IN THE COURT OF APPEAL

AT NAIROBI

CORAM: J. MOHAMMED, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 143 OF 2018

BETWEEN

TERESIA WAMBUI NJOROGE.....1ST APPLICANT

ANTHONY MUNGAI NJOROGE.....2ND APPLICANT

(as the Legal Representatives of Philip Njoroge Mungai (Deceased)

AND

SIMON NGUMO GACHOKA.....1ST RESPONDENT

MAGDALINE WANJIKU KAMAU.....2ND RESPONDENT

NDUTA GACHOKA.....3RD RESPONDENT

(Being an application for extension of time to file and serve the Record of Appeal out of time in an intended Appeal against the whole of the judgment and Decree of the High Court of Kenya at Nairobi before W. Musyoka, J. delivered on 29th September, 2017

in

SUCCESSION CAUSE NO. 2734 & 2800 OF 2006 (CONSOLIDATED)

RULING

BACKGROUND

[1] **Teresia Wambui Njoroge** and **Anthony Mungai Njoroge** (**as the Legal Representatives of Philip Njoroge Mungai** (Deceased), the applicants herein filed a Notice of Motion dated 16th May, 2018, premised on **Sections 3(2), 3A** and **3B** of the **Appellate Jurisdiction Act and Rules 4 of the Court of Appeal Rules** (the Court Rules). The applicants seek the following orders:

> ***a) That the Honourable Court do extend the time for filing and serving of the Record of Appeal and the Applicants be allowed to file and serve the said Record of Appeal within such extended time.***
>
> ***b) That the costs of the application be in the cause.***

[2] The application is premised on the grounds in the body of the application and the supporting affidavit of the 2nd applicant. **Simon Ngumo Gachoka** (the 1st respondent), **Magdalene Wanjiku Kamau** (the 2nd respondent) and **Nduta Gachoka** (the 3rd respondent) are the respondents herein.

[3] The application is anchored on grounds that the applicants intend to file an appeal against the judgment of the High Court (W. Musyoka, J.); that the failure by the applicants to file the record of appeal in time was occasioned by the death of the applicants' father, **Philip Njoroge Mungai** (the Deceased) who was the Petitioner in the matter of the Estate of the deceased **Veronica Njoki Mungai (Veronica)** in P&A Cause No 2274 of 2016 which was consolidated with P&A 2800 of 2016; that after the said consolidated P&A Causes were heard, the Deceased died on 23rd May, 2017, pending the determination of the consolidated causes; that the impugned judgment was delivered on 29th September, 2017; that aggrieved by the said judgment, the applicants filed a notice of appeal on 4th October, 2017 and applied for

proceedings and certified copy of the judgment on 5th October, 2017; that the applicants applied for the grant of letters of administration to facilitate the filing of the intended appeal which was granted by the Chief Magistrate's Court in Kiambu in Succession Cause No 34 of 2018 on 14th March, 2018; that the proceedings and certified copy of the impugned judgment were not ready until 23rd April, 2018 and 26th April, 2018 respectively and a Certificate of Delay was issued on 3rd May, 2018; that the applicants have an arguable appeal with a high probability of success on the grounds *inter alia* that the validity of **Veronica**'**s** Will was in doubt as it was allegedly thumb printed by **Veronica** when she was hospitalized and further, that the advocate who purportedly drew **Veronica's** Will did not attest it.

[4] The applicants also filed a supplementary affidavit on 1st April, 2019 sworn by **Stanley Kingara**, the applicants' counsel wherein he deponed *inter alia*, that the applicants are the legal representatives of the Deceased and have the capacity to file the instant application; and that by summons dated 27th February, 2019 filed in P&A Cause No 61 of 2018 before the High Court in Kiambu, the applicants filed an application for substitution in that cause in place of the Deceased. Counsel urged this Court to grant the orders sought in the notice of motion.

[5] The application was opposed by the respondents who filed a replying affidavit on 11th December, 2018 sworn by the 2nd respondent with the authority of the 1st respondent. The 2nd respondent deponed that the 3rd respondent died on 7th January, 2015. The respondents' main grounds for opposing the application are that the notice of appeal dated 4th October, 2017 and filed on 5th October, 2017 is defective as the appeal had abated in view of the fact that the Deceased who was the petitioner had died in May, 2017 and no substitution had been effected prior to filing the Notice of Appeal; that to date no application for substitution of the Deceased has been effected; that the basis of the application for extension of time is the notice of appeal which is defective and no orders as to substitution of the Deceased has been effected; that the applicants have not given a plausible explanation for the delay in filing the record of appeal; that the application for extension of time was filed over six (6) months after the expiry of the 60 days within which the record of appeal should have been filed; that no record of appeal has been filed to date despite the judgment having been delivered on 29th September, 2018; that the applicants filed for letters of administration in respect of the estate of the Deceased several months after the death of the Deceased ; and that no plausible reason has been given by the applicants for the delay in applying for the letters of administration nor has a nexus been shown between the death of the Deceased and the delay in filing the record of appeal; and that the instant application lacks merit and should be dismissed with costs to the respondents.

SUBMISSIONS BY COUNSEL

[6] At the hearing of the application, learned counsel, **Mr. Stanley Kingara** represented the applicants while learned counsel, **Ms. Ann Nderu,** represented the respondents. **Mr. Kingara** relied on the application and the supporting affidavit sworn by the 2nd applicant and on the supplementary affidavit filed on 1st April, 2019. Counsel submitted that the petitioner who was the intended appellant died on 23rd May, 2017 before the impugned judgment was delivered on 29th September, 2017; that the notice of appeal was filed within the prescribed timelines and the letter bespeaking proceedings was served in compliance with the Court Rules; that on 14th March, 2018, a Grant of letters of representation was issued to the applicants as the legal representatives of the Deceased; that the proceedings in respect of this matter were ready for collection on 26th April, 2018; that a Certificate of Delay was issued on 23rd May, 2018; that the instant application was filed on 16th May, 2018; that sixty (60) days within which the applicants should have filed the record of appeal in compliance with **Rule 82 of the Court Rules** have lapsed; that the applicants have been diligent and have not been indolent in failing to file the record of appeal within time as the delay has been fully explained; that there is no evidence of delay on the part of the applicants; that the intended appeal has high chances of success; that the intended appeal did not abate for want of substitution as there was no appeal filed; that **Rule 85 of the Court Rules** contemplates that the person making the application is the legal representative who is mandated to file the appeal; that the applicants have applied for substitution; and that no prejudice will be suffered by the respondents as they will have an opportunity to respond to the applicants' intended appeal. Counsel urged the Court to allow the application with costs.

[7] **Ms. Ann Nderu** opposed the application and relied on the replying affidavit sworn by the 2nd respondent and the Preliminary Objection (PO) filed on 11th December, 2018. Counsel submitted that the respondent filed a PO to the effect that the applicants had no locus to institute the notice of appeal as they had not made an application for substitution; that the notice of appeal was therefore defective; that the notice of appeal was filed several months after the death of the Deceased; that at the time that the notice of appeal was filed there was no legal representative of the Deceased appointed in compliance with **Order 24, Rule 1 & 4(1)** of the **Civil Procedure Act (CPA)**; that the Deceased died prior to the filing of the notice of appeal and the filing of the instant application; that no attempt has been made to apply for substitution in compliance with **Rule 99 of the Court Rules**; that the applicants are therefore strangers and do not have the legal capacity to file the instant application and the intended appeal; that the notice of appeal is therefore defective; that the prayers for enlargement of time within which to file a record of appeal are discretionary and should be exercised judiciously by the Court; that the applicants have not demonstrated a plausible explanation for the delay in filing the record of appeal; that the applicants have failed to explain the inordinate delay in filing the record of appeal; and that the applicants' counsel has not applied for the supplementary affidavit filed on 1st April, 2019 to be deemed as properly filed. Counsel urged the Court to dismiss the application for lack of merit and to award costs to the respondents.

[8] In a brief rejoinder, **Mr. Kingara** submitted that **Rule 99 of the Court Rules** is not applicable to the circumstances of this case; that **Rule 99** applies when an appellant dies after the appeal has been filed which was not the case in the instant application ; and that **Order 24 of the CPA** applies where a party dies before judgment is delivered as in the instant case.

DETERMINATION

[9] I have carefully considered the application, the rival submissions by counsel, the authorities cited and the law. The discretion that I am called upon to exercise in this application is provided under **Rule 4 of the Court Rules** as follows:

> ***"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."***

[10] The parameters for the exercise of such discretion are clear. In ***Njuguna v Magichu & 73 others [2003] KLR, 507***, this Court stated as follows:

> ***"The discretion exercisable under Rule 4 of the Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual legal basis."***

[11] The factors to be considered by a Single Judge in an application for enlargement of time under Rule 4 of the Court Rules were succinctly laid down in ***Fakir Mohammed v Joseph Mugambi & 2 others] [2005] (Civil Application No Nai. 332 of 2004),*** where it was held that:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors."*** [Emphasis supplied].
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> See: ***Mwangi v Kenya Airways Ltd (2003) KLR 486 and Leo Mutiso vs Rose Hellen Wangari Mwangi (Civil Application No Nai 255 of 1977)*** **(unreported).**

[12] On the length of the delay, the law does not set out any minimum or maximum period of delay. All that it requires is that any delay should be satisfactorily explained. There has to be valid and clear reasons upon which discretion can be favourably exercisable by a Court. In the instant application, the explanation for the delay in filing the record of appeal was that the intended appellant died before the impugned judgment was delivered and that the applicants had to obtain letters of administration prior to filing the intended appeal. I note that the notice of appeal was filed timeously and that the applicants applied for typed proceedings and certified copy of the impugned judgment on 3rd October, 2017. I note further that the Certificate of Delay was issued on 3rd May, 2018 and that this application was filed on 16th May, 2018. In the circumstances of this case, I find that the applicants have offered a satisfactory explanation for the delay and have laid a proper basis upon which I can exercise my unfettered discretion in their favour.

[13] On the issue whether there is merit in the intended appeal, it is the applicants' claim that they have an arguable appeal with high chances of success. At this stage, it is imperative to point out that in dealing with an application for extension of time, a single Judge cannot make definitive pronouncements on the success of the intended appeal as that is the purview of the Court that will deal with the main appeal. An arguable appeal is not one that will necessarily succeed, but one which merits consideration by the court. See: **Wasike v Swala, [1984] KLR 591**.

[14] A perusal of the draft memorandum of appeal reveals that the intended appeal is arguable as it raises issues for determination, *inter alia*, whether there was a valid Will in the absence of any attestation of the advocate who purportedly drew the Will; and whether the requirements of **Rule 54 (3)** of the Probate and Administration Rules were discretionary or mandatory. In the circumstances of this case, I find that the applicants have an arguable appeal and the interests of justice will be better served by allowing the parties an opportunity to ventilate their respective positions on merit. In **Richard Nchapi Leiyagu v IEBC & 2 others, [2013] eKLR Civil Appeal No. 18 of 2013**, this Court stated as follows:

> ***"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

[15] On the issue whether the respondents will be prejudiced if the application to extend time is granted, it is the respondents' claim that they will suffer prejudice if the application is granted as they will be deprived of the fruits of their judgment. The Court has to balance the competing interests of the applicants with those of the respondents. In **Mwaniki Njoroge Kamau & another v Lee Sheth Poong, Civil Application No. Nai 55 of 1998 (unreported)** Lakha, J.A. stated:

> ***"As it often happens, this application highlights two principles, each in itself salutary. The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by*** *rule 4,* ***a discretion to be exercised in accordance with the requirements of justice in the particular case."***

[16] The upshot is that I find merit in this application and allow it. I direct the applicants to file and serve the record of appeal within thirty (30) days from the date hereof. The costs of this application to abide by the outcome of the intended appeal.

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

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR