



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAL. 306 OF 2018

BETWEEN

SUSAN MIKONYO KAMUI.....APPLICANT

AND

JENNIFER WAIRIMU NJOGU.....RESPONDENT

(An application for extension of time within which to file and serve notice of appeal against the order of the High Court at Makeni (C. Kariuki, J.) dated 20th September, 2018 in *Succ. Case No. 458 OF 2017*)

RULING

The applicant **Susan Mukonyo Kamui** by the motion dated 25th October, 2018 prays that this Court be pleased to extend time within which to file and serve a notice of appeal. Such notice is of an intended appeal against the order of the High Court at Makeni (C. Kariuki, J) made on 20th September, 2018 that;

- “1. A bank account in the name of both administrators shall be opened within 30 days period alternatively deposit of same cash to be going to court every month if parties fail to open an account within 30 days from date herein.**
- 2. Kshs. 94,400 should be deposited in the account every month or court as the case may be with effect from September 2018.**
- 3. Any withdrawal and or expenditure should be done with the consent of both administrators. In event of disagreement with court leave.**
- 4. The petitioner should file accounts from the date of her first appointment to date, within 30 days period, failure to which her administrator ship shall stand revoked.”**

In the course of the ruling the learned Judge noted that the issue of joint administration of the estate of **Kamui Mavuti** (deceased) by and between the parties herein had already been allowed by Nyamweya, J. in an earlier ruling delivered on 16th October, 2017.

The parties herein were the petitioner and objector, respectively, before the High Court and claim to be wives of the deceased.

The grounds on which the applicant seeks the order of extension of time appear on the face of the motion as follows;

- “a. That the ruling against which the applicant intends to appeal was delivered on 20th September, 2018.**
- b. That the applicant was being represented by the firm of Mwangangi & Associates.**
- c. That the applicant had instructed the said firm to file an appeal against the said ruling.**
- d. That the said firm refused, failed and/or neglected to file a notice of appeal as earlier instructed by the applicants.**
- e. That the applicant’s rights to a fair hearing may be infringed upon in the event she is not accorded a hearing of the**

intended appeal.

f. That the intended appeal has very high chances of success.”

In her supporting affidavit sworn on 23rd October, 2018, the applicant swore that immediately after delivery of the impugned ruling, she instructed her advocates of record to lodge an appeal as it infringed on her “*right as the rightful administrator of [her] husband’s estate*”. She does not name the advocate nor indicate the mode of the instructions. It was not until 19th October, 2018 that she came to learn with utter consternation that the advocate did not file the notice of appeal. She swears that she has an arguable appeal and that the mistakes of her advocate should not be visited upon her.

There was no replying affidavit or other response filed by the respondent **Jennifer Wairimu Njogu**, notwithstanding that the application was served upon her on 22nd November 2018 as sworn to in the affidavit of service filed by **James Muchui Gachoka**, the process server. Notice of the hearing was also served on the respondent on 23rd February 2019 by the same process server but she did not appear at the hearing before me on 26th February, 2019.

The applicant was present as was **Mr. Wafula**, the advocate she had newly-instructed. He admitted that the application was filed some 35 days after the ruling sought to be appealed against. In answer to my questions, counsel conceded that there was nothing to show, beyond her say-so, that the applicant had instructed the firm of Mwangangi & Co. Advocates to file a notice of appeal. There was also no affidavit by the said advocates offering any explanation as to why the filing did not take place. He also conceded that there was no draft memorandum of appeal nor grounds of appeal in the supporting affidavit to lend credence to the applicant’s assertion that the intended appeal is arguable and, as she swears, “*has very high chances of success.*”

I have given due consideration to the application, the supporting affidavit and the submissions made by counsel. An application such as is before me is a plea to my discretion which is wide and unfettered to the end that justice should be done.

The discretion is not one without logic and principle, however. It is a judicial one and must be exercised in a manner that is sound, not capriciously and whimsically. There really is no magic to it and over time a number of considerations have been distilled as germane. They are of course merely indicative and must not be construed as fettering the discretion of a single judge exercising jurisdiction to extend time under **Rule 4 of the Court of Appeal Rules 2010**.

It is proper to consider from the authorities, as I recently enumerated in **SAVINGS TEA BROKERS LTD vs. KENYA TEA DEVELOPMENT AGENCY & OTHERS** Civil Application Nai. 218 of 2015;

- a. the length of the delay,
- b. the reason for the delay,
- c. (possibly) the proprietors of the appeal succeeding,
- d. the degree of prejudice (if any) that may be suffered in case the extension is granted and;
- e. the general conduct of the parties so that the concealment or non disclosure of material facts, lack of candour or any inequitable conduct is more likely to disentitle an applicant.

See, also **GITETU vs. KENYA COMMERCIAL BANK LTD [2009] KLR 545; POTHIWALLA vs. KIDOGO BASI HOUSING CO-OP SOCIETY LTD & 31 OTHERS [2005] KLR 733.**

The filing of a notice of appeal is a rather simple and straight-forward matter requiring no more than the intention to appeal expressed in a single sentence. I am not satisfied that there was any reason why such notice was not filed. Even though the applicant avers that she instructed her advocate but he did not file the notice of appeal, I am later told that it is the firm of Mwangangi and Co. Advocates that was instructed. There is no indication as to who exactly was so instructed and whether the instructions were verbal or in writing. There is no averment that fees were paid for the new step of litigation before a higher court. Granted, advocates may be instructed but fail to file a notice of appeal for any number of reasons, but I would think it not a difficult or onerous thing for such advocate to offer some explanation or, if he be unwilling to offer any, it be at least stated that an explanation was sought from such advocate. That did not happen herein.

I am at liberty to consider, though it is not mandatory that I do, the prospect of success of the intended appeal. In the application before me, no attempt has been made to either exhibit a memorandum of appeal in draft or to even mention some of the points of grievance meant to be raised before this Court. Speaking for myself, and while fully aware that it is not my place to make any firm declarations on the matter, the order sought to be challenged appears to me eminently reasonable. I say no more.

The delay herein was in the circumstances inordinate, no material has been placed before me upon which I can properly exercise a favourable discretion towards the applicant, and her application is for denial.

It is accordingly dismissed but with no order as to costs given the respondent’s default of participation.

Dated and delivered at Nairobi this 22nd day of March, 2019.

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR