



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 283 OF 2019

BETWEEN

ANN NJIKI MUNGA.....APPLICANT

AND

CLEMENT SOLOMON MUNA.....1ST RESPONDENT

SAMUEL NG'ANG'A.....2ND RESPONDENT

(An Application for leave seeking extension of time to appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Muchelule, J) dated 10th December, 2018 in Succession Cause No. 857 of 1992)

RULING

1. This application emanates from a Ruling rendered on 10th December, 2018 by Muchelule J. in **Succession Cause No. 857 of 1992**, dismissing the applicant's notice of motion dated 4th January, 2017, as amended on 5th June, 2017. In the said motion, the applicant was seeking orders of revocation of a Grant of Letters of Administration issued to the two respondents on 3rd December, 1996. The learned Judge found the application '*res judicata*' as a similar application seeking annulment of the Grant had been heard and dismissed before the High Court sitting in Eldoret.
2. Aggrieved by the said dismissal, the appellant/applicant through the firm of Musyoka Murambi & Associates timeously filed a Notice of Appeal on 20th December, 2018. However, according to her, the file went missing and could not be traced for a while causing her counsel on record to write to the Court on 28th January, 2019 requesting for assistance in tracing the file.
3. Other letters were sent to the Deputy Registrar subsequently but it was not until 22nd February, 2019 that the applicant's advocates wrote to the Deputy Registrar of the High Court requesting to be supplied with typed and certified copies of the proceedings for purposes of filing the appeal. This letter was not copied to counsel on record for the respondents. The proceedings were subsequently prepared and counsel for the applicant was informed that the same were ready for collection on 29th March, 2019.
4. By this time, the 60 days allowed by **Rule 82** of the Court of Appeal Rules for filing the Record of Appeal had already lapsed. The applicant had in the meantime been served with an application to strike out the appeal on 30th July, 2019. This is the application that appears to have nudged her from slumber prompting her to file the application that is the subject of this Ruling under Certificate of Urgency on 22nd January, 2020.
5. The application which is pronounced to be premised on **Rules 4, 41, 42 and 43** of the Court of Appeal Rules and **Sections 3, 3A and 3B** of the Appellate Jurisdiction Act seeks "*extension of time within which the applicant ought to have filed the Appeal; and further that the Record of Appeal which was filed out of time be deemed as duly filed*". The Application is predicated on grounds that the delay was inadvertent; the delay was caused by "various mishaps at the Court registry; the delay is not inordinate or so great as to be inexcusable and that the respondents will not suffer any prejudice if the application is allowed.
6. These grounds are expounded in the applicant's affidavit in support of the motion sworn on 22nd January, 2020 to which she has annexed the letters referred to earlier.
7. The application is opposed by the 1st respondent vide his replying affidavit sworn on 28th May, 2020. According to him, the Record of Appeal was lodged 135 days after the notice of appeal was filed, which delay is inordinate and has not been explained. The respondent posits

that the application is an afterthought and was filed to circumvent the respondent's application to strike out the record of appeal, which application was filed earlier and had already gone through case management. The respondent also contends that the application is bad in law and is an abuse of the court process and it should be dismissed.

8. Both parties filed submissions whose contents buttress and expound the contents of their affidavits. I have carefully considered the application in its entirety. I have also considered the rival submissions by both counsel and the law. I must say from the onset that I am perturbed by the fact that this matter has been in court for over three decades as parties file one application after another with no end in sight. I will nonetheless determine this application purely on the basis of the material before me and the law.

9. **Rule 82(1)** Court of Appeal Rules sets out the law in respect of filing of appeals before this Court. The same provides as follows:-

“Sec 82(1)

Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- a. a memorandum of appeal, in quadruplicate;**
- b. the record of appeal, in quadruplicate;**
- c. the prescribed fee and**
- d. Security for the costs of the appeal.**

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.”

The above proviso clearly obligates a party who anticipates that the record may not be ready for filing within 60 days to write the letter bespeaking proceedings to the Deputy Registrar of the Court within 30 days of the date of the decision desired to be appealed against. Further, under sub-rule 2 which is couched in mandatory terms, a party shall not rely on the proviso to sub-rule 1 unless the letter bespeaking the proceedings was served on the respondent.

10. Has the applicant satisfied the above requirements? The answer is in the negative. The letter requesting for a certified copy of the Ruling and proceedings is dated 22nd February, 2020 which was evidently outside the 30 days from the 10th December, 2018 when the impugned ruling was made. Secondly, even on its face, the letter was not copied to the respondent's counsel on record. There is also no evidence of service of the letter on the respondent. No plausible explanation has been proffered for this noncompliance with the Rules of Court. Even if the Court was to assume that the High Court file went missing, and there is paucity to evidence in support of that allegation, nothing stopped the applicant's counsel from writing the letter in question within 30 days and serving it on the respondent or his counsel. Thirdly, the delay between 29th April, 2019 when the Certificate of Delay was issued and 22nd January, 2020 when this application was filed is also not explained.

11. Rule 4 of the Court of Appeal Rules grants a single judge the power to extend the time limited by the Rules, or by the Court or of any superior court, “on such terms as it thinks just”. Pursuant to this rule and on the authorities of a long line of decisions, the leading one being **Leo Sila Mutiso V Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997**, as a single judge I am only required to satisfy myself that the delay was not inordinate; that the reason or reasons for the delay is or are plausible; that granting the relief will not be prejudicial to the respondent; and (possibly) that the appeal has reasonable chances of succeeding if the application is granted.

12. On the question as to whether the delay between 10th December, 2018 to 22nd January, 2020 when this application was filed can be excused. In my view, that delay is inordinate. Has it been sufficiently explained? The answer to this is in the negative. On the question of prejudice, as stated earlier the matter has been in court for 3 decades and running. Further delay is definitely prejudicial to the respondents and any other beneficiaries of the deceased's Estate. On whether the appeal has chances of success, the impugned ruling was to the effect that the application for revocation of the Grant was *res judicata*. This has not been addressed in the applicant's affidavit or grounds on the face of the application. The Ruling was not about distribution of the Estate but about revocation of the grant and the question whether the application was *res judicata* or not.

13. In view of the above, I come to the inevitable conclusion that this application does not reach the threshold set for applications under **Rule 4** of the Court of Appeal Rules. I have no basis for exercising my discretion in favour of the applicant herein. Accordingly, the notice of motion dated 22nd January, 2020 is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 18th day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR