



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 368 OF 2018

BETWEEN

CHARITY WACEKE KIMARI.....APPLICANT

AND

FLORENCE WANGUI KIMARI.....1ST RESPONDENT

SHEM KIHORO KIMARI.....2ND RESPONDENT

JEMIMAH JANE WACHEKE.....3RD RESPONDENT

(Application for extension of time to file and serve the notice of appeal in an intended appeal from the Ruling of the High Court at Nairobi (J.N.Onyiego, J.) dated 29th September, 2017 which was based on a ruling by Lenaola, J (as he then was) dated 27th January 2012

in

HC Succession No. 777 OF 1985)

RULING

In an application for extension of time which entails the exercise of this Court's discretionary powers, the factors to be considered are; the length of delay; the reason for delay; any prejudice likely to be suffered by the respondent if the extension is granted; and the reason or reasons for the delay. The Court may also "possibly" consider the chances of the appeal succeeding if the application is granted. See: **Nicholas Kiptoo Arap Korir Salat V. Independent Electoral and Boundaries Commission & 7 others**, Supreme Court Application No. 16 of 2014.

The dispute in question involves issues of succession and in particular the revocation by Lenaola, J (as he then was) of a grant issued on 16th July 1986. The learned Judge also ordered parties to agree on a fresh mode of distribution of the properties listed in the grant. Aggrieved by this decision, two applications were placed before Onyiego, J to review or set aside the orders of Lenaola, J. The said application was rejected and the administrators of the estate ordered to comply with the court order directing parties to embark on fresh distribution.

The applicant filed a notice of appeal on 16th October, 2017 evincing the intention to challenge that decision. However she could not do so as the time limited for doing so had lapsed. Because of this, the applicant now prays, in her omnibus application, for enlargement and also for stay of execution of the orders issued by Onyiego, J on 29th September 2017. Ms. Muigai learned counsel for the applicant, properly conceded that the prayer for a stay of execution was for determination by a full bench of the Court and therefore confined her submissions to the prayer seeking extension of time.

To justify the delay counsel posited that the notice of appeal was filed on 13th October, 2017; that this matter is old having been instituted in 1993; and that due to the large volume of the file, the typing of proceedings is still on-going and the same are yet to be received. On the chances of success of the appeal, it was submitted that in his ruling Lenaola, J (as he then was) excluded third parties who will be prejudiced as they were not involved in the suit yet their titles are to be cancelled. It was submitted finally that the respondents will not be prejudiced if time is enlarged for the applicant to file the appeal.

Mr. Kuria learned counsel for the respondents opposed the prayer for extension of time. He submitted that the applicant did not demonstrate

plausible reasons to warrant the extension of time; and that the delay has not been explained; that a statement from the bar that proceedings are being typed is not sufficient without letters exchanged between the applicant and the court. Counsel submitted further that all the applicant needed in order to file the appeal was not the entire file but only the decision intended to be challenged on appeal; that out of the three rulings in the matter, a notice of appeal has only been filed in respect of that of Onyiego, J; and that even if time was extended the orders of Lenaola, J would still remain in place.

The ruling in this matter was delivered on 29th September, 2017. The last date of filing the notice of appeal was 13th October 2017, being the 14 day of the date of the decision in question as required by **Rule 75(2)** of this Court's Rules. The notice of appeal was, however filed on 16th October 2017 constituting a delay of only 3 days. This delay is not inordinate. But it was necessary for the applicant to seek to have the notice of appeal deemed as duly lodged within time before applying for enlargement of time to institute the appeal. In view of the Court's inherent powers under Article 159 of the Constitution and sections 3A and 3B of the Appellate Jurisdiction Act, nothing really turns on that omission.

After lodging the notice of appeal the applicant had 60 days to institute the appeal but failed to do so. Her explanation for this failure is that the file is bulky and typing of proceedings has taken long. While this may be true and nobody can blame the applicant for that, it is the applicant's casual approach in the whole matter that I find unsatisfactory and unacceptable. This application was filed on 11th December 2018, a whole year from the date of the ruling sought to be challenged. The decision of Lenaola, J was itself rendered on 27th January, 2012, six years before the filing of this application. The delay is therefore inordinate and unreasonable.

Though at this stage I cannot definitively say whether the appeal would be arguable, I cannot however understand how the applicant intends to leapfrog the decision of Lenaola, J and challenge only that of Onyiego, J, yet it is the former that made orders that aggrieved her.

Because of the delay that has been experienced since the cause was filed in 1985 and grant issued in 1986, it will be unconscionable and extremely prejudicial to the respondents to wait any longer. I also consider that this is a probate matter which ought to be expeditiously settled and in any case Lenaola, J extended an opportunity to the parties to suggest fresh mode of distribution.

Accordingly this application is dismissed. I make no orders as to costs.

Dated and delivered at Nairobi this 5th day of July 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR