



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 46 OF 2019

BETWEEN

SUSAN WAMBOI CHEPKAITANY.....APPLICANT

AND

IN THE MATTER OF THE ESTATE OF

LAZARO CHEPKAITANY CHEBII (DECEASED).....RESPONDENT

(Being an application for extension of time and leave to file and serve a Notice and Record of Appeal from the order of the High Court at Mombasa, Thande, J delivered on 25th January 2019

in

Succession Cause No. 4 of 2011)

RULING

By a Notice of Motion dated 20th May 2019 premised on **Article 159 (2)** of the **Constitution, sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **rules 4** and **42 (2)**, of the **Court of Appeal Rules, the applicant, Susan Wamboi Chepkaitany** has sought orders for extension of time within which to file and serve a Notice and record of appeal against the orders of the High Court dated 25th January 2019. The application was brought on the grounds that after delivery of the Ruling on 25th January 2009, the applicant instructed her former advocate, Kanyi J & Company Advocates to lodge a Notice of Appeal. But on account of an error or mistake, the firm inadvertently failed to lodge the Notice. It was further contended that she subsequently instructed the current firm, Chamwada & Company Advocates who, after the original file was released them on 8th May 2019, sought leave to institute an appeal.

The applicant's apprehension is that unless time to lodge a Notice of appeal was extended, she would suffer irreparable prejudice, and no discernable prejudice would be visited on the respondent. The motion was supported by the applicant's affidavit that largely reiterated the grounds set out in the motion.

When the application came up before me, **Mr. Atiang** holding brief for Mr. Chamwada appeared for the applicant, while the respondent, though served with the hearing notice did not attend court.

Mr. Atiang submitted that despite receiving assurances that the Notice of appeal would be lodged, the firm of Kanyi J Advocates failed to do so. And when the applicant did not receive any update on the progress of the appeal, she instructed the firm of Chamwada Advocates to take over the matter. It was further submitted that Chamwada Advocates responded expeditiously as upon receiving the instruction on 8th May 2019, by 20th May 2019 it had filed this Motion seeking to have time extended to file the appeal.

Counsel asserted that the intended appeal has a high chance of success as, the dispute concerns the distribution of the assets of estate of the deceased, and despite the learned judge having found that there were two households, the court declined to distribute the assets between both households.

An application for extension of time is governed by **rule 4** of this Court's Rules. Under **rule 4**, it is settled that, the Court has unfettered discretion on whether or not to extend time for filing of an appeal. In so doing, the discretion should be exercise judiciously and not

whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997 where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”

Applying these principles to the circumstances of this case, I will begin by ascertaining the length of delay. The High Court’s decision was rendered on 25th January 2019, and this application was filed on 20th May 2019. In effect there was a 4 months delay in bringing this application.

In explaining the delay, the applicant contends that she instructed Kanyi J & Company Advocates to file the Notice and record of appeal, which the advocates did not do. She was therefore compelled to instruct the present firm of advocates to file the intended appeal. I have been through the record, and despite the claim that she had instructed Kanyi J and Company advocates, there is nothing to show whether such firm was infact instructed, and if so when and by what means. No letter of instruction, or document was produced evidencing the instruction to the advocates to act on her behalf. There is also nothing that demonstrated that following such instruction the applicant diligently pursued the firm of advocates to ensure that the intended appeal was filed.

Then all of a sudden on 8th May 2019 the former advocates released the original file to her thus then enabling her to instruct the current advocates. So when was the decision made to withdraw the file from the former advocates, and would there not have been a letter releasing the file to the current advocates? In short, nothing has been produced to show that the firm of Kanyi J & Company advocates was instructed to file an appeal on the applicant’s behalf.

Though the applicant blames the firm of Kanyi J and Company Advocates for the delay in filing the appeal, I can find nothing that supports this assertion or demonstrates indolence on the firm’s part.

In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98, this Court stated thus;

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

My view is that the claim that the delay was occasioned by Kanyi J and Company Advocates is a red herring, and the alleged instruction and perceived inaction is but an illusion on the applicant’s part as no basis for laying blame at their doorstep was established. As such, without any material to support their firm’s existence, or to show that they were instructed or that they are the cause of the delay, and I find no material upon which to rely to reach a finding that the delay has been sufficiently explained.

The next issue for determination is whether the intended appeal has any chance of success. The applicant has filed a draft memorandum of appeal where in a nutshell the grounds of complaint are that despite finding that there were two households that formed part of the deceased’s estate the learned judge went on to distribute the assets to the household of the first wife to the exclusion of the applicant’s household.

I have been through the record, and it acutely short on the facts of the case, and the nature of the dispute. More importantly, the High Court’s judgment or ruling was not annexed. Without this, it was not possible to weigh the High Court’s reasoning or the conclusions reached against the grounds of complaint so as to gauge the likelihood of success of the intended appeal.

Finally, on whether any prejudice would be occasioned to the parties, I am in agreement with the applicant that since the respondents also intend to appeal against the High Court’s decision, it is unlikely that they will suffer any prejudice.

Be that as it may, having taken all the requisite factors into account, I come to the conclusion that the application for extension of time is not merited, and I decline to exercise my discretion to allow it. Accordingly, the Notice of Motion dated 20th May 2019 be and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Mombasa this 17th day of October, 2019.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR