



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 310 OF 2018

BETWEEN

NANCY WANJIRU MWAURA.....APPLICANT

AND

JENNIFER WAIRIMU NJOGU.....1ST RESPONDENT

JOHN KIMONDO.....2ND RESPONDENT

REGISTRAR OF TITLES KIAMBU.....3RD RESPONDENT

PETER MBUGUA NJERI .....4TH RESPONDENT

(An application for extension of time to file and serve notice of appeal and record of appeal out of time against the judgment of the High Court of Kenya at Nairobi (Gacheru, J.) dated 12th October, 2017 in *ELC Case No. 397 OF 2013*)

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RULING

By her application dated 29th October, 2018, the applicant **Nancy Wanjiku Mwaura** seeks, mainly under **Rule 4** of the Court of Appeal Rules, an extension of time to file and serve a notice of appeal.

The grounds in which the application is premised are more than a dozen and appear on its face thus;

- “a. That judgment in this matter was delivered at the High Court on 12th October, 2017.**
- b. That the applicant then instructed her advocates to file and notice of appeal and the record of appeal against the whole of the said judgment.**
- c. That for unexplained reasons the advocates did not file the notice of appeal at all.**
- d. That the applicant was made to falsely believe that the notice was filed and the advocates were only waiting for the proceedings to prepare and file the record of appeal.**
- e. That the applicant only discovered that no notice was ever filed when she persistently demanded a copy of the notice and the letter asking for the proceedings to assist in getting the proceedings typed quickly.**
- f. That the advocates categorically informed the applicant that they did not file the notice.**
- g. That the applicant reported the matter to the *Advocate’s Complaint Commission*.**
- h. That on 12th September 2017 the commission wrote to the advocates over the issue.**

- i. That on 26th September the advocates wrote to the commission and offered to refund the fees paid for the filing of the appeal.**
- j. That on 14th September 2018 the advocates refunded the Kshs. 30,000/ via Mpesa to the applicant.**
- k. That the applicant is now hopelessly out of time and she desires to appeal.**
- l. That the subject matter is a parcel of land known as Kabete/Lower Kabete/1163 over which the 1st defendant has a life interest.**
- m. That his parcel of land is the grave yard for the family. The applicant's mother and the 1st respondent's mother are buried on the subject matter.**
- n. That the 1st respondent has 9 children who will have nowhere to live should the sale of this parcel of land be allowed to stand."**

The applicant's supporting affidavit sworn on the same date expounds on those grounds under oath and attaches various documents in proof of the main averments that she paid fees to her former lawyers for filing of the appeal but she, later learnt, to her shock and consternation, that they did not do so, and that she as a result reported the said advocates to the Advocates Complaints Commission, as a consequence of which the said advocates refunded the fees paid. She also swore that the subject matter of the dispute is ancestral land on which lie the mortal remains of the 1st respondent's deceased mother, as well as those of the applicant's mother. The said land houses the 1st respondents 9 children and young wife that the applicant takes care of as the 1st respondent is allegedly not of sound mind and cannot take care of his affairs. The intended appeal is to protect the ancestral land and the interests of those children.

The applicant is opposed by **John Kimondo** the 2nd respondent who, by an affidavit sworn on 26th February, 2019 states that the supporting affidavit is fatally defective for not attaching a draft memorandum of appeal; the 365-day delay is inordinate and inexcusable and the reasons given therefor do not hold water, the complaint made against the advocate is by one **Jane Wanjiku Tatua** and not by the applicant; the 1st respondent has other properties besides the disputed land; she would be prejudiced were the orders to be granted as she would be prevented from fully utilizing the subject land, and the applicant has come to court with unclean hands as she has been frustrating the said respondent and his tenants by denying them access and also interfering with becons, besides cutting down bananas and trees.

At the hearing of the applicant **Mr. Masaviru** and **Ms Nelima**, respective learned counsel for the applicant and the 2nd respondent made submissions which were a reiteration of the positions taken by their respective clients in those affidavits. I have carefully considered them.

An application for extension of time is a call for a single judge to exercise a discretion. The discretion is a judicial one to be exercised judicially on the basis of settled principles, not capriciously in accordance with a judge's whims. The discretion is perfectly free and unfettered but it is not wild and unfathomable. The matters that a judge would ordinarily consider include;

- a. The length of the delay**
- b. The reasons for the delay**
- c. (possibly) the likelihood of the intended appeal succeeding**
- d. The likely prejudice if any that the respondent may suffer and,**
- e. The conduct of the applicant.**

These have been said to be the indicative considerations in a long line of decisions of single Judges and the full Court. See, for instance, **GITHUAKA vs. NDURIRI [2004] 2 KLR 67** **WAWERU & ANOR vs. KIRORI [2003] KLR 448.**

Now, there is no dispute that on the face of it, the delay sought to be regularized herein is a long one. 365 days are not few. But they are not the longest days that this Court has excused. What matters is whether a plausible explanation is given for the delay and in this case the applicant says that she instructed her erstwhile lawyers to file the appeal and followed those instructions with a payment of fees. She swears, without serious controvert, that she thereafter followed upon the status of the appeal only to be told that proceedings were awaited. It is only when she insisted in September 2018, on seeing the notice of appeal and the letter be speaking proceedings that she, as she swears rather extravagantly at paragraph 10;

**" ...almost suffered a heart attack when [they] disclosed that they had indeed not filed a notice of appeal."**

She goes on to detail the steps she took of reporting the matter to the Complaints Commission, as a result of whose intervention the said advocates refunded the fees, whereupon she instructed her current advocates.

I am satisfied that the applicant was let down by her advocates and that their having misled her into thinking that an appeal had been filed explains the year-long delay. I think also that the application has made out a case for a facially arguable appeal in the grounds and on the supporting affidavit where she mentions the respects in which she will contend the learned Judge erred. There is no hard and fast rule that such grounds be contained in a memorandum of appeal though, admittedly, it is a neater way of raising such grounds.

Considering that what is in dispute is apparently ancestral land in which the graves matriarchs lie, it being claimed that someone is of not in full control of his faculties and has left the care of his wife and children, all nine of them, in the hands of the applicant needing the use of the subject land; it would be in the interests of justice that the applicant be permitted to agitate her grievances before this Court on appeal. I shall not shut her out.

For these reasons, I find that the applicant deserves my favourable discretion, and I have not been furnished with a firm basis for finding that her hands are tainted with inequity as alleged.

I do, in the result, allow the application in the following terms;

- a. The applicant shall file and serve a notice of appeal within **seven (7)** days of the date hereof.
- b. The applicant shall file and serve the record of appeal **within 45** days of filing the notice of appeal.
- c. The appeal so filed shall be fast-tracked for hearing on priority basis.
- d. Costs shall be in the intended appeal.

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

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**