



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 113 OF 2018

BETWEEN

KIBIEGO TUWEIAPPLICANT

AND

MARY CHESANG 1ST RESPONDENT

BENJAMIN KARONEI 2ND RESPONDENT

(An application for leave to lodge an appeal out of time in respect of the Judgment and Decree of the High Court of Kenya at Eldoret (Gacheche, J.) dated 9th May, 2006

in

Succ. Cause No. 81 of 1998 (O.S))

RULING

The motion before me is brought under **rule 4** of the Court of Appeal Rules. It purports to also cite various provisions of the Civil Procedure Act and Rules, which are of no relevance or application hereto, and which I shall ignore. The motion seeks in prayer (b) an order that;

“(b) There be an extension of time to file an appeal out of time in the Court of Appeal from the Judgment delivered by Lady Justice Jeanne Gacheche on 9th May, 2006.”

It also seeks orders for stay of further proceedings. It is obvious that a single Judge is not possessed of the jurisdiction to entertain or grant such prayers even were they merited, which is doubtful in the circumstances of this case.

The grounds on which the prayer for extension of time is sought appear on the face of the motion as follows;

“(i) The Appeal Eldoret Court of Appeal Civil Appeal No. 262 of 2018 has abated.

(ii) The applicant has obtained letters of Administration on behalf of the deceased and seeks to prefer a fresh appeal.

(iii) The statutory time provided to prefer an appeal has not lapsed.

(iv) The applicant seeks extension of time in order to file his appeal in the Court of Appeal.

(v) The appeal has high chances of success.”

The evidential basis is provided by the affidavit of **Kibiego Tuwei**, the applicant, which is expressed as sworn on 9th October, 2018. He swears that the appeal is necessitated by the High Court’s decision some 13 years ago on 9th May, 2006 that “*the 2nd respondent was a child of the deceased yet he was not.*” An appeal that had been filed by the applicant’s mother **Taborise Chesang Keter**, Civil Appeal No. 262 of

2007, abated following her demise on 26th September, 2011, and no substitution application having been made within a year.

He swore further at paragraph 7 that following that abatement he “*filed an application for enlargement of time and substitution but the same was struck out on 2nd October, 2018*” and that, he (at paragraph 11) “*prefer(s) to put a fresh appeal on the matter but [is] out of [the] statutory time allowed,*” hence the application for extension of time to file an appeal, which he believes has a high chance of success.

The applicant’s learned counsel **Mr. Okango** relied on those grounds and that affidavit when urging the application before me. When I enquired of him what handicap the applicant suffered to explain the failure to seek substitution within time, he conceded that none had been deposed to. I also asked him why, precisely, a previous application for extension was dismissed or struck out by Odek, JA but he was unable to give details. The ruling or order of Odek, JA was not exhibited in the motion.

Even though the respondents had not filed a replying affidavit, they were represented before me by learned counsel **Mr. Kiboi**, who addressed on points of law. He submitted that the applicants recourse upon the abatement of Civil Appeal No. 262 of 2007 lay in an application to revive that appeal and not in the filing of a fresh appeal.

Counsel submitted, further, that as the intended appeal is from a succession dispute, the applicant would have no right of appeal unless he first obtained leave to appeal, which he had not done. Finally, the previous application for extension of time having been struck out by Odek, J. for the precise reason of seeking to file a fresh appeal instead of reviving the abated one, this application is an abuse of the process of the Court. He urged me to dismiss the same.

In a brief reply **Mr. Okango** stated that the application that was struck out by Odek, J. was for revival of the suit and not for enlargement of time such as the one before me.

I have given due consideration to the application and to the submissions made by opposing counsel before me. There can be no question at all that Civil Appeal No. 262 of 2007 having abated due to non-substitution within a year as contemplated by the Court of Appeal Rules, the path open to the applicant as the administrator of the estate of the appellant therein would have been an application to revive the appeal. I do not think that it is open to such an administrator to act as if the abated appeal never existed and so apply to file a fresh, independent appeal. On that score alone, I apprehend that this application must fail.

But even were I wrong on that score, then it would be upon me to bear in mind on an application to enlarge time for the filing of an appeal, in my wide and unfettered discretion, a number of considerations including; the length of the delay, the reasons for the delay, (possibly) the likelihood of the appeal succeeding and the prejudice (if any) that such extension might occasion the respondent.

The judgment of the High Court was entered into thirteen years ago. The notice of appeal filed on 9th October, 2018 speaks to that. That is a very long time ago by any standards. Granted that there was an appeal filed which was later marked as abated, I cannot but note that the deceased expired on 26th September, 2011 which is nearly eight years ago. The delay appears to me to be long and inordinate before this application was brought.

I am not satisfied that a plausible reason has been given for the delay in moving the Court for extension of time. That the family could not seem to agree as to whom among them was to file for letters of administration can hardly be a reason why the respondent should be exposed to a new round of litigation.

The length of time alone appears to me to be prejudice enough because litigation must come to an end. Parties must obtain closure and matters sometimes must be allowed to lie as they are.

In short, I do not find that the application herein is deserving of my favourable discretion and I accordingly dismiss it with costs.

Dated and delivered at Eldoret this 6th day of June, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.