



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. 33 OF 2016 (UR 21 OF 2016)

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

BETWEEN

FRANCIS JAMES NDEGWA.....APPLICANT

AND

JULIET WANGUI NDEGWA.....RESPONDENT

(Being an application for extension of time to file and serve

memorandum of appeal and record of appeal out of time

against the ruling of the High Court (Ngaah, J.)

in

Succession Cause No. 72 of 2004)

RULING OF KANTAI, JA.

The applicant, **Francis James Ndegwa**, is husband of the respondent, **Juliet Wangui Ndegwa** but their relationship is strained and they are estranged. They had a son **Robert Wahome Ndegwa** who unfortunately died on 15th December, 2002. The respondent moved the High Court in Nyeri High Court Succession Cause No. 72 of 2004 for grant of letters of administration. The applicant objected to that application and on 7th February, 2005 **Hannah Okwengu, J.** (as she then was) ordered that the applicant and the respondent be appointed joint administrators of the estate of their son. It was further ordered that the Succession Cause be disposed of by way of *viva voce* evidence. The Succession Cause was heard by **Mary Kasango, J.** who took evidence of witnesses and in a judgment delivered on a date not clear to me from the record the estate was distributed it being ordered amongst other things that the parcel of land known as plot No. Nairobi Block 75/669 Buru Buru estate, Nairobi, go to the respondent. The applicant was dissatisfied with those orders and filed in this Court Nyeri Civil Appeal No. 260 of 2008. Apart from a variation of orders by the Court of Appeal in relation to money in a bank the appeal failed. The applicant went back to the High Court praying for certain orders but in a ruling delivered on 30th June, 2015 **Ngaah, J.** found no merit in the application and dismissed it. The applicant intends to appeal against those orders.

In the application before me the applicant prays that I extend time to enable him file and serve Memorandum of Appeal and Record of Appeal out of time. In the grounds in support of the motion the applicant states that he is a co-administrator of the estate of his deceased son; that certain forms were not executed or signed in a manner envisaged in law; that prescribed forms were interfered with contrary to law in a manner that amounted to commission of criminal offences; and that the respondent was in the process of selling the Buru Buru house stated in this ruling.

There is also a supporting affidavit sworn by the applicant at Nyeri on 6th June, 2016. That affidavit gives a history of the issues in the said Succession Cause and the appeal that was filed to this Court. There are also various annexures.

I heard the motion on 27th November, 2017 when the applicant appeared in person and **Mr. Peter Muthoni** learned counsel appeared for the respondent. The applicant informed me that he had applied for proceedings in the High Court; that the proceedings were not availed to him on time; that Certificate of Delay was given to him. None of this was in the record before me. If a Notice of appeal had been filed it is not in

the record before me. **Mr. Ndegwa** told me that he wanted to challenge the judgment of the Court of appeal which I have already referred to.

Mr. Muthoni in opposing the application submitted that the motion was incompetent as it was not supported by any documentation or evidence. Counsel also informed me that the property in Buru Buru estate had been transferred to the respondent as was confirmed by a certificate of title annexed to the replying affidavit of the respondent.

I have considered the motion, the submissions made and the law.

The principles applicable in considering an application under **Rule 4** of our rules are fairly well settled as was summarized by Waki, JA in **Fakih Mohammed vs. Joseph Mugambi and 2 Others Civil Application No. 332 of 2004 (ur)** as follows:

“The exercise of this court’s discretion under Rule 4 has followed a well beaten path since the stricture ‘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, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public 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: see Mutiso vs. Mwangi Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs. Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta vs. Mulika M’Ethare and Attorney General, Civil Application No. Nai 8/2000 (ur) and Murai vs. Wainana (No. 4) [1982] KLR 38.”

I have considered the factors that I am supposed to consider as well set out in the above case.

The applicant asks me to exercise discretion to allow him to appeal out of time. Looking at the record presented before me there is nothing in the motion or the affidavit in support presented to show why the applicant did not take the steps that he was required to take to file an appeal on time. I was not given reasons why necessary steps were not taken on time to file an appeal at all. I may also say in passing that the intended appeal does not appear to me to have any merit, the High Court and the Court of Appeal having pronounced on the property in Buru Buru Estate and which has long been registered in the respondent’s name. I find no merit in the motion and I dismiss it and I grant costs of the motion to the respondent.

Dated and delivered at Nyeri this 17th day of January, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR