



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 70 OF 2018

BETWEEN

JULIUS MATHIA NDAMAIYU.....APPLICANT

AND

PETER NJOROGE MWANIKI.....RESPONDENT

(An application for leave to appeal out of time against the whole of the Judgment of the High Court of Kenya at Murang'a (Ngaah Jairus, J.) made on 19th November, 2014

in

Succession Cause No. 179 of 2013)

RULING

1. The applicant's application dated 15th June, 2018 seeks leave to appeal out of time against the judgment of the High Court at Murang'a, Succession Cause No. 179 of 2013 that was delivered on 21st November, 2014.
2. In his affidavit in support of the application, the applicant states that the judgment was to be delivered on notice but he never received any notice; that on 13th August, 2015 he wrote a complaint to the Deputy Registrar, High Court, Murang'a about the delay; that the Deputy Registrar informed him that the judgment was delivered on 21st November, 2014; that he collected a copy of the judgment on 24th August, 2015 and that between then and 13th June, 2018 when he filed the application he was assembling the necessary documents to enable him file an appeal as well as looking for an advocate to act for him.
3. The respondent opposed the application. In his replying affidavit, the respondent stated that the inordinate delay in bringing the application had not been well explained; and the intended appeal has no chance of success.
4. **Mr. Ndichu**, who held brief for **Mr. Mogikoyo**, learned counsel for the applicant, briefly submitted that although the delay in filing the application was in excess of 3 years, the applicant had advanced sufficient reason for it; that from the draft memorandum of appeal that was annexed to the applicant's affidavit, the intended appeal has good chances of success; and lastly, the respondent shall not suffer any prejudice if the application is allowed.
5. **Mrs. Kimani**, learned counsel for the respondent, submitted that although the applicant was notified about delivery of the judgment on 18th August, 2015, he did not file his application until 13th June, 2018; and that the respondent shall be prejudiced if the application for extension of time is allowed in that he will not be able to fully enjoy the fruits of the judgment.
6. I have considered the application and the brief submissions on record. The principles that guide this Court in an application of this nature are well settled. The Court considers, among other things; the period of the delay; the reason for the delay; the chances of success of the intended appeal if the application is granted; and the degree of prejudice to the respondent. See ***Fakir Mohamed vs Joseph Mugambi & 2 Others [2006] eKLR***
7. Applying the above principles, I find that there was inordinate delay from the date when the applicant was informed by the Deputy Registrar that the judgment had been delivered and the date when the applicant filed his application. That delay has not been well explained. It is not enough for the applicant to simply state that "I was assembling all the documents filed in court and also looking for an advocate to

file the appeal for me.” The applicant knew or ought to have known that time is of the essence in complying with court process. Having collected the proceedings, judgment and the decree, there was nothing else to “assemble.” This Court has stated, time and again, that every delay must be explained before it can exercise its discretion in favour of an applicant. In Joel Tirop Busienei vs David Randichi [2016] eKLR the Court held:-

“The timelines prescribed under this Court’s Rules are not ornamental, they are important if timely dispensation of justice is to be achieved. They provide predictability and level playing field. Where a party has been unable to comply with the same, he has to offer an appropriate explanation before the Court can allow extension of time...”

8. Having found that there was inordinate delay that was not well explained, it may not be necessary to consider the other principles but I shall do so, albeit briefly. Regarding the chances of success of the intended appeal, I have perused the judgment as well as the draft memorandum of appeal. I entertain serious doubts about its success. I will say no more, lest my remarks prejudice the applicant in case of a reference to the full Court.

9. Lastly, on the question of prejudice, the dispute over the mode of distribution of the estate of Mwaniki Ndamaiyu (deceased) has been in Court since 1991. The deceased’s children, including the respondent, have been unable to get title documents to the portions of the deceased’s estate that they are rightly entitled to because of the ongoing land dispute. They will be prejudiced by any further delay in the finalization of the long standing dispute if the orders sought are granted, and particularly so when the applicant has not satisfied me that the intended appeal stands good chances of success.

10. All in all, I find this application devoid of merit and hereby dismissed it with costs.

Dated and delivered at Nairobi this 21st day of June, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR