodged, the relationship between the applicant and his advocate soured and as a result of outstanding legal fees, the applicant was unable to retrieve his file from his advocate until settlement of the outstanding amounts; that the applicant now seeks to file the record of appeal, and that the delay in filing was occasioned due to no fault of his own; that he has since secured another firm of advocates to file the appeal, and that this application has been brought timeously. He claims he will suffer extreme prejudice if he were not granted leave to file the record of appeal out of time.

The application was supported by the applicant's affidavit sworn on 22<sup>nd</sup> November 2019 which reiterated the grounds of the application and written submissions wherein it was submitted that the delay of about 700 days was occasioned by the applicant's former advocates holding of the file as a lien over the outstanding legal fees, and the Court was requested to take judicial notice of the fact that a party cannot prepare a record of appeal without the pleadings contained in the file. It was submitted that disputes with the counsel over payment of fees was considered in the case of **Kagima Kariuki & 2 others vs George Gichimu & 2 others [2014] eKLR** and found to be a plausible reason for delay; that the applicant has since requested for a copy of the ruling and the proceedings which to date has not been supplied; despite a request having been made. It was further submitted that the intended appeal had a high chance of success as the respondent did not involve the applicant in the process of obtaining the confirmation of grant of letters of administration; that this was despite the requirements of **rule 40 (8)** of the **Probate and Administration Rules** that required that consent of all dependants and beneficiaries should be obtained; that further the court having found that the grant and confirmation was obtained in disregard of the law, it ought to have revoked the grant, but nevertheless declined to do so.

In a replying affidavit filed by the respondent together with written submissions, it was deponed that the application for leave to file the record of appeal is tainted with laches on account of the inordinate delay; that the applicant had failed to provide sufficient reason for the delay; that despite the lien held over the applicant's file by his former advocate, the applicant failed to show what steps he took to secure the records from the court file which was available, or that he was denied access to the court file to obtain the record and the proceedings; that the court registry has been fully operational in the two years since the ruling was rendered, and many proceedings have been typed and appeals filed and determined in that time; that the applicant had not demonstrated in any way that he has pursued the certified proceedings from the registry, and has not so much as attached a certificate of delay; that as a consequence, the reason for delay has not been explained,

and there is nothing to show that the delay was occasioned by his former advocate but instead points to total inaction on the applicant's part which was inexcusable; that the applicant has not specified what prejudice he stands to suffer; that he (*the respondent*) is almost 90 years old and will be greatly prejudiced were leave to file the appeal be allowed, as the estate of the deceased was distributed to the beneficiaries immediately after the grant was confirmed on 23<sup>rd</sup> September 1992, which was 24 years before the summons for revocation was filed by the applicant on 5<sup>th</sup> October 2016; that all beneficiaries are enjoying their share of the deceased's estate, some of the properties have since been disposed of; and there is nothing further to distribute, and that the applicant has squandered his share of the estate, and now seeks to have the deceased's properties redistributed, by demanding a second bite at the cherry.

It was submitted in addition, that the applicant is not entitled to benefit from the *proviso* to **rule 82**, as he has not complied with the requirement to serve the respondent's counsel with a copy of the request for proceedings; and therefore, the period for preparation of the proceedings cannot be excluded from the entire period of delay in filing the record of appeal. For the foregoing reasons I was urged to decline to grant the extension sought.

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 exercised 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***.

Applying these principles to the circumstances of this case, it is not disputed that the length of delay was about 700 days or 2 years and 2 months. The High Court's decision was rendered on 6<sup>th</sup> October 2017, and this application was filed on 22<sup>nd</sup> November 2019.

In explaining the delay, the applicant contends the former advocate Kenga and Company Advocates lodged, a Notice of Appeal dated 17<sup>th</sup> October 2017. Thereafter, the advocate/client relationship between the applicant and the former advocates broke down irretrievably. It was the applicant's case that they were unable to file the record of appeal because the former advocates refused to release his file on account of outstanding legal fees, and that it was not until the fees were cleared that he was able to file this application.

In considering his explanation, I find it to be most unsatisfactory and unconvincing. This is because, if indeed legal fees were outstanding with the former advocates, there is nothing to support the assertion. No copy of an invoice was attached that specified the outstanding sums due and, no correspondence evidencing a demand for specified amounts in exchange for the applicant's file. There is nothing to show that the legal fees were eventually settled, or that would evidence the release of the file to the applicant's current advocates, once the fees were settled. Indeed, the reason advanced seems to me rather farfetched and a sad attempt to hoodwink the court.

Furthermore, if the applicant was unable to secure his file from his former advocate, he could always have obtained the documents from the registry. Once again, there is nothing to show that the applicant visited the registry to ascertain whether he could access the pleadings, as well as the proceedings and the certified ruling. I would agree with the sentiments expressed by the respondent in *paragraph 10* of the replying affidavit that, "... *the registry has been fully operational in the said 2 years of the delay and many litigants have been able to have proceedings typed in many appeal, some awaiting determination and some which have been fully determined.*" Any effort made on the applicant's part to visit the registry would have greatly assisted in securing the required records.

The foregoing notwithstanding, there is a further short-coming in the applicant's narrative. An analysis of the Notice of appeal reveals that it was not served on the respondent or his advocate.

In this regard the *proviso* to **rule 82** is unequivocal. It specifies that;

***"...Provided that where 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."*** *Sub rule (2) of rule 82* goes on to provide that;

***"An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent"***. (emphasis mine)

Essentially, **rule 82** makes provision for the time taken to prepare and supply proceedings to the effect that, provided the prerequisites set out in the provision are complied with, then the time taken for preparation of the proceedings can be excluded from the total period of delay. **Sub- rule (2)** makes it clear that for an appellant to rely on the *proviso*, it must demonstrate that firstly, a request for proceedings has been made in writing to the deputy registrar, and secondly, that a copy of such request has been served on the respondent.

Without having served the respondent or his counsel with the request for the proceedings, the applicant cannot benefit from the *proviso* to **rule 82**, with the effect that, the period for preparation of the proceeding cannot be excluded from the period of delay. And since as indicated above, the explanation for the delay of 2 years and 2 months was not a satisfactory explanation, I find that the delay was not explained.

As concerns the possibility of success of the intended appeal, the applicant's complaint arises from a decision of the High Court wherein the learned judge dismissed the respondent's Preliminary Objection to the applicant's application for revocation of a Grant of Letters of administration of the deceased's estate that was issued to the respondent on 25<sup>th</sup> May 1990 and confirmed on 23<sup>rd</sup> September 1992. The learned judge dismissed the respondent's objection, for the reasons that the grounds advanced which were that, the application was overtaken by events as the estate's properties had changed hands and that the applicant had filed another matter in the Kadhi's court were not pure points of law, but were matters that required to be ascertained through interrogation and enquiry.

Strangely enough, despite the court dismissing the respondent's objection, it is the applicant who is aggrieved by the trial court's decision. The Notice of appeal indicates that the applicant intends to appeal against a part of the decision, while, the draft Memorandum of appeal indicates that he intends to appeal against the whole of the decision. The grounds of appeal indicate that he is aggrieved by the decision because the trial court declined to revoke the Grant despite concluding that it was obtained through defective proceedings. The trial judge was further faulted for failing to find that the estate was not unfairly distributed notwithstanding the provisions of Islamic law; and for declining to delve into the issue of propriety of administration of the estate.

When the grounds of the intended appeal are considered in light of the learned judge's decision dismissing the respondent's preliminary objection, there appears to be a disconnect between the ruling and the applicant's grounds of appeal. Given this anomaly, it becomes uncertain whether the intended appeal has any chance of success.

With respect to whether any prejudice would be occasioned to the respondent, it is apparent that the application for revocation relates to a grant that was confirmed way back in 1992. This is clearly a very old succession matter. The question would arise as to whether the revocation sought would serve any useful purpose this late in the day.

All factors considered, I am not persuaded to exercise my unfettered discretion to allow the application, which I accordingly dismiss. Considering that this is a family dispute, I order each party to bear their own costs.

***It is so ordered***

***DATED and delivered at Nairobi this 7<sup>th</sup> day of August, 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**