



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 70 OF 2019

BETWEEN

NDERI WATHUKO CHONGO.....1<sup>ST</sup> APPLICANT

PETER NDERI CHONGO.....2<sup>ND</sup> APPLICANT

AND

SAMUEL NJOROGE WATHUKO.....1<sup>ST</sup> RESPONDENT

SERAPHINE WANJIKU WATHUKO.....2<sup>ND</sup> RESPONDENT

*(Being an application for extension of time to file the intended appeal out of time from the Judgment of the High Court at Nairobi (A.O Muchelule, J.) dated 7<sup>th</sup> September, 2016 and delivered by W.M. Musyoka, J on 14<sup>th</sup> September 2016 together with ruling dated 16<sup>th</sup> March 2018 (A.O Muchelule, J.) delivered by W.M. Musyoka, J on 20<sup>th</sup> March, 2018 and Ruling dated 29<sup>th</sup> January, 2019 by (A.O Muchelule, J.)*

in

*Succession Cause No. 2171 of 2001)*

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RULING

The succession cause from which this application premised was filed in 2001 but the decision intended to be challenged on appeal was rendered 15 years later in 2016. After the delivery of the judgment on 7<sup>th</sup> September, 2016, in which the applicants' application for revocation of the grant and for the setting aside of the consent order was dismissed by the High Court, the applicants instituted two applications before that court; and to review the judgment; to enlarge time to file an appeal against the judgment. The rulings in respect of these applications were delivered on different dates, 16<sup>th</sup> March, 2018 and 29<sup>th</sup> January, 2019 respectively.

In the instant motion on notice filed on 4<sup>th</sup> March, 2019 the applicants seek, in an omnibus manner: that the time be enlarged for the filing notices of appeal against the judgment of 7<sup>th</sup> September, 2016, the rulings dated 16<sup>th</sup> March, 2018 and that of 29<sup>th</sup> January, 2018. Then there is this strange prayer; that the record of appeal be deemed to be properly filed **“as soon as certified copies of the judgment, rulings and proceedings are placed in court”**.

In trying to persuade the Court to grant the prayers, the applicants have pleaded that the court finds that they have not been indolent; that the decisions of the court below were not rendered on the dates they were scheduled and without notice to the applicants; that in respect of the last ruling counsel representing the applicants wrote to the Deputy Registrar inquiring the date of delivery and; that as soon as a copy of the ruling was received, this application was filed within 3 days; that the appeal raises questions of law and matters of public interest hence has high chances of success.

The respondents do not think the applicants have demonstrated that they deserve the exercise of the Court's discretion; that application lacks merit and is an abuse of the court process; that they have not demonstrated why the notice of appeal was not filed within time; that this application is intended to delay the matter further and deny the beneficiaries an opportunity to benefit and develop their share of the estate; that appeal is unlikely to succeed because the orders sought to be challenged were recorded by consent of all the four households; that it was irregular to bring a blanket application for extension of time in respect of three distinct decisions; that there was inordinate delay as the

decisions were delivered in 2016, 2018 and in early 2019; and that further delay in this matter will be prejudicial to the nearly 26 beneficiaries, who are being held hostage by the applicants, who in turn are in control of properties that generate income.

The guiding principles to consider in an application for extension of time are well settled. To rehash, they are those set out in the decision of this Court in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Appeal No. 255 of 1997 that:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that, in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly the reason for the delay; thirdly possibly the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondent if the application is granted.”**

On the length of delay, the applicants wish to appeal three separate decisions being, a judgment dated 7<sup>th</sup> September, 2016 which dismissed an application for revocation of the grant and an application for vacating a consent order; a ruling dated 16<sup>th</sup> March, 2018 dismissing the applicants review application; and a ruling dated 29<sup>th</sup> January, 2019 declining to enlarge time for the applicants to file an appeal. These being three separate and distinct decisions, it is doubtful that an application for extension of time can be brought in this manner. Secondly, in respect of the judgment, no sufficient reason for a delay of over 3 years has been furnished. Thirdly, it is doubtful that the intended appeal would be successful considering that the learned Judge properly took into consideration that no proof of fraud was present to vitiate the confirmation of the grant; that the applicants were represented by counsel who was competent to enter into a consent in the best interest of his clients. The fourth point is that the respondents are likely to suffer prejudice if time is extended to file notices of appeal and the appeal itself if at the stage this application was being canvassed the typed proceedings were yet to be availed. The veracity of the applicants’ letter dated 26<sup>th</sup> February, 2019 purported to have been sent to the Deputy Registrar requesting for certified copies of the proceedings, judgment and rulings is questionable. It has no official court/date stamp to signify receipt. No copy of the correspondence alluded to and alleged to have been exchanged between the applicants and the Deputy Registrar to follow up on the delivery of the ruling on extension of time and discovering that it was already delivered have not been exhibited.

In the end, I come to the conclusion that the delay has been inordinate; no sufficient reason or reasons have been proffered and the respondents will be prejudiced in view of how long parties have had to wait for the final distribution of the estate. Accordingly, the applicants have not satisfied the criteria for the grant of leave to extend time. This application is dismissed with no orders as to costs.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of August, 2019.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**