



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 409 OF 2018

BETWEEN

SHARATH ISMAIL IBRAHIM.....1ST APPLICANT

SHAREEN ISMAIL IBRAHIM.....2ND APPLICANT

AND

HAFZA KHAMA ISMAIL.....RESPONDENT

(An application for extension of time to file and serve the Record of Appeal out of time in an intended appeal against the ruling of the High Court at Nairobi (A.O. Muchelule, J) dated 11th July, 2016

in

Succession Cause No. 1213 of 2010)

RULING

The applicants herein have filed two applications in this matter. One is seeking extension of time under **Rule 4** of this Court's Rules and the second one is for stay of execution against the ruling of the High Court (A.O. Muchelule, J) dated 11th July, 2016 pursuant to **Rule 5(2) (b)** of this Court's Rules. The respondent, for his part, has filed an application to strike out the appellant's record of appeal pursuant to **Rules 42(1), 43(1), 82, 83 and 84** of this Courts Rules.

This Court has on several occasions abhorred and cautioned litigants against the practice of seeking omnibus reliefs within applications made pursuant to under **Rule 4** which may only be granted by a single judge, along with those that are for a full bench. K. M'Inoti, J.A sitting as a single Judge in the case of **Riccardo Fanelli & 2 others v Frigieri Graziano**, Civil Application No. 51 of 2015, expressed himself as follows;

“Before me is yet another ominous motion on notice in which the applicants are seeking in the same application, reliefs which can only be granted by a single judge, as well as other reliefs which must be sought before the full court. This undesirable practice that is fast taking root in Malindi and Mombasa has no basis in the rules of procedure, encourages wastage of time in the form of unnecessary objections and is otherwise a devise for avoiding payment of the prescribed court fees for applications before a single judge, and those before the full court. We have previously decried the practice in **CHRISTOPHER IDDI MOTO & 15 OTHERS V. CHIRIBA NYAMBU BARUA & ANOTHER, CA NO. 43 OF 2014 (UR 38/14) and **FEISAL MOHAMED ALI V. REPUBLIC**, CR AP.NO. 2 OF 2015 (UR1/15) and hope that it shall cease (sic) forthwith.**

For the record applications for extension of time under Rule 4 of the Court of Appeal Rules are, by virtual of the provisions of rule 53 (1) to be heard and determined in the first instance by a single judge. Such an application comes to the full court under rule 55 only by way of reference from the decision of the single judge. On the other hand, an application for stay of execution, injunction or stay of proceedings under rule 5 (2) (b) must be made to the full court. These are two separate and distinct applications that should be filed and prosecuted as such.

In the application before me, Ms. Otieno, learned counsel for the respondent, has rightly taken objection to the omnibus

nature of the application. While I agree with Ms. Otieno that the applicants ought to have separated the two applications, the default is technical in nature and curable under Article 159 of the Constitution and the overriding objective in section 3A and 3B of the Appellate Jurisdiction Act. I will accordingly treat the application before me as a single judge application. Should the applicant's desire any relief from the full court, they must file a separate application in that regard, for it is not the practice of the Court to hear and determine applications piecemeal and in bits and pieces."

In light of the foregoing, and for the reason that this defect is curable, the only relief properly sought before me is for leave to deem as having been duly filed and served within time, the record of appeal, already filed in this Court.

The applicants whose case was that they were daughters of the deceased but were omitted in his written will, intend to challenge the decision of the High Court where Muchelule, J in determining the question came to the conclusion that the applicants were neither beneficiaries nor dependants of the deceased and as such, could not benefit from his estate. They lodged their notice of appeal on 15th July, 2016 which was within the prescribed time. The notice of appeal was also served within the prescribed time. The record of appeal was also filed but out of the prescribed time hence the instant application, hence this application.

Learned Counsel Ms. Mwangi for the applicants, submitted that the delay was for 79 days and proceeded to explain that it was caused, first by the trial court for the applicants applied for the proceedings on 19th July, 2016 and only received them on 3rd July, 2018; that the record of appeal was filed on 21st November, 2018 which was 79 days late; that the delay was occasioned by intervening applications pending before the High Court and the fact that there were corrections to be made in the typed proceedings. On this basis, counsel submitted that the delay was neither inordinate nor intentional.

On the chances of success, it was posited that the intended appeal raises weighty issues of succession under Islamic law and particularly the question whether the applicants were daughters of the deceased. It was submitted that no prejudice would be occasioned to the respondent as it is the applicants who stand to suffer as they will virtually be disinherited.

Mrs. Ahomo, holding brief for Mr. Issa for the respondent opposed the application. Counsel conceded to the delay of 79 days and submitted that this application was an afterthought prompted by the respondent's application to strike out the record of appeal on 13th December, 2018. It was contended that the applicants have not proffered any good reason for delay; that summons for confirmation of grant were filed on 28th September, 2017 and that there has been no attempt by the applicant to stay the said proceedings either in the High Court or this Court. She maintained that the appeal is not arguable and that in any case arguability is not in itself a ground for extension of time. Counsel relied on the case of **County Executive of Kisumu V County Government of Kisumu & 8 Others**, Supreme Court Civil Application No. 3 of 2016, to argue that where documents are filed out of time without leave of the court they are a nullity.

In a brief rejoinder Ms. Mwangi submitted that the **County Executive of Kisumu** (supra) case was interpreting the Supreme Court Rules as opposed to the Rules of this Court which allows such applications where an appeal is filed without leave under **Rule 4** and **82**.

On the strength of a long line of authorities, it is settled that whether or not to extend time for filing a notice of appeal or lodging the appeal itself is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. See **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Appeal No. 255 of 1997.

It is conceded that the notice of appeal was filed and served within time; that, according to the certificate of delay the time taken to prepare the proceedings was between 19th July, 2016 and 3rd July, 2018; and that the delay in filing the appeal was 79 days. The applicants have attributed the reason for delay partly to the late receipt of proceedings from the High Court and on account of various applications in the matter that were pending before the High Court.

Although no details of the specific applications said to have been pending in the High Court, it is common factor that the court below took nearly two years to prepare and furnish the applicants with the proceedings. When the record of appeal was filed on 21st November, 2018, it was already outside the prescribed 60 days from the period accounted for in the certificate of delay. This application seeking leave to deem the record of appeal already filed as duly filed within the prescribed time was filed on 7th February, 2019. I think, myself, that a delay of 79 days as compared to the court's 2 years is neither unconscionable nor unreasonable. Instead, it is my considered view that an injustice will be occasioned to the applicants, who lodged their appeal one year ago, albeit without leave, if they are locked out and prevented from ventilating their grievance that they are likely to be disinherited if the decision of the High Court is not set aside.

The inconvenience to the respondent of waiting longer for the grant can be ameliorated by an award of costs.

There was nothing unusual under the rules of the Court for applicants to file the record of appeal and seek leave of the Court to regularize it. The decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat V. Independent Electoral and Boundaries Commission & 7 others**, Application No. 16 of 2014, was premised on **Rules 33(1) and 53** of that Court's Rules, and therefore respectfully not applicable to the instant matters before me. The latter specifically provides simply that;

"The Court may extend the time limited by these Rules, or by any decision of the Court".

While **Rule 4** of this Court's rules provides that;

"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended".

(My emphasis).

Of course, there is no doubt that an appeal filed out of time and without leave is of no effect until it is regularized by the Court.

The delay, I reiterate, was not inordinate and the reasons proffered were plausible. In view of the question involved in the appeal, it is just and fit to grant leave to the applicant in terms of prayer 2 of the motion lodged on 7th February, 2019. The record of appeal to be served upon the respondent within 14 days from the date of this ruling. Costs to the respondent.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR